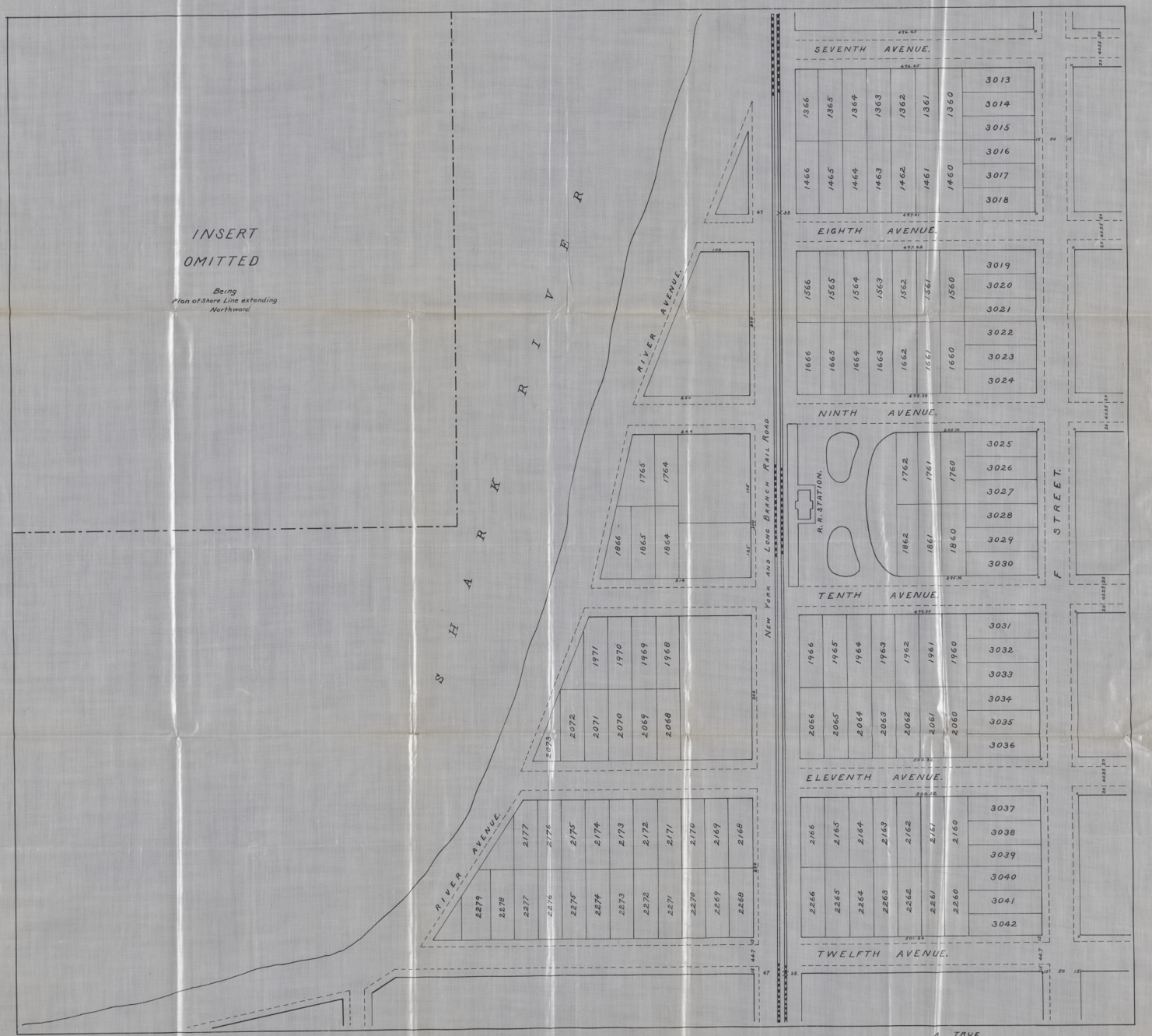
New Jersey Court of Errors and Appeals

GEORGE H. HEYNIGER, Complainant-Respondent, v. ABRAHAM LEVINSOHN, Defendant-Appellant. THE BOROUGH OF BELMAR, ET ALS., Complainants-Respondents, v. ABRAHAM LEVINSOHN, Defendant-Appellant.	On Appeal.

STATE OF CASE

EDMUND WILSON,
PATTERSON AND RHOME,
DURAND, IVINS AND CARTON,
Counsel for Appellant.

HARRY R. COOPER,
H. H. SNEDEKER,
Counsel for Respondents.



Legend

Monuments ○ 3' from Street Lines.
Curb Lines
Rail Road

Copy By
Walter K. Potter,
Manasquan,
N. J.

A TRUE
Copy of Page 6 From
"Belmar Borough Atlas of"
"1889-90."
Scale 100'=1" "Made by A.P. Irons." Gradients Excepted.

Except from Map offered
under stipulation
(Minutes p. p. 624-628)
Case pp 564-568.

INDEX

Bill of Complaint (Borough of Belmar v. Levinsohn) 5–22
Answer 23–26
Replication 27–30
Bill of Complaint (Heyniger v. Levinsohn) 31–38
Answer 38–42
Replication 43–46
On Bill — Testimony 47–49

	DIRECT	CROSS	RE-DIRECT	RE-CROSS
Charles O. Hudnut	49– 56 470–473	56– 62 473–476	62– 65	
Joseph McDermott	66– 69			
Recalled	458–465	178–181 465–466	182 466–470	
Robert G. Poole	70– 76	76– 84	84– 87	87– 93
Recalled	568–572	572–576	576	
Lawrence J. McCormick	93– 94			
Samuel Johnson	94– 96	96–106		
Solomon Michelson	106–108	108–110		
Jacob Newman	110–114	114–117	117–118	118–119
Clarence C. Wildman	119–122	123–127	127–128	
Leonard J. Arrowsmith	129–133	133–136	136	
Samuel S. Murphy	137–139	140–141		
George H. Heyniger	141–150	150–163	163–164	164–167
Harry R. Cooper	168–172	172–178		
Archibald Wolverton	182–186 588–559	560–568		
Jacob Rosenfeld	186–188			
Frederick G. Lake	188–190	190	190–191	
William A. Robinson	191	192–195	195–196	196–197
Dr. Charles Everett	197–200	200–203		
Egbert Newman	203–205			
William L. Heyniger, Jr	205–206	206-209	209	
W. M. Burroughs	210–212	212–213		
Rean Vannote	213–214	214	214	214
Cortlandt Heyniger	215–216	216–218		
William L. Heyniger, 3rd	218–219	219–221		
Wilson E. Allen	221–222	222–223		
Nathan C. King	224–225	225–226	226–227	227–229

INDEX

	DIRECT	CROSS	RE-DIRECT	RE-CROSS
James H. Emlen	230–273	273–299	299–310	310–314
			314–316	317–323
			323–324	324–328
Recalled			520–522	
Thomas J. Dillon	329–338	338–340		
Herbert Heroy	340-344	345–346		
William S. Jackson	346–348	348		
Appearances heretofore noted,	349–359			
John Arnold Osborne	359–365	365–375	375–376	
William Watson	376–379	380–384	384	384–385
Job Barcalow	385–393	393–395	409–412	413–415
	396–400	400–409		
Louis Tafsinki	415–421	421–427	427–428	428
John Allspach	428–434	434		
Dan A. Conover	434–442	442–448		
Charles Levinsohn	448–457			
	477–490	490–492		
Recalled	542–552	552–555	555	
	615			
George K. Allen, Jr.	492–506	507–513	513–514	514–515
Recalled		517–518	518–519	519–520
Leroy Chamberlain	515–516	516–517		
Benjamin Pine	523–524			
Abraham Levinsohn	524–530	530–541	541–542	542
Isaac Traub	555–558	558		
Recalled	559–560			
	577–578	578	578–579	579–583
	583			
	616–617	617		
Walter K. Potter	584–589			
	594–605	605–613	613	613–615
Recalled	618	618–619		
William B. Bamford	590–591	591	591–592	592–594

Stipulation 620

On Bill — Final Decree 621–622

Notice of Appeal 623

On Appeal — Petition 624–625

Answer to Petition on Appeal 626

Bill of Complaint

IN CHANCERY OF NEW JERSEY

BILL OF COMPLAINT

(Borough of Belmar v. Levinsohn)

Filed Dec 22 1913

To His Honor Edwin R. Walker,
Chancellor of the State of New Jersey.

Your orators, The Borough of Belmar, Charlotte Wildman and Jacob Newman, jointly and severally, complaining show unto your Honor, that a corporation known as the Ocean Beach Association was incorporated under the Laws of the State of New Jersey on March 13th, 1873 (P. L. 1873, pg. 1089). Said corporation was authorized to purchase and sell lands, and was especially empowered to require any grantee from it to make and maintain such style and character of improvements on the lands conveyed, or the streets fronting thereon, as might seem most expedient for securing a uniform system of development and improvement.

The Association purchased a tract of land extending from the Atlantic Ocean to Shark River in Monmouth County, with the intent of promoting the seaside resort which is now known by the name of Belmar. It at once laid out streets and avenues through the property east of F Street, and filed maps thereof, the streets running north and south being designated by the letters of the alphabet, and the avenues running east and west, at right angles with the streets, being designated by numbers. The streets were laid out sixty feet wide, and the avenues eighty feet wide.

Before any lots were sold by the corporation, its Board of Directors on June 9th, 1873, passed the following resolution:

> "RESOLVED that it is highly important to maintain uniformity in the line of buildings on the main avenues of the Association, and for securing said object, that no building be erected on said

avenues nearer to the line of the same than twenty feet."

This resolution was entered upon the minutes of the corporation.

The said Ocean Beach Association was, prior to the ninth day of June, 1873, seized and possessed of the premises now owned by your orators, and the premises now owned by the defendant Abraham Levinsohn, and hereinafter more particularly referred to; the premises of your orator The Borough of Belmar being known by the lot number 1749; the premises of your orator Charlotte Wildman being known by the lot number 1846; the premises of your orator Jacob Newman being known by the lot number 1843; and the premises of the defendant being known by the lot number 2931, all on said map and the map adopted by the Borough of Belmar.

That the premises owned by your orator the Borough of Belmar are situated on the southeast corner of Ninth Avenue and E Street in said Borough; the premises of your orator Charlotte Wildman on the northerly side of Tenth Avenue 150 feet east of E Street; the premises of your orator Jacob Newman on the northerly side of Tenth Avenue 150 feet west of D Street, and the premises of the defendant on the southeast corner of Tenth Avenue and F Street in said Borough. That the distance from the northeast corner of the defendant's said property to the west side of E Street, is 350 feet; that E Street is 60 feet wide; that the distance from the east side of E Street to the west side of D Street is 500 feet.

That each of said premises were, subsequently and after the ninth day of June, 1873, conveyed by the Ocean Beach Association, and that each of the deeds executed by the said Ocean Beach Association conveying the aforesaid premises contained the following covenant:

"And the said party of the second part, for herself, her heirs and assigns, does covenant and

agree to and with the said the Ocean Beach Association, their successors and assigns, that the said party of the second part, her heirs and assigns, shall not sell or suffer to be sold on the premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said Association at any time."

That where the conveyances were to males the masculine gender of the pronouns was used in the wording of the covenant. That the act of incorporation mentioned in said covenant was the act of 1873, incorporating the Ocean Beach Association as aforesaid. That said act contained the following:

"7. And Be It Enacted, That for the purpose of restricting nuisances and of compelling a uniform system of improvements of said settlement, the said company are hereby authorized and invested with power to incorporate into any deed of conveyance made by them, whether in fee simple or otherwise, a clause or condition forbidding the sale upon the premises so conveyed by said company, of any spirituous or intoxicating liquors; and to require any grantee of said company to make and maintain such style and character of improvement on said lots so conveyed, or on the streets fronting thereon, as to the said company may seem most expedient for securing a uniform system of development and improvement throughout the said settlement;"

Title to lot number 1749 of which your orator The Borough of Belmar is now seized and possessed, was conveyed by and passed directly from the said Ocean Beach Association to what is now the said The Borough of Belmar, and title to the three lots of which your orators Char-

lotte Wildman and Jacob Newman, and the defendant Abraham Levinsohn are now each respectively seized and possessed, passed by several mesne conveyances; and the deeds respectively to your orators and the defendant are made subject to certain conditions, covenants and restrictions theretofore imposed upon said land and premises by the Ocean Beach Association, and subject to all the covenants, conditions and restrictions contained in former deeds of the same premises. That the covenant, condition and restriction contained in all the former deeds from the Ocean Beach Association is as follows:

> "And the said party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that the said party of the second part, her heirs and assigns, shall not sell or suffer to be sold on the premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said Association at any time."

That lot number 1749 was conveyed to your orator The Borough of Belmar by the Ocean Beach Association by deed dated August 17th, 1879, and by the following description:

"ALL that certain lot of land situate at Ocean Beach in the Township of Wall, in the County of Monmouth and State of New Jersey, being lot Number 1749 on a plan of lots of the Ocean Beach Association duly filed in the Clerk's Office of the County of Monmouth aforesaid, bounded and described as follows, to wit:

BEGINNING at a point or stake at the intersection of the easterly side or line of E Street with the southerly side or line of Ninth Avenue, (as laid down on the aforesaid plan of lots), thence (1) southerly along said easterly side

or line of E Street one hundred and fifty (150) feet; thence (2) Easterly at a right angle to the last mentioned course, and along the rear line of lot Number 1849 fifty (50) feet to the westerly line of lot Number 1748; thence (3) at a right angle to the last mentioned course and along the said westerly line of lot number 1748, one hundred and fifty (150) feet to said southerly side or line of Ninth Avenue; thence (4) westerly at a right angle to the last mentioned course and along the said southerly side or line of Ninth Avenue, fifty (50) feet to the point or place of beginning.

Subject nevertheless to the covenants, conditions and restrictions contained in the act entitled 'An Act to Incorporate the Ocean Beach Association.' And the said party of the second part, for itself, its successors and assigns, doth covenant and agree to and with the said Ocean Beach Association, their successors and assigns, that it, the said party of the second part, its successors and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations, made by the said association at any time."

That lot Number 1846 was conveyed to your oratrix Charlotte Wildman by Carrie J. McGronigle by deed dated April 2, 1907, by the following description:

"All that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey:

Being lot number 1846 on a plot of land of the Ocean Beach Association, (now Belmar) duly filed in the County Clerk's Office of the County of Monmouth and State of New Jersey, bounded and described as follows, to wit:

BEGINNING at a point in the northerly line of Tenth Avenue distant one hundred and fifty (150) feet easterly from the easterly line of E Street as laid down on the aforesaid map and extending from thence (1) northerly along the easterly line of lot number 1847 one hundred and fifty

(150) feet to the rear line of lot number 1746; thence (2) easterly along the said rear line of lot number 1746 fifty (50) feet to the westerly line of lot number 1845; thence (3) southerly along the said westerly line of lot number 1845, one hundred and fifty (150) feet to the said northerly line of Tenth Avenue, and thence (4) westerly, along the said northerly line of Tenth Avenue, fifty (50) feet to the place of beginning.

Subject, nevertheless, to all the covenants, conditions and restrictions contained in former deeds for the same premises."

That lot number 1843 was conveyed to your orator Jacob Newman by Jeremiah M. Newman, by deed dated April 2nd, 1884, and by the following description:

"All that certain lot of land situate at Ocean Beach in the Township of Wall, in the County of Monmouth and State of New Jersey, being lot Number eighteen hundred and forty-three (1843) on a plan of lots of the Ocean Beach Association duly filed in the Clerk's office of the County of Monmouth aforesaid, bounded and described as follows, to wit:

Beginning at a point or stake on the northerly line of Tenth Avenue (as laid down on the aforesaid plan of lots) distant one hundred and fifty (150) feet westerly from the westerly line of D Street and extending thence (1) Northerly at a right angle to said Tenth Avenue and along the westerly line of lot number eighteen hundred and forty-two (1842) one hundred and fifty (150) feet to the rear line of lot number seventeen hundred and forty-three; thence (2) westerly at a right angle to the last mentioned course and along the said rear line of lot number seventeen hundred and forty-three fifty (50) feet to the easterly line of lot number eighteen hundred and forty-four; thence (3) southerly at a right angle to the last mentioned course and along the said easterly line of lot number eighteen hundred and forty-four one hundred and fifty (150) feet to the said northerly line of Tenth Avenue; thence (4) easterly at a

right angle to the last mentioned course, and along the said northerly line of Tenth Avenue fifty (50) feet to the place of beginning.

Subject, nevertheless, to the covenants, conditions and restrictions contained in the act entitled 'An Act to Incorporate the Ocean Beach Association.'

And the said party of the second part, for himself, his heirs and assigns, doth covenant and agree to and with the said Ocean Beach Association, their successors and assigns, that he, the said party of the second part, his heirs and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed, any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations, made by the said Association at any time."

That lot number 2931 was conveyed to the defendant Abraham Levinsohn by John E. Miller, by deed dated November 22nd, 1905, and by the following description:

"All that certain piece or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey, with the buildings and improvements thereon erected, being lot number twenty-nine hundred and thirty-one.

Lot number twenty-nine hundred and thirty-one being the same property mentioned in a deed of conveyance from Samuel L. Gillin and Mary Virginia Gillin, his wife, to James S. Huyler, executor, April 26, 1892, in Book 496 of Deeds, pages 475, etc., described as lying in the Borough of Belmar, Monmouth County, —

BEGINNING at a point at the intersection of the easterly side or line of F Street with the southerly side or line of Tenth Avenue; thence (1) southerly along said easterly side or line of F Street fifty feet; thence (2) easterly at a right angle to first course one hundred and fifty feet; thence (3) northerly parallel with first course fifty feet to the said southerly side or line of Tenth Avenue; thence (4) westerly along said southerly side or line of Tenth Avenue one

hundred and fifty feet to the point or place of beginning.

Subject to the covenants, conditions and restrictions as in deed from Ocean Beach Association for said property."

That all of the aforesaid lots are now in what is known as the Borough of Belmar, which Borough was formerly called Ocean Beach, and all of said lots formerly, and prior to June 9th, 1873, belonged to the Ocean Beach Association and formed a part of the tract of land purchased by said Association as aforesaid.

On the lot number 1749 of your orator The Borough of Belmar is erected the Municipal Building of the Borough of Belmar valued at $15,000.; on the lots of your orators Charlotte Wildman and Jacob Newman are erected dwelling houses; on the defendant's lot a building is now being erected. That the said Tenth Avenue was and is one of the main avenues referred to in the said resolution passed by the said Ocean Beach Association, and is and always has been, one of the main residential avenues of the Borough of Belmar, running east and west from the river to the sea, and crossing the railroad at the depot in the said Borough of Belmar.

And your orators further show that the said resolution of the said Ocean Beach Association was a general scheme and plan for the benefit of every person to whom said Ocean Beach Association should thereafter sell a lot, and to his and her heirs and assigns, and that the said resolution was equally binding upon each subsequent purchaser of a lot, and his or her heirs and assigns. That the purpose of the passage of the aforesaid resolution by the said Ocean Beach Association was to obtain and compel uniformity in the building line of all buildings fronting on the main avenues, and for the protection of all lot owners who should purchase lots from said Ocean Beach Association, its successors and assigns, and for maintaining a uniform building line on said main avenues, and to prevent obstruction of view by adjacent lot owners erecting buildings or structures nearer than twenty feet to the line of the avenue, and that said building line established by said resolution has been

generally recognized and adhered to by lot owners on main avenues. That Tenth Avenue is one of the main avenues referred to, and is one of the principal residential avenues in the Borough of Belmar. That said building line as established twenty feet back from the street line has always been recognized and followed, and since the erection of the first building on a main avenue in what is now the Borough of Belmar, has been and now is observed, and since the passage of the aforesaid resolution by the Ocean Beach Association in 1873, there has been and now is a uniform plan or scheme laid out by said Ocean Beach Association and observed and maintained by its grantees, their heirs, successors and assigns, whereby a building line twenty feet back from the street line was established and has ever since been, and now is conformed to by the owners of property on the main avenues in said Borough, to the great benefit and advantage of the community, and the attractiveness, welfare and prosperity of the said Borough of Belmar.

And your orators further show that the buildings erected upon their respective lots are each within the building line of twenty feet from the street line, as established by the resolution of the Ocean Beach Association as aforesaid, and as continually conformed to as aforesaid. That the defendant Abraham Levinsohn is erecting, or causing to be erected, on said lot number 2931, owned by him as aforesaid, a large building, the foundation walls of which have now been constructed, and the part thereof fronting on Tenth Avenue projects three feet nine inches or thereabouts, beyond the aforesaid building line established as aforesaid, and the distance from the foundation wall of said building to the street line of Tenth Avenue is only about sixteen feet three inches, when the same should be at least twenty feet.

That directly across the street from the building now being erected by the defendant, and on the northeast corner of Tenth Avenue and F Street, is a building used by the defendant as a dry goods store. That said building is erected within the aforesaid building line of Tenth Avenue.

That directly opposite this store and on the northwest corner of Tenth Avenue and F Street, is a building now used as a drug store. That said building is erected within the aforesaid building line of Tenth Avenue. That the southwest corner of Tenth Avenue and F Street is vacant and unimproved property. So that on the four corners of F Street and Tenth Avenue the building line of Tenth Avenue has been conformed to, except in that the defendant in the erection of the building aforesaid at the southeast corner, is in the act of erecting a building beyond the established building line, which said act is complained of in this suit.

That Tenth Avenue is and always has been a strictly residential street, and there has been no change in the character of the same since said avenue was laid out and built upon, and the established building line on said Tenth Avenue as aforesaid, has always been and now is conformed to, recognized and observed, and your orators and each of them erected respectively the buildings on their aforesaid lots relying upon the observance and recognition thereof, and that all other owners would abide thereby.

That the said building line restriction has been of great benefit to the Borough of Belmar, and has given it preference over other summer resorts where such restriction does not exist or has been allowed to become of no effect by repeated violations thereof.

That in said Borough of Belmar there has been no violation of the said restriction on Tenth Avenue since the decision upholding the said building line as a valid restriction in the case of Newbery v. Barkalow, decided by this Honorable Court in 1909, and reported in 75 N. J. Eq. at page 128, except the violation complained of in this suit, and a violation of said restriction by one Charles Levinsohn, the son of this defendant, who about two years ago erected a dwelling house known as 613 Tenth Avenue, a portion of which dwelling extends beyond the said building line.

And your orators further show that the line of the street of all main avenues in said Borough is twenty feet back from the curb line of the street, and the building line

established as aforesaid is back twenty feet from said street line. That said building line always has had reference to the front foundation wall of the buildings, so that the building line observed is a distance of forty feet measured back from the curb line of the street to the front foundation wall of the building, eaves, open piazzas, bay-windows, etc., being treated as not being violations of the building line restriction in accordance with the decisions of this Court, and of the Court of Errors and Appeals of this state.

And your orators further show that the defendant Abraham Levinsohn had knowledge of said established building line and of the rules and regulations of the said Ocean Beach Association establishing the building line hereinbefore referred to at the time he purchased his said property, and at the time that he commenced the construction of his said building, and that he commenced the same and caused the northerly wall of said building and a portion of the easterly and westerly walls thereof to be erected on lot 2931 owned by said defendant as aforesaid, so that said walls and the said building itself, as far as it has progressed, projects about three feet and nine inches beyond the building line on Tenth Avenue established as aforesaid, in spite of such knowledge and after being notified of objections to his so proceeding, and has willfully, knowingly and intentionally violated said restriction, and continues to violate the same, although frequently notified to cease and desist at his peril.

That the Borough of Belmar, in conformity with the wishes of the property owners therein, on May 11, 1909, passed what is known as the "building line ordinance," and incorporated bodily therein the resolution of the Ocean Beach Association establishing the building line as aforesaid, in order that all persons might have notice of said restrictions, and be estopped from claiming want of knowledge of the same. Said ordinance was regularly published according to law.

And your orators further show on information and belief, that the defendant Abraham Levinsohn, when remon-

strated with by one of the Councilmen of the Borough of Belmar for erecting his said building over the established line, made it his boast that he expected suit to be brought against him for so doing, and that he had put away $500 to fight any suit that might be brought against him by the Borough of Belmar, or any property owner therein, and if he won it would be worth it.

And your orators further show that the said Abraham Levinsohn is bound to construct any building that is erected on said lot number 2931 to conform with said building line established on Tenth Avenue, and that by the deed conveying said premises to him he expressly covenanted so to do.

And your orators further show, that before the said defendant had commenced the construction of his said building on said lot number 2931, and on or about the 11th day of October, 1913, he submitted to Hon. Robert G. Poole, in his official capacity as Mayor of the Borough of Belmar, the plans of his said building, and inquired of said Mayor whether he would be permitted to erect a building that would extend over the Tenth Avenue building line.

That said Mayor thereupon requested James H. Emlen, the Borough Engineer and Surveyor, to survey the said lot 2931 of the said defendant, and to indicate to him the proper line or lines on which he should construct his said building. That in accordance with said instructions, and before any work, other than excavating said lot had been done, said surveyor made a survey of said lot and indicated to the defendant, the owner thereof, the proper line for his said building. That on November 3rd, 1913, said surveyor made a re-survey of said property, and found the northerly wall three feet nine inches beyond the said building line.

That said defendant nevertheless proceeded to erect his said building so that the northerly wall, and a portion of the easterly and westerly walls of said building projected three feet nine inches beyond the established building line on the Tenth Avenue side of said building.

That shortly after the defendant had commenced the construction of the northerly wall of said building, and on

November 14th, 1913, one George H. Heyniger, the owner of real property on said Tenth Avenue in said Borough of Belmar, caused notice to be served on said defendant that if he proceeded with the erection of said wall, that said Heyniger would apply for an injunction restraining him from proceeding with its further erection, and compelling him to set the same back within the said building line.

That defendant refused to heed said notice and proceeded with the erection of his said building.

That thereafter, and on the 19th day of November, 1913, said George H. Heyniger filed a bill in equity to compel the said defendant to remove his said building within the said building line.

That an order to show cause containing a stay was issued in said suit, which said order to show cause came on for a hearing before his Honor Vice-Chancellor Vivian M. Lewis at Jersey City, N. J., on December 1st, 1913.

That at said hearing an affidavit was presented by the defendant stating that the complainant's house in that suit projected ten inches over said building line. This was denied by the complainant, but on the disputed state of facts the Vice-Chancellor dismissed the order to show cause and removed the stay.

Your orators the Borough of Belmar, Charlotte Wildman and Jacob Newman knowing of the pendency of the aforesaid suit of Heyniger vs. Levinsohn, and not wishing to annoy and harass the defendant by a multiplicity of suits, had taken no direct action against said Levinsohn (other than the notice given him by his Honor R. G. Poole, aforesaid), until the order to show cause in said suit was dismissed.

On the 4th day of December, 1913, however, the following notice was served on the defendant by the Chief of Police of the Borough of Belmar:

To Abraham Levinsohn, Owner.

Sir:—

You are hereby notified that the building being erected by you on the southeast corner of Tenth Avenue and F

Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean Beach Association.

You will also please to take notice that in my official capacity as Mayor of the said Borough of Belmar, I have received requests from a majority of the property owners in said Borough to take such steps as may be necessary and proper to preserve and maintain the said building line, and to prevent your encroaching thereon.

I shall accordingly lay the matter before the Borough Council at the next regular meeting of that body, which will be held on Tuesday evening, December 9th, 1913.

I, therefore, deem it my duty to give you this notice, in order that you may govern your actions accordingly, and that in the meantime, you may know, that if you proceed with the erection of the Tenth Avenue wall of your said building you do so at your peril.

Dated, December 3, 1913.

Yours, etc.,

R. G. POOLE,
Mayor of the Borough of Belmar.

On the 6th day of December, 1913, both the complainant Charlotte Wildman and the complainant Jacob Newman served on the defendant herein the following notices:

To Abraham Levinsohn, Owner,
Or
Traub Brothers, Contractors.

Sir:—

You are hereby notified that the building being erected by you on the southeast corner of Tenth Avenue and F Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean Beach Association, and that unless you forthwith move

back the foundation wall on the Tenth Avenue side of said building to a point within the said building line, I shall make application for an injunction restraining you from proceeding with the further erection of said building, and compelling you to remove and set back the said foundation wall on or within the said building line.

Dated, December 6, 1913.

Yours, etc.,

CHARLOTTE WILDMAN

HARRY R. COOPER, Attorney

To Abraham Levinsohn, Owner,

or

Traub Brothers, Contractors.

Sirs: —

You are hereby notified that the building being erected by you on the southeast corner of Tenth Avenue and F Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean Beach Association, and that unless you forthwith move back the foundation wall on the Tenth Avenue side of said building to a point within the said building line, I shall make application for an injunction restraining you from proceeding with the further erection of said building, and compelling you to remove and set back the said foundation wall on or within the said building line.

Dated, December 6, 1913.

Yours, etc.,

JACOB NEWMAN

HARRY R. COOPER, Attorney.

On the 9th day of December, 1913, the Borough of Belmar, at a regular meeting of the Borough Council, at the request and demand of over four hundred owners of real property in said Borough, passed the following resolution:

Bill of Complaint

Whereas, Abraham Levinsohn is erecting on the southeast corner of Tenth Avenue and F Street, in the Borough of Belmar, New Jersey, a building, the northerly wall of which, on the Tenth Avenue side of said building, projects three feet nine inches beyond the building line established by the rules and regulations of the Ocean Beach Association, and

Whereas, said building line has been and now is generally recognized and observed in the said Borough of Belmar, New Jersey, and

Whereas, the Borough Council deems it in the interest of and for the general good of the said Borough, and for the benefit of the inhabitants thereof, that the said building line continue to be recognized and observed, and that all buildings be built in accordance with the provisions thereof, and

Whereas, a large number of the property owners of the Borough of Belmar have requested this Council to preserve and maintain the said building line, and to compel the removal of the aforesaid encroachment therefrom, therefore,

Be it Resolved by the Council of the Borough of Belmar, that the Borough Solicitor be, and he is hereby authorized and instructed to take such proceedings, and to commence such suit or suits, action or actions, either at law or in equity, as may be necessary and proper to preserve and maintain the said building line, and to compel the removal of the aforesaid encroachment therefrom.

Be it further Resolved that the said Borough Solicitor be, and he is hereby expressly authorized to associate with him for such purpose such counsel as he may deem proper.

ROBERT G. POOLE, Mayor.

Passed, December 9, 1913.

Approved, December 9, 1913.

Attest:

CHAS. O. HUDNUT, Borough Clerk.

And your orators further show that the defendant Abraham Levinsohn refused and still refuses to mind the aforesaid notices, and to refrain and desist from proceeding with the erection of his said building or that portion thereof which projects beyond the Tenth Avenue building line, and is now erecting his northerly wall and a portion of his easterly and westerly walls without said building line and nearer the line of Tenth Avenue than twenty feet. That thereby the said defendant greatly injures the said Borough of Belmar in depriving it of the benefit of the aforesaid building restriction, and in encouraging future builders to disregard said restriction.

And your orators further show that they greatly fear that the said Abraham Levinsohn will as speedily as possible erect, construct and finish said wall and said building with the northerly wall thereof and a portion of the easterly and westerly walls without the said building line, and nearer the line of Tenth Avenue than twenty feet, and greatly damage your orators and their said property.

In tender consideration whereof, and for as much as your orators are without adequate remedy in the premises by the strict rule of the common law, and without the aid of this Honorable Court, where matters of this nature are properly cognizable and relievable: To the end, therefore, that the defendant may full, true, perfect and distinct answer make to all and every the matters aforesaid, and as fully as if the same were here again repeated and he thereunto interrogated, paragraph by paragraph, and that the said Abraham Levinsohn, and all persons under him be restrained and enjoined from proceeding with the further erection of so much of said building as projects north of a line drawn twenty feet south of the line of Tenth Avenue and parallel therewith, and that the said Abraham Levinsohn be compelled to remove and set back so much of said building as projects north of said line to a point within said line. And that your orators have such further and other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

Bill of Complaint

May it please your Honor, the premises considered, to grant unto your orators, not only the State's writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said Abraham Levinsohn strictly enjoining and commanding him, his agents, servants and employees, to refrain from proceeding with the further erection of so much of said building as projects north of a line drawn twenty feet south of the line of Tenth Avenue and parallel therewith, and from erecting any portion of said building nearer than twenty feet to the line of said avenue, and commanding and compelling them to remove said wall or structure, or so much thereof as is already erected nearer than twenty feet to the line of said Tenth Avenue, but also the State's writ of subpoena issuing out of and under the seal of this Honorable Court, commanding him by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein, as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, etc.

HARRY R. COOPER,

Solicitor and of Counsel with Complainant.

Answer

ANSWER
(Borough of Belmar v. Levinsohn)

The answer of Abraham Levinsohn, the defendant in the above entitled cause, for answer unto the Bill of Complaint filed therein, shows:

1. This defendant admits that the Ocean Beach Association was incorporated under the laws of the State of New Jersey, in Eighteen hundred and seventy-three, by the Legislature of the State of New Jersey, and was authorized to purchase and sell lands, and that said Association purchased a tract of land in the Township of Wall, in what is now known as the Borough of Belmar, in the County of Monmouth, New Jersey, and laid out streets and avenues therein.

2. This defendant has no knowledge except as set forth in said Bill of Complaint, that the said Association, on June ninth, Eighteen hundred and seventy-three, adopted a resolution requiring buildings erected on said avenues and streets to be not nearer the line of the same than twenty feet; that no such resolution was ever incorporated in any deed of the premises owned by the complainants or the defendant in Belmar aforesaid, and which are the subject of the matters set forth in said Bill of Complaint.

3. This defendant has no knowledge except as appears in said Bill of Complaint that on March twenty-seventh, Eighteen hundred and seventy-seven, the said Association made a deed to one Harvey for a plot of land about three and one-fourth acres in extent, lying west of F Street, in Belmar aforesaid, or that said tract was made subject to any restrictions or covenants.

4. This defendant does not deny nor admit the allegation in said Bill of Complaint that the premises set forth in said Bill are owned by the said complainants, and leaves the said complainants to make proof of such ownership according to law.

5. This defendant admits that the premises referred to in said Bill of Complaint as Lot No. 2931 is the property

of this defendant, and further admits that the deed of conveyance of said lot made by the Ocean Beach Association originally to Theresa C. M. Boone, dated November tenth, Eighteen hundred and seventy-three, contained a clause to the following effect:

"Said party of the second part, for herself, her heirs and assigns, does covenant and agree with the said Ocean Beach Association, its successors and assigns, that she, the said party of the second part, her heirs and assigns, shall not violate any of the provisions contained in said Act of Incorporation, (meaning the aforesaid Act of 1873), By-laws, rules or regulations made by the said Association at any time." But this defendant denies that the said Association ever imposed any restriction upon said premises regarding the building line that was lawful or binding upon this defendant, nor had this defendant heard of any such restriction, directly or indirectly, at the time he purchased said premises in the year Nineteen hundred and five, from one John E. Miller.

6. This defendant further answering said bill says that he denies that there has been or is any uniform plan or scheme in Belmar aforesaid, laid out by said Association or observed or maintained by its grantees, whereby any building line was established and conformed to, either by said Association or its grantees, and avers the fact to be that in Belmar aforesaid it has for years been the custom and practice of said grantees to build dwelling houses and other structures in Belmar upon any line or lines that they deemed proper, and that the said complainants well knew, at the time they filed said Bill of Complaint, that there was no such uniform plan or scheme made or laid out in Belmar aforesaid, and observed by its grantees for the establishment and maintenance of a uniform building line in said locality.

7. This defendant further answering says that the said complainants have been cognizant of the fact that there was no uniform building line or lines in said Borough of Belmar. That since said complainants purchased their aforesaid property, there have been many structures built

on said avenues that were not within the twenty foot line and which said structures extend over said line and nearer the avenue than twenty feet. That on said Tenth Avenue, there are over forty houses and buildings erected that are nearer the said avenue than twenty feet, and on F Street, the principal avenue in Belmar, there are over two hundred buildings and structures erected nearer the line of said street than twenty feet.

8. This defendant further answering says that he admits that he has erected on his said premises a building which is intended to be a department store, and which will cost, when finished, Twenty-three thousand dollars. It is located sixteen feet, three inches, approximately, beyond the line of said Tenth Avenue. From the premises of the defendant, the said lots and dwellings of the complainants cannot be seen, either from the sidewalk or any part of the lot. That said defendant's said building has a frontage on F Street, the principal business avenue in Belmar, of forty feet, extending six feet, three inches, southerly on another lot owned by defendant, and extends easterly on the lot one hundred and thirty-one feet. That the said building is constructed of brick and has a sixteen-inch wall in front, and a twelve-inch wall on the side and rear.

9. This defendant further answering says that said F Street extends north and south in Belmar, and is the main business street in Belmar, and is also used by the Atlantic Coast Electric Railroad Company for its double track, which road runs from Asbury Park to Sea Girt. That said F Street has, for more than twenty years, been used and recognized almost exclusively as a business street, and accordingly, few, if any, of the many buildings on that street are erected with any regard to uniform plans as to a building line. That this defendant began the erection of said building on or about October fifteenth, Nineteen hundred and thirteen. The said structure was erected about the extent of two-thirds of its present dimensions when the said complainants caused the notices to be served on defendant referred to in said Bill of Complaint, protesting against the

erection by defendant of said building over said twenty foot line.

10. And this defendant answering says that he denies that the said complainants are entitled to an injunction restraining this defendant from erecting said structure upon said lot or upon said line already occupied by the said building, by reason of the matters aforesaid, or by reason of any allegations contained in their said Bill of Complaint, and this defendant charges that said complainants have been guilty of laches in bringing their said suit and in filing said Bill of Complaint; all of which said matters and things so averred by this defendant, this defendant is now ready to aver, maintain and prove, in accordance with the rules and practice of this Honorable Court, and prays that said Bill of Complaint be dismissed, and that said complainants be directed to pay the reasonable costs of this defendant in this behalf incurred.

PATTERSON & RHOME,
Solicitors of Defendant.

REPLICATION
(Borough of Belmar v. Levinsohn)

The replication of The Borough of Belmar, Charlotte Wildman and Jacob Newman in the above-entitled cause, to the answer of the defendant shows:

I. That the resolution adopted by the Ocean Beach Association, providing that uniformity be maintained in the line of buildings on main avenues of the Association, and for securing said object that no building be erected nearer to the line of the same than twenty feet, was a valid and binding resolution for the benefit of all its grantees, their heirs, successors and assigns, and that the said resolution was binding upon this defendant as the owner of property on one of said avenues. These complainants deny that this defendant at the time he purchased his said premises in the year 1905 from one John E. Miller had not heard of any such restriction, directly or indirectly, and allege that the defendant prior to, and at the time he purchased his said premises, was fully cognizant and aware of such restriction in Belmar, which was formerly owned by the Ocean Beach Association. These complainants deny that it has for years been the custom and practice of said grantees to build dwelling houses and other structures upon any line or lines that they deemed proper, and that these complainants well knew at the time they filed their Bill of Complaint that there was no such uniform plan or scheme made or laid out in Belmar aforesaid and observed by its grantees for the establishment and maintenance of a uniform building line in said locality, and aver the fact to be that since the erection of the first building in Belmar aforesaid, there has always been and now is an established building line on the main avenues, which includes Tenth Avenue, on which the defendant is erecting the building in question, and that said line as established and observed is twenty feet back from the street line. That this uniform plan or scheme has always been and now is observed and conformed to, and the defendant was bound to erect his building to conform to the said established build-

ing line. That in the deed conveying said premises to him, he expressly covenanted to conform to the aforesaid resolution of the Ocean Beach Association. That the deed from John E. Miller to the defendant contained the clause, "Subject to the covenants, conditions and restrictions as in deeds by Ocean Beach Association for said property."

That a covenant, condition or restriction contained in the first deed made by the Ocean Beach Association conveying said premises, was as follows:

"Said party of the second part, for herself, her heirs and assigns, does covenant and agree with the said Ocean Beach Association, its successors and assigns, that she, the said party of the second part, her heirs and assigns, shall not violate any of the provisions contained in said act of incorporation," (meaning the aforesaid act of 1873) "by-laws, rules, or regulations made by the said Association at any time."

This deed was made November 10th, 1873, some five months after the resolution providing that no building should be erected nearer to the line of any avenue than twenty feet had been passed.

That defendant was bound by the provisions in his deed to trace back his title to the original grantor, and to conform to and abide by any restriction placed upon his said property by said original grantor.

II. These complainants further replying to the answer of said defendant say that they deny that they have been cognizant of the fact that there was no uniform building line or lines in said Borough of Belmar, and allege the fact to be, and they have been cognizant thereof, that there always has been and now is a uniform building line on the main avenues, which includes Tenth Avenue aforesaid, and that the dwellings of the complainants Wildman and Newman, and the Municipal Building of the Borough of Belmar were built in conformity thereto; and deny that since said complainants purchased their respective properties there have been many structures built on said avenues that were not within the twenty foot line, and which said structures extend

over said line and nearer the avenue than twenty feet; and deny that on said Tenth Avenue there are over forty houses and buildings erected that are nearer the said avenue than twenty feet, and allege the fact to be that the houses on Tenth Avenue conform to the building line and are erected within the twenty foot building line; that these complainants have no knowledge or information as to how many buildings and structures are erected on F Street nearer the line of said street than twenty feet, and allege the fact to be that F Street is not one of the main avenues included in the said resolution of the Ocean Beach Association, and upon which a building line has been established; that the buildings erected at the corners of Tenth Avenue and F Street, other than the one now being erected by the defendant and complained of, all conform to the established building line of twenty feet back from the street line of Tenth Avenue.

III. These complainants further replying to the answer of the defendant say that they have no knowledge of the cost, when finished, of the building being erected by the defendant; they deny that from the premises of the said defendant the said lots and dwellings of the complainants cannot be seen, either from the sidewalk or any part of the lots. They allege the fact to be that a notice was served upon the defendant to the effect that the building being erected by him encroached three feet nine inches on Tenth Avenue beyond the established building line, and that unless moved back an injunction would be asked for compelling the removal back; that when said notice was served none of the walls of said building had been completed and the north wall, being that on the Tenth Avenue side, had not been commenced, the excavation therefor only having been completed.

IV. These complainants further replying to the answer of the defendant, deny that the building of the said defendant was erected about the extent of two-thirds of its present dimensions when the said complainants caused the notices to be served on defendant referred to in said Bill of Complaint, protesting against the erection by defendant of

said building over said twenty foot line, and allege that no portion of the north wall on the Tenth Avenue side of the building, being erected by the defendant as aforesaid, had been commenced when the first notice referred to in the Bill of Complaint aforesaid was served; that it is admitted that F Street is a business street, but it is alleged that this is not one of the main avenues included in the resolution of the Ocean Beach Association establishing a building line, and that Tenth Avenue is one of the main avenues so included, and is a residential avenue.

V. These complainants further replying to the answer of the defendant deny that they have been guilty of laches in serving their said notices and in bringing their said suit and in filing their said Bill of Complaint, and allege that they promptly, persistently and aggressively asserted their rights against the defendant, without any delay on their part or any damage to the defendant by reason of any time that may have elapsed since the defendant commenced the erection of his said building, and the serving of their said notices, and the filing of their said Bill, and that by reason of the matters aforesaid, and the allegations contained in their said Bill of Complaint, they are entitled to a mandatory injunction against the defendant, compelling him to remove and set back within the said building line so much of his said building as is erected nearer to the line of Tenth Avenue than twenty feet.

HARRY R. COOPER,
Solicitor and of Counsel with Complainants.

Bill of Complaint

IN CHANCERY OF NEW JERSEY

BILL OF COMPLAINT
(Heyniger v. Levinsohn)
Filed Nov. 19 1913

To His Honor Edwin R. Walker,

Chancellor of the State of New Jersey.

Your orator, George H. Heyniger, complaining shows unto Your Honor, that a corporation known as the Ocean Beach Association was incorporated under the Laws of the State of New Jersey on March 13th, 1873 (P. L. 1873, pg. 1089). It was authorized to purchase and sell lands, and was especially empowered to require any grantee from it to make and maintain such style and character of improvements on the lands conveyed, or the streets fronting thereon, as might seem most expedient for securing a uniform system of development and improvement. The Association purchased a tract of land extending from the Atlantic Ocean to Shark River in Monmouth County, with the intent of promoting the seaside resort which is now known by the name of Belmar. It at once laid out streets and avenues through the property east of F Street, and filed maps thereof, the streets running north and south being designated by the letters of the alphabet, and the avenues running east and west, at right angles with the streets, being designated by numbers. The streets were laid out sixty feet wide, and the avenues eighty feet wide.

Before any lots were sold by the corporation, its Board of Directors on June 9th, 1873, passed the following resolution:

> "RESOLVED that it is highly important to maintain uniformity in the line of buildings on the main avenues of the Association, and for securing said object, that no building be erected on said avenues nearer to the line of the same than twenty feet."

This resolution was entered upon the minutes of the corporation.

On March 27th, 1877, the corporation made a deed to Ellen T. H. Harvey for a plot of land containing about three and one-fourth acres. This plot lay west of F Street, and between that street and Shark River. At the time of the conveyance it had not been plotted into lots, nor had there been filed any map showing the lines of streets and avenues through it. The aforesaid deed, however, refers to several streets and avenues by name. These were afterwards plotted and made conterminous with the streets and avenues which had been previously laid out east of F Street. The deed was made out in the usual form of a warranty deed, and made "Subject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act entitled 'An Act to incorporate the Ocean Beach Association.'" The deed also contained a covenant made by the grantee in the following words:

> "And the said party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that the said party of the second part, her heirs and assigns, shall not sell or suffer to be sold on the premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said Association at any time."

That the Ocean Beach Association was prior to the ninth day of June 1873, seized and possessed of the premises now owned by your orator, and hereinafter more particularly referred to, which are known as lot number 1944, and the premises now owned by the defendant, Abraham Levinsohn, more particularly hereafter referred to, which are known by the lot number 2931. That both of said premises are situated on the south side of and front on Tenth

Avenue. That each of said deeds executed by said Ocean Beach Association, conveying said premises, contained the aforesaid covenant. The title to these two lots, as passed by several mesne conveyances and the deeds, respectively to your orator and the defendant, are made subject to certain conditions, covenants and restrictions theretofore imposed upon said land and premises by the Ocean Beach Association, and subject to all the covenants, conditions and restrictions contained in former deeds of the same premises. That the covenant, condition and restriction contained in all the former deeds, is as follows:

> "And the said party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that the said party of the second part, her heirs and assigns, shall not sell or suffer to be sold on the premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said Association at any time."

That the description in the deed conveying said lot number 1944 to your orator is as follows:

All that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Belmar, in the County of Monmouth and State of New Jersey, being lot number Nineteen hundred and forty-four (1944) as shown on a map or plan of lots of the Ocean Beach Association, duly filed in the Clerk's office of the County of Monmouth, and bounded and described as follows:

Beginning at a point on the southerly side of Tenth Avenue, distant two hundred (200) feet westerly from the westerly line of D Street as laid down on said map, and extending from thence (1) southerly, along the westerly line of lot nineteen hundred and forty-three (1943) one hundred and fifty (150) feet; thence (2) westerly, at a

right angle to the last mentioned course fifty (50) feet; thence (3) northerly, at a right angle to the last mentioned course, one hundred and fifty (150) feet to the southerly line of Tenth Avenue, and thence (4) easterly, along the southerly line of Tenth Avenue fifty (50) feet to the point or place of beginning.

That said premises were conveyed to your orator on or about the twenty-seventh day of January 1909.

That the said lot number 2931 owned by the defendant, is located at the southeast corner of Tenth Avenue and F Street. That both of said lots are now in what is known as the Borough of Belmar, and was formerly called Ocean Beach, and was formerly the property of the Ocean Beach Association above referred to.

On your orator's lot is erected a dwelling house; on the defendant's lot a building is now being erected. That the said Tenth Avenue was one of the main avenues referred to in the said resolution passed by the said Ocean Beach Association, and is, and always has been, one of the main avenues of the Borough of Belmar, running east from the river direct to the ocean, and crosses the railroad at the depot in the said Borough of Belmar.

And your orator further shows that the said resolution of the said Ocean Beach Association was a general scheme and plan for the benefit of every person to whom said Ocean Beach Association should thereafter sell a lot, and to his and her heirs and assigns, and that the said resolution was equally binding upon each subsequent purchaser of a lot, and his or her heirs and assigns. That the purpose of the passage of the aforesaid resolution by the said Ocean Beach Association was to obtain and compel uniformity in the building line of all buildings fronting on the main avenues, and for the protection of all lot owners who should purchase lots from said Ocean Beach Association, their successors and assigns, and for the maintaining a uniform building line on said main avenues and streets, and to prevent obstruction of view by adjacent lot owners erecting buildings or structures nearer than twenty feet to the boundary line

of the avenue, and that said building line established by said resolution has been generally recognized and adhered to by lot owners on main avenues of the aforesaid Association and including Tenth Avenue, which are now in the Borough of Belmar.

And your orator further shows that the building erected upon said lot number 1944, owned by your orator, is within the building line of twenty feet from the line of the avenue, as established by the resolution of the Ocean Beach Association as aforesaid, and that the defendant Abraham Levinsohn is erecting, or causing to be erected, on said lot number 2931, owned by him as aforesaid, a large building, the foundation walls of which have now been constructed, and the part thereof fronting on Tenth Avenue projects three feet and nine inches, or thereabouts, beyond the aforesaid building line established as aforesaid, and the distance from said foundation wall to the street line of said Tenth Avenue is only about sixteen feet and three inches, when the same should be at least twenty feet.

And your orator further shows that the defendant Abraham Levinsohn had knowledge of the rules and regulations of the said Ocean Beach Association, and particularly of the resolution establishing the building line hereinbefore referred to, and that he has caused the wall of the building and the building itself, as far as it has progressed, to be constructed on lot number 2931, owned by him as aforesaid, so that it projects beyond the building line on Tenth Avenue, established as aforesaid, with knowledge thereof and with intent to violate the same.

And your orator further shows that said Abraham Levinsohn is bound to construct any building that is erected on said lot number 2931 to conform with the building line established on Tenth Avenue, and that by the deed conveying said premises to him, he expressly covenanted so to do.

And your orator further shows that upon obtaining knowledge, by personal observation, of the erection of a building upon said lot number 2931, owned by the defendant Abraham Levinsohn, and that the foundation wall of the

building was being erected without the aforesaid building line, to wit: nearer the street line of Tenth Avenue than twenty feet, and that defendant intended to erect a building on said foundation wall, your orator on the fourteenth day of November 1913, caused the following notice to be served on the said defendant Abraham Levinsohn and on the contractor in charge of the work on said building, to wit:

To Abraham Levinsohn, Owner,
Or
Traub Brothers, Contractors.
Archibald K. Wolverton, Sub-Contractor.

Sirs:

You are hereby notified that the building being erected by you on the southeast corner of Tenth Avenue and F Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean Beach Association, and that unless you forthwith move back the foundation wall on the Tenth Avenue side of said building to a point within the said building line, I shall make application for an injunction restraining you from proceeding with the further erection of said building and compelling you to remove and set back the said foundation wall on or within the said building line.

Dated, November 14, 1913.

Yours, etc.,

GEORGE H. HEYNIGER

HARRY R. COOPER, Attorney.

And your orator further shows that the defendant Abraham Levinsohn refused and still refuses to mind said notice, and that he persists in and is erecting said wall and said building without said building line, and nearer the line of Tenth Avenue than twenty feet.

And your orator further shows that he greatly fears that the said Abraham Levinsohn will as speedily as pos-

sible erect, construct and finish said wall and said building with the northerly wall thereof without the building line and nearer Tenth Avenue than twenty feet, and greatly damage your orator and his said property.

In tender consideration whereof, and forasmuch as your orator is without adequate remedy in the premises by the strict rule of the common law, and without the aid of this Honorable Court, where matters of this nature are properly cognizable and relievable: To the end, therefore, that the defendant may, full, true, perfect and distinct answer make to all and every the matters aforesaid, and as fully as if the same were here again repeated and he thereunto interrogated, paragraph by paragraph, and that the said Abraham Levinsohn, and all persons under him be restrained and enjoined from proceeding with the further erection of said wall or of any structure thereupon nearer than twenty feet to the street line of said Tenth Avenue and that the said Abraham Levinsohn be compelled to remove the said wall and set the same back within the said building line. And that your orator have such further and other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator, not only the State's writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said Abraham Levinsohn strictly enjoining and commanding him, his agents, servants and employees to refrain from proceeding with the further erection of the said wall on the said Tenth Avenue side of said building, and from erecting any structure thereon within twenty feet of the line of aid Avenue, and commanding and compelling them to remove said wall or structure, or so much thereof as is already erected within twenty feet of the said line of Tenth Avenue, but also the State's writ of subpoena issuing out of and under the seal of this Honorable Court, commanding him by a certain day and under a certain penalty therein to be expressed, to be and

appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

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

HARRY R. COOPER,
Solicitor of Complainant.

H. H. SNEDEKER,
Of Counsel.

ANSWER

(Heyniger v. Levinsohn)

The answer of Abraham Levinsohn, the defendant in the above entitled cause for answer unto the bill of complaint filed therein shows:

1. This defendant admits that the Ocean Beach Association was incorporated under the laws of New Jersey in 1873 by the legislature of New Jersey and was authorized to purchase and sell lands and that said Association purchased a tract of land in the Township of Wall in what is now known as the Borough of Belmar in the County of Monmouth, New Jersey, and laid out streets and avenues therein.

2. This defendant has no knowledge except as set forth in said bill of complaint, that the said Association on June 9th, 1873, adopted a resolution requiring buildings erected on said avenues and streets to be not nearer the line of the same than twenty feet; that no such resolution was ever incorporated in any deed of the premises owned by complainant or defendant in Belmar aforesaid, and which

are the subject of the matters set forth in said bill of complaint.

3. This defendant has no knowledge except as appears in said bill of complaint that on March 27th, 1877, the said Association made a deed to one Harvey for a plot of land about three and one-fourth acres in extent, lying west of F Street in Belmar aforesaid, or that said tract was made subject to any restrictions or covenants.

4. This defendant does not deny nor admit the allegation in said bill of complaint that the premises known as lot number 1944 were or are owned by the said complainant and leaves the said complainant to make proof of such ownership according to law.

5. This defendant admits that the premises referred to in said bill of complaint as lot number 2931 is the property of this defendant, and further admits that the deed of conveyance of said lot made by the Ocean Beach Association originally to Theresa C. M. Boone, dated November 10th, 1873, contained a clause to the following effect:

"Said party of the second part, for herself, her heirs and assigns does covenant and agree with the said Ocean Beach Association, its successors and assigns that she, the said party of the second part, her heirs and assigns shall not violate any of the provisions contained in said act of incorporation, (meaning the aforesaid act of 1873) by-laws, rules or regulations made by the said Association at any time."

But this defendant denies that the said Association ever imposed any restriction upon said premises regarding the building line that was lawful or binding upon this defendant, nor had this defendant heard of any such restriction directly or indirectly at the time he purchased said premises in the year 1905 from one John E. Miller.

6. This defendant further answering said bill says, that he denies that there has been or is any uniform plan or scheme in Belmar aforesaid laid out by said Association or observed or maintained by its grantees whereby any building line was established and conformed to either by said Asso-

ciation or its grantees and avers the fact to be that in Belmar aforesaid it has for years been the custom and practice of said grantees to build dwelling houses and other structures in Belmar upon any line or lines that they deemed proper and that the said complainant well knew at the time he filed said bill of complaint, that there was no such uniform plan or scheme made or laid out in Belmar aforesaid and observed by its grantees for the establishment and maintenance of a uniform building line in said locality.

7. This defendant further answering says that the said complainant is the owner of said lot number 1944 which is situated on the south side of Tenth Avenue in Belmar aforesaid and consists of a lot of land fifty by one hundred and fifty feet on which is erected a dwelling house occupied by said complainant and his family; that said lot is located nine hundred feet east of the said lot of this defendant's; that the premises of this defendant cannot be seen from any part of the lot of the complainant. That the said dwelling of the said complainant is a two and one-half story structure, having a porch and a roof projection, both of which extend over the said twenty foot restriction line and are nearer the line of said Tenth Avenue than twenty feet.

8. This defendant further answering says that the said Heyniger has lived in the Borough of Belmar aforesaid over twenty-two years past and has been cognizant of the fact that there was no uniform building line or lines in said Borough of Belmar. That since said Heyniger purchased his aforesaid property in 1905, there have been many structures built on said avenues that were not within the twenty foot line and which said structures extend over said line and nearer the avenue than twenty feet. That on said Tenth Avenue, there are over 21 houses and buildings erected that are nearer the said avenue than twenty feet and on F Street, the principal avenue in Belmar, there are over 150 buildings and structures erected nearer the line of said street than twenty feet.

9. This defendant further answering says that he admits that he has erected on his said premises a building

which is intended to be a department store and which will cost when finished, Twenty-Five Thousand Dollars. It is located sixteen feet three inches, approximately, beyond the line of said Tenth Avenue. From the premises of the defendant, the said lot and dwelling of the complainant cannot be seen, either from the sidewalk or any part of the lot. That said defendant's said building has a frontage on F Street, the principal business avenue in Belmar, of forty feet, extending 6 feet 3 inches southerly on another lot owned by defendant, and extends easterly on the lot one hundred and thirty-one feet. The south and east walls of the first story of said building are entirely completed. The north and west walls of said building are about two-thirds completed and that said building so far as it is now completed represents an expenditure of about eight thousand dollars. That the said building is constructed of brick and has a sixteen inch wall in front and twelve inch wall on the side and rear.

10. This defendant further answering says that said F Street extends north and south in Belmar and is the main business street in Belmar and is also used by the Atlantic Coast Electric Railroad for its double track, which road runs from Asbury Park to Sea Girt. That said F Street has for more than twenty years been used and recognized almost exclusively as a business street and accordingly a few, if any, of the many buildings on that street are erected with any regard to uniform plans as to a building line. That this defendant began the erection of said building on or about October fifteenth, Nineteen Hundred and Thirteen and that the said structure was erected about the extent of two-thirds of its present dimensions when the said complainat caused a notice to be served on defendant, November fourteenth, Nineteen Hundred and Thirteen, protesting against the erection by defendant of said building over said twenty foot line, which notice is referred to in said bill of complaint and the affidavit of H. R. Cooper, attorney, attached thereto.

11. This defendant further answering said bill says that prior to the beginning of the erection of said store, de-

fendant entered into a contract for the erection of the same with Traub Brothers of Belmar, and the said Traub Brothers submitted to the complainant in this case, the plans and specifications of the brick and mason work, the complainant being a mason contractor for the purpose of having said Heyniger submit a bid for said work. That the said complainant came to this defendant several times while he was figuring on said work to inquire about different matters connected with the work. That the said plans and specifications so submitted to the said complainant show that the said store building was to be forty feet wide on F Street and that the lot was fifty feet wide and thereby the said Heyniger knew of the proposed erection by the defendant of said building on said line and knew the dimensions of said building and the dimensions of said lot and with such knowledge he made a written bid to said Traub Brothers for said work but his bid was three thousand dollars higher than another competitor and he did not therefore get the work. That the said Heyniger after discovering that he had not secured said work, told one of the said contractors that if he had secured the job he intended to build the structure over the said twenty foot line and would have made no complaint in that event.

12. And this defendant answering says, that he denies that the said complainant is entitled to an injunction restraining this defendant from erecting said structure upon said lot or upon said line already occupied by the said building by reason of the matters aforesaid, or by reason of any allegations in his bill of complaint, all of which said matters and things so avered by this defendant, this defendant is now ready to aver, maintain and prove in accordance with the rules and practice of this Honorable Court, and prays that said bill of complaint be dismissed and that said complainant be directed to pay the reasonable costs of this defendant in this behalf incurred.

PATTERSON & RHOME,
Attorneys of Defendant.

REPLICATION
(Heyniger v. Levinsohn)

The replication of George H. Heyniger, the complainant in the above-entitled cause, to the answer of the defendant shows:

I. That the resolution adopted by the Ocean Beach Association providing that uniformity be maintained in the line of buildings on main avenues of the Association, and for securing said object that no building be erected nearer to the line of the same than twenty feet, was a valid and binding resolution for the benefit of all its grantees, their heirs, successors and assigns, and that the said resolution was binding upon this defendant, as the owner of property on said avenue. This complainant denies that in Belmar, which was formerly owned by the Ocean Beach Association, that it has for years been the custom and practice of said grantees to build dwelling houses and other structures upon any line or lines that they deemed proper, and that this complainant well knew at the time he filed his Bill of Complaint that there was no such uniform plan or scheme made or laid out in Belmar aforesaid and observed by its grantees for the establishment and maintenance of a uniform building line in said locality, and avers the fact to be that since the erection of the first building in Belmar aforesaid, there has always been and now is an established building line on the main avenues, which includes Tenth Avenue, on which the defendant is erecting the building in question, and that said line as established and observed is twenty feet back from the street line. That this uniform plan or scheme has always been and now is observed and maintained by the grantees of the Ocean Beach Association, their heirs, successors and assigns and has been of great benefit to the community and property owners therein; that said building line was established by resolution in 1873 and has always been and now is observed and conformed to, and the defendant was bound to erect his building to conform to the

said established building line. That in the deed conveying said premises to him, he expressly covenanted to conform to the aforesaid resolution of the Ocean Beach Association. That the deed from John E. Miller to the defendant contained the clause, "Subject to the covenants, conditions and restrictions as in deeds by Ocean Beach Association for said property."

That a covenant, condition or restriction contained in the first deed made by the Ocean Beach Association conveying said premises, was as follows:

"Said party of the second part, for herself, her heirs and assigns, does covenant and agree with the said Ocean Beach Association, its successors and assigns, that she, the said party of the second part, her heirs and assigns, shall not violate any of the provisions contained in said act of incorporation," (meaning the aforesaid act of 1873) "by-laws, rules, or regulations made by the said Association at any time."

This deed was made November 10th, 1873, some five months after the resolution providing that no building should be erected nearer to the line of any avenue than twenty feet had been passed.

That defendant was bound by the provisions in his deed to trace back his title to the original grantor, and to conform to and abide by any restriction placed upon his said property by said original grantor.

II. This complainant further replying to the answer of said defendant says that he denies that lot number 1944 owned by him is located nine hundred feet east of said lot of the defendant; and denies that the premises of the defendant cannot be seen from any part of the lot of this complainant; and denies that this complainant's dwelling extends over the said twenty foot restriction line and is nearer the line of said Tenth Avenue than twenty feet.

III. This complainant further replying to the answer of said defendant says that he denies that he has been cognizant of the fact that there was no uniform building line or lines in said Borough of Belmar, and alleges the fact to be,

and he has been cognizant thereof, that there always has been and now is a uniform building line on the main avenues which includes Tenth Avenue aforesaid, and that complainant's said dwelling was built in conformity thereto; and denies that since 1905 there have been many structures built on said avenues that were within the twenty foot line and which said structures extend over said line and nearer the avenue than twenty feet; and denies that on said Tenth Avenue there are over twenty-one houses and buildings erected that are nearer the said avenue than twenty feet; that this complainant has no knowledge or information as to how many buildings and structures are erected on F Street nearer the line of said street than twenty feet and alleges the fact to be that F Street is not one of the main avenues included in the said resolution of the Ocean Beach Association and upon which a building line has been established; that the buildings erected at the corners of Tenth Avenue and F Street, other than the one now being erected by the defendant and complained of, all conform to the established building line of twenty feet back from the street line on Tenth Avenue.

IV. This complainant further replying to the answer of the defendant says that he has no knowledge of the cost, when finished, of the building being erected by the defendant; he denies that from the premises of the defendant the said lot and dwelling of this complainant cannot be seen either from the sidewalk or any part of the lot; that a notice was served upon the defendant to the effect that the building being erected by him encroached three feet nine inches on Tenth Avenue beyond the established building line, and that unless moved back an injunction would be asked for compelling the removal back; that when said notice was served none of the walls of said building had been completed and the north wall, being that on the Tenth Avenue side, had not been commenced, the excavation therefor only having been completed.

V. This complainant further replying to the answer of the defendant denies that any portion of the north wall

or Tenth Avenue side of the building being erected by the defendant as aforesaid, had been commenced when the notice aforesaid was served; that it is admitted that F Street is a business street, but it is alleged that this is not one of the main avenues included in the resolution of the Ocean Beach Association establishing a building line, and that Tenth Avenue is one of the main avenues so included and is a residential street.

VI. This complainant further replying to the answer of the defendant admits that he submitted a bid for mason work on the building to be erected by the defendant, but that his attention was not called to the exact location of the building and that it would extend over the building line for a distance of three feet and nine inches, and he expressly denies that he told a contractor, or any one, that if he had secured the job he intended to build the structure over the said twenty foot line and would have made no complaint in that event.

HARRY R. COOPER,
Solicitor and of Counsel with Complainant.

IN CHANCERY OF NEW JERSEY

Between
GEORGE H. HEYNIGER,
Complainant,
and
ABRAHAM LEVINSOHN,
Defendant.

Also

Between
THE BOROUGH OF BELMAR, ET. ALS.,
Complainants,
and
ABRAHAM LEVINSOHN,
Defendant.

On Bill, etc.
Testimony.

Transcript of testimony taken in the above-entitled cause, before HON. VIVIAN M. LEWIS, Vice-Chancellor, at the Chancery Chambers, Jersey City, New Jersey, on the nineteenth day of March, 1914.

MR. SNEDEKER: I offer in evidence, and ask to have read into the record Chapter 231 of the Session Laws of 1873, entitled "An Act to Incorporate the Ocean Beach Association."

"7. And be it enacted, That for the purpose of restricting nuisances and of compelling a uniform system of improvements of said settlement, the said company are hereby authorized and invested with power to incorporate into any deed of conveyance made by them, whether in fee simple or otherwise, a

clause or condition forbidding the sale upon the premises so conveyed by said company, of any spirituous or intoxicating liquors, and to require any grantee of said company to make and maintain such style and character of improvements on said lots so conveyed, or on the streets fronting thereon, as to the said company may seem most expedient for securing a uniform system of development and improvement throughout the said settlement, and the Board of Directors of said company shall have the power to appoint such peace officers as they may deem necessary for the purpose of keeping order on the premises of the company," etc., etc.

MR. COOPER: Will you concede the property which is now the Borough of Belmar was originally owned by the Ocean Beach Association?

MR. WILSON: No.

MR. COOPER: I offer in evidence certified copy of a deed by Abner Bitner, Jr., and Sarah A. Bitner, his wife, to the Ocean Beach Association, dated the 27th of June, 1873, and recorded in the office of the Clerk of the County of Monmouth in Book of Deeds 253, page 151.

Marked "Exhibit C 1."

I offer in evidence a deed made by Joseph B. Yard and Angeline C., his wife, to the Ocean Beach Association, dated the 26th of May, 1873, and recorded in the office of the Clerk of the County of Monmouth, in Book 253 of Deeds, page 147.

Charles O. Hudnut — Direct

Marked "Exhibit C 2."

Under stipulation I read into the record a resolution from the minutes of the Ocean Beach Association, which was passed on June 9, 1873, in the following language:

"RESOLVED, that it is highly important to maintain uniformity in the line of buildings on the main avenues of this association, and for securing said object that no building be erected on said avenues nearer the line of the same than twenty feet."

MR. WILSON: If this is a copy, we are perfectly willing that it shall be used. It is a question of the whole tract: it is not a question of this property.

May it appear that it is stipulated and agreed that all pleadings were filed as of time?

THE COURT: Yes.

CHARLES O. HUDNUT, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. You are the Borough Clerk of Belmar?
A. Yes, sir.
Q. Belmar was incorporated under the general laws of boroughs?
A. Yes, sir.
Q. How long have you lived in Belmar?
A. Since early in 1882.
Q. And your business is that of a real estate broker?
A. Yes, sir.
Q. How long have you been in that business?

New Jersey State Library

A. Since I have been there; during all that time since I have been there.

Q. Were you acquainted with the officers of the Ocean Beach Association?

A. Yes, sir, nearly all of them I have.

Q. The Ocean Beach Association is now out of existence?

A. Yes, sir.

Q. Have you seen any of the deeds from the Ocean Beach Association, conveying property in Belmar?

A. Yes, sir, a great many of them.

Q. How many of those deeds do you think you have seen?

A. Hundreds.

Q. Have you noticed whether or not there was a covenant in any of those deeds referring to a resolution, by-laws and regulations of the Ocean Beach Association?

MR. WILSON: Objected to as being illegal. Our objection is not intended to be captious. I do not want to put these gentlemen to the necessity of producing every deed, but I do want them to produce the best proof reasonably obtainable. Now, that best proof has usually been presented in this way — the County Clerk or some competent person examines the record, and they ascertain how many deeds have been made by this original grantor, and how many of them contain this restrictive covenant. The theory upon which this evidence is important, is not the theory that the gentleman suggests at all, it seems to me; the theory of the law seems to be that it is incumbent upon them to show, as a part of their insistence, that there was a land scheme. This is the highest and one of the best types of evidence of establishing a land scheme, a general land scheme — the fact

that the Ocean Beach Association uniformly, that is, the strength of it, if there were deeds that waived this covenant ——

THE COURT: It seems to me that the objection is well taken; in this proceeding before the Court, you must produce the best evidence obtainable, and it is quite within your reach to get this evidence; I shall sustain the objection.

Q. How many of the purchasers from the Ocean Beach Association were you personally acquainted with, do you suppose — that is, people who purchased property directly from the Ocean Beach Association, — how many do you know personally, and how many of them have you conversed with?

A. A great many.

Q. Say whether it was 100 or 500, or 10 or 12.

A. 150, or more.

Q. Did you ever have any conversation with any of them in regard to this building line restriction?

A. Yes, sir.

BY THE COURT:

Q. About how many do you think you have talked with where the building line restriction was referred to?

A. I could not say, sir.

Q. Was anything said in the conversation that showed that they knew of this building line restriction?

MR. WILSON: Objected to.

THE COURT: Objection sustained.

Q. Will you state what the conversation was that you had with them in regard to this building line restriction?

MR. WILSON: Objected to.

MR. COOPER: It might be material to show that these owners all knew of the restriction.

THE COURT: The objection is sustained.

Q. Have you seen the map of the Ocean Beach Association, the original map of 1873?

A. Yes, sir.

Q. Do you know whether or not that is the map that is followed in Belmar today — whether the streets and avenues are the same as on that original map?

A. Yes, sir.

Q. And is that the map that is referred to now when real estate people convey property?

A. Yes, sir.

Q. So that the map of Belmar is the same map that was the map of the Ocean Beach Association; is that right?

A. Yes, sir — there have been numerous copies of it made, you know.

Q. Yes, I know that ——

BY THE COURT:

Q. That is the map used, is it, entirely?

A. Yes, sir.

Q. When reference is made to the streets and avenues of Belmar?

A. Yes, sir.

Q. The map of the Ocean Beach Association?

A. Yes, sir.

Q. (FURTHER DIRECT) Now, the streets are lettered, are they not?

A. Yes, sir.

Q. That is, letter "A" commences at Ocean Avenue, and then next to that comes "A, B, C, D?"

A. Yes, sir.

Q. Running West — is that right?
A. Yes, sir.

BY MR. WILSON:

Q. Do you mean they run East and West?
A. The streets run North and South.

FURTHER DIRECT:

Q. Now, the avenues run East and West; is that right?
A. Yes, sir.
Q. And they are numbered, commencing from the North and running South, so that First Avenue is the most Northerly?
A. Yes, sir.
Q. Do you know the width of the avenues?
A. 80 feet.
Q. Do you know the width of the streets?
A. 40 feet, I think.

MR. WILSON: I suggest that the map is the best evidence.

Q. Is Tenth Avenue one of the main avenues?
A. Yes, sir, it is just like the rest of them.
Q. Now, is that built up with residences?
A. Yes, sir.
Q. How often do you go down the avenue?
A. Not so much as I used to.
Q. Have you been down there lately?
A. Yes, sir.
Q. How long ago?
A. Oh, within two weeks.
Q. Then you have observed the buildings along the avenue?
A. Not particularly.

Q. From F Street on Tenth Avenue, running East to the ocean, is there any business place at all on Tenth Avenue?

A. No, sir.

Q. It is all residences?

A. Yes, sir.

Q. Is the avenue in that section fairly well built up?

A. Yes, sir; there are very few vacant lots.

Q. Do you know how long the curb line on Tenth Avenue has remained in its present condition? Do you remember anything about its establishment — the curb line?

A. I remember the fact of its being established, but I don't remember the date.

Q. Do you know how long ago it was established?

A. A great many years ago.

Q. Do you know whether it has been changed since that time?

A. It is the same now as it was originally.

Q. There has been no change in Tenth Avenue from the way it was originally laid out?

A. No, sir.

Q. Do the buildings that are erected on Tenth Avenue conform to this building line?

A. I think they do generally, yes, sir.

BY THE COURT:

Q. You have made no survey, of course — just walked along?

A. Yes, sir.

Q. (FURTHER DIRECT) You say you are a real estate broker?

A. Yes, sir.

Q. What do you say as to whether it is or is not an advantage to a place to have an established building line, so that the houses are back 20 feet from the building line?

MR. WILSON: Objected to as immaterial.

THE COURT: I do not see the materiality of the evidence myself; still, at the same time I will allow him to answer that.

A. It is, in my opinion.

MR. WILSON: It depends entirely upon the character of the neighborhood whether it is enforced; and the question is wholly unlimited.

Q. Do you know the property of Abraham Levinsohn, the defendant in this action, upon which there is being constructed a building at the Southwest corner of F Street and Tenth Avenue — Southeast corner, I mean?

A. I do, yes, sir.

Q. On the Northeast corner of F and Tenth, there is a business building fronting on F Street?

A. Yes, sir.

Q. Do you know whether or not that building sets back to the building line on Tenth?

A. I do not.

Q. You say you do not?

A. I do not.

Q. Do you know whether it sets back from the avenue line?

A. Yes, sir, it seems to be back from the curb line.

Q. Do you know how far back it is from the curb line?

A. No, sir, I do not.

Q. Does it appear to line up with the other buildings on the avenue?

A. Yes, sir.

Q. I am speaking of the Northeast corner, being the store that Mr. Levinsohn now occupies — not the one he is building, but the one he now occupies, and I am asking whether that building on the Tenth Avenue site is erected so that it sets back to the building line and is in line with the other buildings on Tenth Avenue?

A. Yes, sir.

Q. Now, there is a building at the Northwest corner of F Street and Tenth Avenue; is that a business building?

A. No, sir; that is next to the post office building, that is back.

Q. Now, the Southwest corner of F street and Tenth, that is vacant property?

A. Yes, sir.

CROSS EXAMINATION BY MR. WILSON:

Q. Do you live at Belmar now?

A. Yes, sir.

MR. COOPER: Just one more question.

FURTHER DIRECT:

Q. You say that you are the Clerk of the Borough of Belmar?

A. Yes, sir.

Q. I show you a resolution which seems to have been certified by you as Borough Clerk, and I ask you whether that was passed by the Council of the Borough of Belmar, and when it was passed?

A. Yes, sir; that was passed December 9, 1913.

MR. COOPER: I offer that in evidence.

MR. WILSON: Will you allow me to see it?

MR. COOPER: Certainly. (Handing it to Mr. Wilson.)

MR. WILSON: If it is wanted merely for the purpose of showing that the Borough of Belmar — that the bill in this case was filed by authority from the governing body of the

Borough of Belmar, it is not objected to. If it is offered for any other purpose, or for the purpose of presenting proof in respect to any other topic of the case, it is objected to.

MR. COOPER: The object of the offer is to show authority that the Borough of Belmar authorized this proceeding against the defendant.

THE COURT: I will accept it for that purpose.

Marked "Exhibit C 3."

Q. Mr. Hudnut, you know the Borough building at the Southeast corner of Ninth Avenue and E Street, the municipal building owned by the Borough?

A. Yes, sir.

Q. That is quite a substantial building, isn't it?

A. Yes, sir.

Q. Worth probably how much, do you suppose?

A. From twelve to fifteen thousand dollars.

CROSS EXAMINATION (resumed) BY MR. WILSON:

Q. Mr. Hudnut, you are the Borough Clerk?

A. Yes, sir.

Q. And did you prepare the copy of this resolution?

A. No, sir.

Q. You certified it?

A. Yes, sir.

Q. Why didn't you embody the entire minute that related to the resolution; you were present when the resolution was offered?

A. Yes, sir.

Q. How many members of the Council were present?

A. I think the full board was.

Q. As a matter of fact, isn't it true that there were

only two present; your minutes would show how many were present?

A. Yes, sir.

Q. And this memorandum which you have certified, does not indicate how many were present, how many voted for it, or who introduced the resolution, does it?

A. No, sir.

BY THE COURT:

Q. Is there anything to show that, Mr. Hudnut?

A. Nothing but the minutes.

FURTHER CROSS:

Q. Have you got the minutes here?

A. No, sir.

Q. Isn't it true, as a matter of fact, that there were only two members of the Council present when this resolution was adopted?

A. I would not say that.

Q. You don't know what the fact is?

A. No, sir.

Q. Were you not asked to prepare a copy of the minutes in relation to this matter?

A. I don't recall that I have been, no sir.

BY THE COURT:

Q. How did you come to prepare this?

A. Mr. Cooper presented it to me, and we compared it, and I signed it.

Q. Then you did not make the copy yourself?

A. No, sir.

FURTHER CROSS:

Q. And everything in the minutes in relation to the

introduction of the resolution and who voted for it, does not appear upon this memorandum at all?

A. No, sir.

Q. You say that you are familiar with the original map of the Ocean Beach Association, prepared in 1873, and that that is the map which is still controlling in all conveyances as to references to streets; that is what you said?

A. Yes, sir.

Q. Are you familiar with the fact that upon this original map the width of F Street is not shown?

A. Yes, sir, it is not shown on that map, F Street is not.

Q. Is the width of E Street shown?

A. I don't remember.

Q. Why is it that you remember about F Street?

A. I don't remember about F Street.

Q. You just said a moment ago that its width was not shown upon the map?

A. I don't think it is.

Q. And why have you no recollection about E Street?

A. It is a matter I cannot answer why.

Q. Let me show you this map which appears to be the original map; this is F Street shown?

A. Yes, sir.

Q. And the width of F Street is not indicated upon the map at all?

A. The balance is undeveloped.

Q. The confines of F Street are not even shown upon the map, are they?

A. No, sir.

Q. This was the only plot sold (pointing to a lot sold apparently to Peter White, containing one acre of land); and as it appears upon this map, what is now the Easterly side of F Street is shown, but what is next the Westerly side of F Street is not shown or delineated upon the map at all?

A. No, sir.

Q. Will you point on this map to the lot on this map,

where the present construction is being made; here is Tenth Avenue; this is Lot No. 2,931 on Tenth Avenue; it also fronts on F Street, doesn't it?

A. Yes, sir.

Q. Do you observe that the frontage of this lot, according to the general lot scheme, is upon Tenth Avenue?

A. Yes, sir.

Q. Do you know whether this building is within or without the 20 foot restriction on F Street — do you know?

MR. COOPER: I object to that, because the witness is not a surveyor. I object to it on the ground that there is no 20 foot restriction on F Street; that the restriction applies to the Tenth Avenue side only of the building.

Q. Is there any restriction as to the building line upon F Street, that you know of?

A. No, sir.

Q. Are the buildings on F Street almost uniformly nearer the street than 20 feet?

MR. COOPER: Objected to as immaterial.

THE COURT: Objection overruled.

A. They are within 20 feet.

Q. And do you know whether this particular building, the building of the defendant, is within or without a line fixed 20 feet distant from the line of F Street?

A. They are within 20 feet; the pavement line is 15 feet distant from the curb.

Q. That does not answer my question —— (Question read).

A. It is within 20 feet.

Q. You mean it is nearer the street line than 20 feet?

A. Yes, sir.

Charles O. Hudnut — Cross

Q. How many buildings, approximately, are there on Tenth Avenue, now standing?

A. I don't know.

Q. Is it a matter of a thousand or a matter of two or three hundred?

A. I presume there are 50 or 60, up as far as Tenth Avenue.

Q. How is it in this immediate locality?

A. The property is all built up.

Q. Your answer to me is unintelligible; you say 50 or 60 up to Tenth Avenue; I am not speaking of Tenth Avenue.

A. I could not tell you.

Q. About how many, would you think there were — more than 50?

A. I should think there were, sir.

Q. As many as 100?

A. I don't think there are 100.

Q. What is the average frontage?

A. 50 foot lots.

Q. How long is the avenue, about?

A. Six blocks — 500 feet long.

Q. That is about 3,000 feet?

A. Yes, sir.

Q. Something over half a mile?

A. Yes, sir.

Q. Can you tell how many houses there are built on Tenth Avenue that are not nearer the line of Tenth Avenue than 20 feet?

A. No, sir.

Q. Can you tell how many houses or other structures there are on Tenth Avenue that are distant more than 20 feet from the street line of Tenth Avenue?

MR. COOPER: I object.

THE COURT: Objection overruled. He said he knew most of the buildings were back and

within the 20 foot line of the avenue; now, he is simply testing him on that; I think it is quite proper. I shall allow it. The objection is overruled.

Q. (Question read.)

A. No, sir, I cannot.

Q. Can you tell how many structures there are on Tenth Avenue that are distant 20 feet, or approximately so, from the street line of Tenth Avenue?

A. No, sir, I have made no measurements.

Q. So that, to summarize your statement, you cannot tell how many buildings there are on Tenth Avenue, and you cannot tell how many have been built in conformity with this restriction, or how many have been built in violation of this restriction?

A. No, sir.

RE-DIRECT EXAMINATION BY MR. COOPER:

Q. You say F Street is a business street?

A. Yes, sir.

Q. How wide do you say it is?

A. I think the roadbed there is 50 feet.

Q. The street line there back from the curb is what distance? How far back from the curb is the street line?

A. 15 feet.

Q. And the buildings are all built up to the street line?

A. Yes, sir.

MR. COOPER: I will offer in evidence a deed by the Ocean Beach Association to Theresa C. M. Boone, dated November 10, 1873, recorded in the office of the Clerk of the County of Monmouth in Book 257 of Deeds, page 317, conveying Lot 2931 on the map of the Ocean Beach Association, and I call particular attention to the following clause in this deed: "Sub-

ject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act entitled "An Act to incorporate the Ocean Beach Association, and the said party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said Ocean Beach Association, their successors and assigns, that she, the said party of the second part, her heirs and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said Association at any time; and that said, the Ocean Beach Association, party aforesaid, of the first part, by themselves and their successors do hereby covenant, promise and grant to and with the said Theresa C. M. Boone, party of the second part." This is the first deed out of the Ocean Beach Association in the chain of title of the defendant, and I call attention to the fact that this deed contains this covenant.

THE COURT: And also refers to the act?

MR. COOPER: Yes. I offer this in evidence.

Marked "Exhibit C 4."

MR. COOPER: I will offer in evidence a deed by Theresa C. M. Boone and James H. Boone, her husband, to Calvin C. Cooper, dated July 6, 1889, recorded in the Office of the Clerk of the County of Monmouth in Book 451 of Deeds, at page 283, conveying Lot No. 2931 on map of the Ocean Beach Association, and

Charles O. Hudnut — Re-direct

I call attention to this portion thereof: "Thus bounding and describing Lot No. 2931, as shown on a plan of lots made by H. H. Yard, and which are filed in the Clerk's office of Monmouth County prior to the grant or conveyance of the said lot by the Ocean Beach Association to the said Theresa C. M. Boone, by deed recorded March 21, 1874, dated November 10, 1873. See record deed book 252, page 317, etc.; this conveyance is made subject to all the conditions and restrictions contained in the above-mentioned deed.

Marked "Exhibit C 5 and C 6."

I would offer in evidence the deed of Calvin C. Cooper and Edith A. Cooper, his wife, to Samuel L. Gillen, dated April 20, 1891, and recorded in the office of the Clerk of the County of Monmouth in Book 499 of Deeds, page 156, conveying lot No. 2931 on the map of the Ocean Beach Association; and I call attention particularly to the following: "Subject, however, to all covenants, conditions and restrictions contained in the deed of the Ocean Beach Association originally conveying this property."

Marked "Exhibit C 5½."

I offer in evidence a deed by Samuel L. Gillen and Mary Virginia Gillen, his wife, to James S. Huyler, dated April 23, 1892, recorded in the office of the Clerk of the County of Monmouth, in Book 496 of Deeds, page 475, conveying Lot 2931 on the Ocean Beach Association map; I call attention particularly to the following: "Subject, however, to all

Charles O. Hudnut — Re-direct

covenants, conditions and restrictions contained in the deed of the Ocean Beach Association, originally conveying this property.

Marked "Exhibit C 6"

I offer in evidence a deed of John E. Miller and Anna R. Miller, his wife, to Abraham Levinsohn, dated November 22, 1905, recorded in the office of the Clerk of the County of Monmouth in Book 762 of Deeds, page 433, conveying Lot 2931 (19 lots), 2931, 1955, 1956, 1952, 1953, 1954, 2055, 2056 on the land map of the Ocean Beach Association, and I call attention to the following language: "Lot No. 2931, being the same property mentioned in a deed of conveyance from Samuel L. Gillen and Mary Virginia, his wife, to James S. Huyler, executed April 23, 1892, and recorded in the office of the Clerk of the County of Monmouth April 26, 1892, in Book 496 of Deeds, page 475, et. seq."

And also this language: "Subject to all covenants, conditions and restrictions contained in the deed of the Ocean Beach Association originally conveying this property.

Marked "Exhibit C 6½."

MR. COOPER: We have shown all we need for our purpose; the last deed I have shown is from Miller to Gillen.

MR. WILSON: His chain of title does not show the title from Huyler into Miller.

MR. COOPER: I have sufficient in my record for my purpose.

THE COURT: All right.

JOSEPH McDERMOTT, sworn in behalf of the Complainant, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. You are the Clerk of the County of Monmouth in this State?

A. Yes, sir.

Q. You have produced from the records on file in your office a map?

A. Yes, sir.

Q. Will you look at this map and state whether that was taken from the files of your office?

A. Yes, sir.

Q. You know it, do you?

A. Yes, sir. There is a printed copy there that I think will answer all the purposes; that is a copy of this map, with two exceptions.

Q. What are the two exceptions?

A. The original has indorsed on it the name of William S. Yard, President, and some lots on Ocean Avenue are differently marked than what they are on the original map, that is, as to form, as to contour, different dimensions, in other respects, it is a true copy, printed from the same plate.

BY MR. WILSON:

Q. Why should it show the difference on Ocean Avenue?

A. The copy shows an angle on Ocean Avenue from the center line of the block between Tenth Avenue and Twelfth Avenue, while the original shows a straight line to the same points.

Q. But otherwise, the map is identical?

A. Yes, sir, except the name of William S. Yard is written under the title.

Q. Written in ink under the printed title of the original?

A. Yes, sir.

Q. And here it appears how?

A. It is not written at all.

THE COURT: You offer the map in evidence?

MR. WILSON: I have no objection to it.

THE COURT: Use the copy, then.

MR. WILSON: I think it will be conceded that the difference between the map now offered and the original, the conditions are inconsequential for the purpose of this case.

BY MR. WILSON:

Q. Does it appear, Mr. McDermott, does it appear upon this map when it was, in fact, filed?

A. I think it appears on the back of the original.

Q. Won't you indicate when the original was filed?

A. The original was filed October 4, 1875.

MR. WILSON: I think there must be a mistake about that.

MR. COOPER: I think so myself.

MR. WILSON: It was made on the 9th of May, 1873, and my understanding was, it was recorded October 4, 1873.

MR. COOPER: That is what I understood.

Q. Look at that carefully — you notice something has been written in recently over that last figure?

A. No, sir, I do not; that is the original way it has been for 20 years, to my certain knowledge.

Q. It is written in the handwriting of Joseph C. Arrowsmith?

A. Yes, sir.

BY MR. WILSON:

Q. And it seems to be entirely clear and legible, and bears no evidence of being changed, so far as I can see, and reads "Filed October 4, 1875, Thomas V. Arrowsmith, Clerk." There is no other indorsement on it?

A. No, sir.

Q. What does that say there?

A. "Ocean Beach property."

Q. Will you look at the figure which you say is "'75" at the top of it, and state whether that is in the same ink as the rest of the writing?

A. It shows more pronounced — a deeper color.

THE COURT: When did they adopt the resolution?

MR. COOPER: In 1873.

BY MR. WILSON:

Q. You have been familiar with this map in your official capacity, and as an attorney-at-law for how many years?

A. More than 30 years.

Q. And can you say that the date as it appears on the map now is the same as it appeared on the map when you first observed it?

A. Yes, sir.

Q. There has been no change or alteration of any kind?

A. No, sir.

THE COURT: Now we will accept that map in evidence, and use the copy, it being understood that the copy is practicallu am ecact copy of that, with minor details.

MR. WILSON: I think that correctly recites my understanding of it.

Map marked "Exhibit C 7½."

FURTHER DIRECT BY MR. COOPER:

Q. Have you examined the records in your office as to deeds made by the Ocean Beach Association?

A. Yes, sir, I have examined many deeds made by the Ocean Beach Association.

Q. Do you know about how many deeds you have examined, made by the Ocean Beach Association?

A. Some hundreds.

Q. You are the president of a title company in Monmouth County?

A. Yes, sir.

Q. So that you had occasion to examine these as a lawyer before you were County Clerk; you had occasion to examine a great many deeds?

A. Yes, sir.

Q. I would ask you to look at "Exhibit C 4," and I call your attention to the covenant that this deed is made subject to, particularly to "anything contained in said act of incorporation, by-laws, rules or regulations made by the said association at any time;" you noticed a clause that the deed is made subject to?

A. Yes, sir.

Q. I would ask, whether in the deeds that you say you have seen that were executed by the Ocean Beach Association, conveying property which is now located in the Borough of Belmar, whether those deeds did or did not contain that same clause?

MR. WILSON: Objected to.

THE COURT: The objection is sustained, for the reason that that is not the way to prove that at all.

MR. COOPER: Mr. Wilson gave me a suggestion.

THE COURT: The suggestion was, that Mr. McDermott could make a search and produce the search in Court showing this covenant provision in these deeds and setting them forth in detail; that is my understanding of the suggestion.

MR. COOPER: We will do it in that way, if they wish to put us to that expense

ROBERT G. POOLE, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. You are engaged in what business?
A. Cashier of the First National Bank of Belmar.
Q. Where is that bank located?
A. Corner of Ninth Avenue and Seventh Street.
Q. Do you hold any official position?
A. Mayor of Belmar.
Q. Do you know the location of the municipal building in the Borough of Belmar?
A. Yes, sir, that is opposite my home on the corner of Ninth Avenue and E Street.
Q. Do you know the cost of that building, approximately?
A. About $15,000.

Robert G. Poole — Direct

Q. Do you know whether that building conforms to the established line?

A. Yes, sir.

Q. You said that you lived on the corner of Ninth Avenue and E Street; how far back from the curb is your building?

A. 40 feet.

Q. At the time that you erected your building, or prior to that time, did you have a surveyor give you the lines?

A. I requested the Mayor to give me the stakes to set my building by.

Q. Those stakes were set how far back from the curb?

A. 42 feet.

MR. WILSON: Objected to.

THE COURT: It is immaterial as to where his building is.

Q. How long have you lived in Belmar?

A. Six and a half years.

Q. Do you know the general condition of Tenth Avenue?

A. Yes, sir.

Q. Do you know the condition of the houses on Tenth Avenue in regard to their setting back from the curb?

A. Yes, sir.

Q. What is the condition of the houses on Tenth Avenue?

A. They approximately line up about 40 feet from the curb.

Q. I suppose you traverse the avenue frequently?

A. Yes, sir, since this case has been started.

Q. When did you examine it last?

A. Within a week.

Q. How many buildings are there on Tenth Avenue?

A. About 100.

Q. You have examined it particularly within a week

with special reference to see whether the buildings set back and appear to line up one with the other?

A. Yes, sir.

Q. In what way have you examined it?

A. I have stood on the corners and viewed the buildings from one point to another; on two or three occasions I used a tape.

Q. One of the buildings you measured was a building located at the Northeast corner of Tenth Avenue and F Street?

A. Yes, sir.

Q. State what building that is.

A. That is the building where Mr. Levinsohn is now located.

Q. Where he now has his store at present?

A. Yes, sir.

Q. The Southeast corner of Tenth and F Street, do you know the condition of that?

A. There is a building being erected there at the present time by Mr. Levinsohn.

Q. That is Mr. Levinsohn, the defendant in this case?

A. Yes, sir.

Q. Did you ever have a conversation with Mr. Levinsohn in regard to the erection of this building?

A. Yes, sir.

Q. State to the court where and when that conversation was and just what the conversation was.

A. The conversation occurred on the 11th of October of last year, 1913, Saturday; I was passing the store, and I either stepped in, or he called me in; my recollection is, that I was asked in, and while there Mr. Levinsohn exhibited to me a profile of his building, and stated he was going to build on the opposite corner. We had quite a conversation about it, and he said, "I have got to build over the line."

Q. Did he say how far over he wanted to go?

A. Two feet over the line to get the dimensions which he required.

Q. What did you say to him?

A. I said if he did, it would mean a fight for him, because I was very strongly opposed to it.

Q. After you had this conversation with Mr. Levinsohn, what did you do?

A. Immediately directed the Borough Engineer to set a stake on that corner.

Q. Do you know whether the surveyor set the stakes in accordance with that?

A. Yes, sir.

Q. You say it was on the 11th of October of last year?

A. Yes, sir.

Q. Did you see the stake there?

A. Yes, sir.

Q. Mr. Poole, there was another suit started in this Court prior to the Borough suit, of George H. Heyniger against Abraham Levinsohn; do you know of that suit being commenced?

A. Yes, sir.

Q. Do you know of the notice that was served in that suit on the 14th of October by Mr. Heyniger?

A. I don't remember the date, but I remember the notice was served at my suggestion.

Q. Now, do you know whether or not there was a bill of complaint for an injunction filed in that suit?

A. Yes, sir, there was.

Q. Was a stay obtained?

A. Yes, sir, a five day stay.

Q. Do you know about the other suit?

A. Yes, sir.

Q. You knew that the order to show cause in that suit came on for hearing before Vice-Chancellor Lewis?

A. Yes, sir.

Q. And you know approximately the date when that came on?

A. I cannot remember the date.

Q. You knew that the stay, the restraining order in that suit, was dismissed?

A. Yes, sir.

Robert G. Poole — Direct

Q. And shortly thereafter did you serve a notice on Mr. Levinsohn, or cause a notice to be served on him?

A. Yes, sir.

Q. I hand you a notice; will you look at that and see if that is a copy of the notice which you signed as Mayor of the Borough of Belmar, notifying Mr. Levinsohn that he must observe the rules and regulations?

A. It is, yes, sir.

MR. COOPER: I will offer that in evidence.

Marked "Exhibit C 8½."

Q. Now, how did you come to sign this notice and direct it to be served on the defendant; what actuated you?

MR. WILSON: Objected to as immaterial.

Q. Did you receive requests from a number of property owners of the Borough of Belmar?

MR. WILSON: Objected to on the ground that it is leading, and if it were not leading, it is wholly immaterial in this case.

Q. Did anyone request you to serve this notice?

MR. WILSON: Objected to.

THE COURT: Objection overruled.

A. I did it on my own initiative to compel the defendant to place his building on the proper line, — on my own initiative as Mayor.

Q. After this notice was served, were you requested to follow it up and take some action in regard to this?

MR. WILSON: I object to that on the ground that it is wholly immaterial.

THE COURT: Objection sustained.

Q. You knew, I think you testified that you knew of all the proceedings in the Heyniger suit?

A. Yes, sir.

Q. And this resolution which was passed by the Borough Council on December 9th, was that passed at the request of a number of people?

MR. WILSON: Objected to as being immaterial.

THE COURT: Objection sustained.

Q. You were present at the meeting of the Council when such a resolution passed?

A. Yes, sir.

Q. Do you know how many Councilmen were present?

A. Four members and the Mayor, as I recall it.

Q. How many members have you in your Council?

A. Six and the Mayor.

Q. Do you know how many members constitute a quorum?

A. Four Councilmen, or three Councilmen and the Mayor.

Q. For the purpose of transacting any business?

A. Yes, sir, that is, any business, confirmation must be by the vote of four Councilmen, or three Councilmen and the Mayor — as confirmation of appointment; otherwise, any business transacted is legal business.

Q. Is that by statute?

A. Yes, sir.

MR. WILSON: We deny that; we deny there is any such law.

Q. Do you know of your own knowledge what the conditions of Levinsohn's building was on November 14th, that is the date when Heyniger's notice was served?

A. You mean as to the advance of construction?

Q. Yes, how far had it advanced on November 14th, which is the date that the Heyniger notice was served?

A. It was not level with the ground, to the best of my recollection.

Q. Were the foundation walls up?

A. I cannot recall it as to the date that they were.

Q. I refer now to the Heyniger suit, when the first notice was served?

A. The Tenth Avenue wall was not started above the ground level.

Q. Do you mean by that, that the wall just appeared above the ground?

A. The cement foundation referred to.

Q. Do you know what the condition of the wall was when the bill was filed, when the notices were served?

A. About 2½ to 3 feet on the Tenth Avenue side — that is, the pillars between what will be windows, were three feet high, approximately.

Q. Do you know the condition of the other walls at that time?

A. The other walls had progressed further; they were further up.

Q. Then the East and Southwest walls were higher at the time that the notice was served than the North wall?

A. Yes, sir.

Q. As a business man of the town, and as cashier of a bank, and one of the business men of the Borough of Belmar, is or is not this restriction a benefit to the town?

MR. WILSON: Objected to.

THE COURT: I don't think it is material to this issue at all.

CROSS-EXAMINATION BY MR. WILSON:

Q. Mr. Poole, directing your attention to the buildings on Tenth Avenue, are you able to say how many build-

ings have been constructed at a distance of 20 feet or more from the street line on Tenth Avenue down to the present day?

A. No, sir.

Q. Are you able to say how many buildings have been constructed nearer the street line than 20 feet on Tenth Avenue?

A. No, sir.

Q. There is a number, you know that, don't you?

A. A number of what?

Q. A number of buildings?

A. To which one do you refer?

Q. On Tenth Avenue?

A. There are few, if any; I have not measured them all.

Q. You have not examined the whole thoroughfare then?

A. Not all of them, no, sir; I stated in my direct examination that to the best of my knowledge, most of them were, I might say, at the 40 foot distance.

Q. Do you say you don't know how many were constructed in violation of that building line ——

A. I said, those that were, were immaterial, such as bay windows.

Q. And you have said that they were not numerous; now, I ask you whether or not in reaching that conclusion you have regarded as an encroachment, piazzas?

A. I have not.

Q. Have you regarded as an encroachment a bay window?

A. I have not.

Q. So that, wherever there is a structure with a bay window or piazza extending out into the 20 feet, you have not regarded that as an encroachment on the building line?

A. Yes, sir.

Q. You regarded it as an encroachment in reaching your conclusion; do you say that you regard the bay win-

dow or the piazza extending into the 20 feet area as an encroachment?

A. I say a piazza is not — there is a difference; I regard a piazza as not being an encroachment.

Q. Now, do you know how many structures there are on Tenth Avenue that have piazzas or bay windows within the restricted area of 20 feet?

A. No, sir, I do not.

Q. There are a good many, are there not?

A. There a few; there may be 15 or 20.

Q. Are there any buildings on Tenth Avenue where the main foundations are within the restriction of the 20 feet?

A. The defendant's building, and, to the best of my knowledge, there are none other.

Q. You have made a measurement to ascertain ——

A. I measured some.

Q. How many did you measure?

A. I measured at least ten houses.

Q. Then why did you measure those, — because they seemed to be extending nearer to the street than the others?

A. In working up this case, I endeavored to get those absolutely safe behind the line.

Q. And you measured those ten houses because they seemed to you to be near the area of restriction?

A. They seemed to be about right.

Q. And because they seemed to be about right, that is why you measured them?

A. I wanted to get those that were absolutely safe.

Q. So the ones that you measured were the ones that you thought were absolutely safe before you measured them, and you measured them to be sure they were absolutely safe?

A. Yes, sir, and nearest to this building.

Q. What about the pavilion — is not that on Tenth Avenue — the bathing pavilion?

A. On Ocean Avenue.

Q. What about Buhler's pavilion at Tenth Avenue; do you know where Buhler's pavilion is?

A. Yes, sir.

Q. Does it front at all on Tenth Avenue?

A. On one side.

Q. Is the side which fronts on Tenth Avenue within this restricted area of 20 feet?

A. It is over the building line.

Q. How much.

A. I would say ten or fifteen feet, that is, approximately.

Q. How long has it been standing there?

A. For a number of years.

Q. Do you know how many?

A. No, sir; it has been standing there since I have been in the town.

Q. In point of fact, the encroachment is about 50 feet, isn't it?

A. I cannot say.

Q. It might be as much as 50 feet?

A. I won't say.

Q. That was not one of the ten places you measured?

A. No, sir.

Q. Now, how far is that pavilion distant — how many blocks away from the defendant's property?

A. About two blocks.

Q. How many business places are there between the pavilion and the defendant's property?

A. About six places I would say — six business places.

Q. What about the character of these six business places that you have referred to?

A. One is the residence and business place of one of the complainants in the former suit (Newbury); another is a small real estate office; another is a stable; on the opposite side of the street there is a real estate office; a grocery store; I think that covers it; that is five, I think.

Q. How many business places are there on Tenth Avenue, if you know?

A. From what points?

Q. Anywhere on Tenth Avenue.

A. There are none East of F Street, and those that I just mentioned are West of F Street.

Q. Do you mean to say then, that there are only six business places on Tenth Avenue; do you wish us to conclude that there are only six business places on Tenth Avenue?

A. Yes, sir.

Q. Your statement is this: that there are only ten business places on Tenth Avenue, no matter where located on Tenth Avenue?

A. I said six.

Q. Six — is that your judgment?

A. Yes, sir.

Q. You were Mayor of Belmar when the Heyniger suit was started?

A. Yes, sir.

Q. And I understood you to say that you knew of the suit from its very inception?

A. Yes, sir.

Q. You knew when it was started?

A. Yes, sir.

Q. And I think you said that you suggested the serving of the notice that preceded the Heyniger suit?

A. Mr. Heyniger and I were in a conversation over the matter.

Q. And you suggested that a notice be served?

A. Yes, sir.

Q. A notice upon the defendant that he must not violate the restrictive covenant?

A. Yes, sir.

Q. You knew of the rule to show cause?

A. Yes, sir.

Q. With a temporary stay in that suit?

A. Yes, sir.

Q. You knew of its adverse determination by the Court?

A. Well, do you mean of the stay?

Q. Yes.

A. Yes, sir.

Q. You knew that, didn't you?

A. Yes, sir.

Q. And the first time did your associates know of it too, in the Borough Council; I suppose you kept them informed?

A. As individuals, yes, sir.

Q. And you assumed, I suppose, that whatever rights the Borough had would be sufficiently conserved by the Heyniger suit, and so you did not deem it necessary to start another suit?

A. That was the way of it.

Q. You were waiting for the determination of that proceeding — that is true?

A. Yes, sir.

Q. And that fairly represented the attitude of your City Council?

A. I did not take it up with Council, as the Council — simply with individual members of the Council.

Q. And thus you gathered the sense of the individual members?

A. Yes, sir.

Q. And that was their view of the matter?

A. No, sir; the Heyniger case was started without having any conversation with Council whatever.

Q. (Question read.)

A. I am not quite clear; I don't wish to be confused on it, Mr. Wilson; at the beginning there was a question as to who had the right to make the fight; I asked Mr. Heyniger if he would, and he said he would.

Q. And then you suggested to him the serving of the notice upon the defendant?

A. Yes, sir, in connection with my attorney, Mr. Cooper.

Q. And then he went on with his suit and with his rule to show cause?

A. Yes, sir.

Q. And I ask you whether or not in the course which

you pursued, whether you informed your associates in Council?

A. Not at that time, no, sir.

Q. The resolution directing this suit to be brought, was passed on the 9th of December, 1913?

A. Yes, sir.

Q. And it was after that, of course, when the suit was brought?

A. Yes, sir.

Q. Now, the Borough Engineer was directed to go there and survey the lot and put in stakes?

A. Yes, sir.

Q. And directed by you to do that, as Mayor?

A. Yes, sir.

Q. And the Borough Engineer did that before ground was broken, didn't he?

A. Yes, sir.

Q. And then after ground had been broken and the walls located, you, as Mayor, directed the engineer to go back and make a re-survey?

A. Yes, sir.

Q. And that re-survey indicated that the walls were then located within this restricted area?

A. Three feet nine inches.

Q. So that the Borough Engineer, and you, as the Mayor of the Borough obtained information as Mayor from the engineer, that this man was violating or intending to violate, and, in fact, was violating this covenant?

A. Yes, sir.

Q. As early as the time when he laid out his walls on the ground?

A. Yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. Now, after having obtained this information from the Borough Engineer, was not some notice served upon the defendant by the City Council?

A. Notice was served about the first of December by the City Council, or thereabouts.

Q. No notice until then?

A. Not by the Council.

Q. Didn't you serve a notice as Mayor?

A. Yes, sir, I served notice as Mayor.

Q. Before that time?

A. I cannot say positively; I have not the dates at hand; I served a notice, which has been admitted here as evidence.

Q. Don't you know that you served a notice as Mayor, in November, shortly after or about the time you found out these walls were being started in violation of the restrictive covenant?

A. I cannot answer that question intelligently.

Q. Is it because you don't understand the question?

A. It is because of the conflict of the two — the Borough, my individual actions, and as Mayor, and in the Heyniger suit, and my connection in the Borough suit.

Q. (Question read.)

A. Yes, sir, but I cannot remember the date.

Q. In November sometime, was it?

A. Yes, sir.

Q. Mr. Mayor, what is the width of Tenth Avenue, if you know?

A. 80 feet.

Q. And what is the width generally of the avenues, if you know?

A. 80 feet.

Q. What is the width of the streets generally, if you know?

A. F Street 80 feet, other streets 60 feet; F Street is 80 feet, the other streets 60 feet.

Q. The other streets are 40 feet, are they not?

A. No, from curb to curb is 30 feet, and 50 feet either side; that makes a 60 foot street.

Q. My original question was, if you knew the width

of the streets generally, and you say that the width generally is 60 feet?

A. Yes, sir.

Q. And the only exception to it in the whole scheme is F Street, which has a width of 80 feet?

A. To my knowledge, yes, sir.

RE-DIRECT EXAMINATION BY MR. COOPER:

Q. F Street is the business street of Belmar?

A. Yes, sir.

Q. Is there any business places in Belmar East of F Street more than 200 feet?

A. I don't understand the question.

Q. Are there any business places in Belmar East of F Street more than 200 feet?

A. No, sir.

Q. The business in Belmar that is not conducted on F Street then, is West of F Street, is that right?

A. Yes, sir.

Q. And Tenth Avenue from F Street West is mainly business or residential?

A. Both — about half and half.

Q. So that about one-half the buildings from F Street to the end of Tenth Avenue going West, are used for business?

A. Yes, sir.

Q. But on Tenth Avenue from F Street, going East, there are no business places whatever?

A. That is right.

BY THE COURT:

Q. What avenue is it that leads up to the depot in Belmar?

A. Ninth and Tenth.

FURTHER RE-DIRECT:

Q. Tenth Avenue ends at the West — where; what does Tenth Avenue run into on the West?

A. Into River Avenue.

Q. Then Buhler's pavilion is located where in regard to River Avenue?

A. West of River Avenue.

Q. And between River Avenue and what; between River Avenue, what is West of River Avenue?

A. The river itself.

Q. Does Buhler's pavilion extend from the Westerly side of River Avenue to the river; is that right?

A. Yes, sir.

Q. Now, does Tenth Avenue extend over River Avenue, or does it stop at River Avenue?

A. It is an avenue only as far as River Avenue.

Q. Well, then, if that is so, how does Buhler's pavilion face on Tenth Avenue?

A. It would be at a point that if continued or extended, it would be the Northwest corner.

Q. Then the fact is, that Buhler's pavilion is located on River Avenue between that and the River Road at the foot of Tenth Avenue?

A. Yes, sir.

Q. Immediately West of F Street comes what?

A. The railroad itself.

Q. So that between F Street and the river, which you say is two blocks, you have the railroad running through that section, and you have one-half the buildings occupied for building purposes?

A. Yes, sir.

Q. Do you know of any building on Tenth Avenue where the foundation wall is nearer the curb line than 40 feet, outside of the defendant's?

A. And another owned by him.

Q. Do you know of any other building whatever on that avenue?

A. I cannot designate any.

Q. Now, you have said that you don't consider that bay windows or an open piazza would be an encroachment on the building line; is that right?

A. Yes, sir.

Q. What do you say as to the eaves?

A. They are not considered as an encroachment either.

MR. WILSON: I submit that the question in that form is improper; I had a right to inquire what he regarded as an encroachment; this gentleman has no right to take from him a conclusion of law for the purpose of use in this case; I suppose the Court will reach its own conclusions about the law.

BY MR. WILSON:

Q. Do you mean considered by you?

A. By me, yes, sir.

FURTHER RE-DIRECT:

Q. And as to other avenues outside of Tenth Avenue, in Belmar, is it the foundation wall, or is it anything else that is measured there in determining whether they are within or without the line?

A. The foundation wall; and if there be a second story extending over the porch, that must be back the same distance.

Q. But any open piazza or any bay window on the second story ——

A. I don't consider that as an infraction, as Mayor, if I were to be asked to stop a violation, I would not go on that.

MR. WILSON: I submit that is wholly immaterial, and ought to be excluded.

Robert G. Poole — Re-cross

THE COURT: Strike that out — what he would do as Mayor.

Q. Is the general scheme in regard to the building line maintained on all the avenues in Belmar the same as it is on Tenth Avenue, as you have testified to?

MR. WILSON: Objected to.

THE COURT: Objection overruled.

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. Now, your attention has been directed to a 40 foot building line — do you mean measuring in from the curb to the building?

A. From the curb to the building is 40 feet.

Q. Now, the restrictive covenant which is relied upon in this case, speaks of a building line 20 feet distant from the line of the street?

A. Yes, sir.

Q. Now, when you get out to the line of the street, you give 20 feet; and how far is the line of the street to the curb?

A. 20 and 20.

Q. What about the street line?

A. The building line and the street line are the same on the streets; on the avenues the street line is 20 feet distant from the building line.

MR. WILSON: We have nothing to show what the building line, if any, was ever fixed by the land company, other than this resolution of June, 1874, that appears to be 20 feet from the street line.

Q. Now, I understand you to say that on the avenue, the distance from the street line to the curb line is 20 feet more; what is the distance between the street line — between the street line and the curb line on the avenues?

A. 20 feet.

Q. I think you said that Tenth Avenue ran Westerly until it reached River Avenue?

A. Yes, sir.

Q. And there stopped?

A. Yes, sir.

Q. I think you said that Buhler's pavilion, therefore, in your view of the matter, was not located on Tenth Avenue at all?

A. I did not say that.

Q. I understood you to say that.

A. I said it was located at what would be the Northwest corner of River Avenue and Tenth Avenue, if Tenth Avenue were extended Westerly.

Q. So that you lead us to infer that Tenth Avenue was not extended Westerly beyond this point?

A. No, sir, the river is there.

Q. I am asking you about River Avenue — do you want us to understand that River Avenue is not extended Westerly beyond this point — its intersection with River Avenue?

A. You mean Tenth Avenue?

Q. Yes.

A. It goes no further; that is the end of it.

Q. So that you wish us to conclude Buhler's pavilion after all is not on Tenth Avenue — that is on River Avenue?

A. It is on River Avenue.

Q. And Tenth Avenue goes down to River Avenue and stops?

A. Yes, sir.

Q. Now, I suppose you are testifying to this with full knowledge of conditions down there. I show you this map, which I will have marked for identification in a moment ——

MR. COOPER: I object to this map being used, because I attempted to use it a moment ago, and it was objected to as not being an official map; now, if he wants to use any map, let him use the official map.

THE COURT: What is this map?

MR. WILSON: I am going to ask him what it is.

Q. I show you a map which I shall have marked for identification, entitled "Map of Belmar, Monmouth County, New Jersey;" do you recognize that as the map of Belmar in common use in that neighborhood?

MR. COOPER: I object to that, for the reason that any map in general use is not the correct map of the city, and this is only an attempt —

THE COURT: I will allow that question to stand.

BY THE COURT:

Q. Do you recognize that as the map in general use?

A. Yes, sir.

FURTHER RE-CROSS:

Q. You have a map like this on file in the Mayor's office?

A. Well, I have a map like that.

Q. And it is the map that is used generally in conveyancing?

A. Yes, sir.

Q. Now, I direct your attention to this map, and I ask you whether this map does not show that Tenth Avenue extends Westerly across the railroad into River Avenue, and across River Avenue into Shark River?

MR. COOPER: I object, if your Honor please, as to what that map may show.

THE COURT: Objection overruled.

A. The map shows for itself.

BY THE COURT:

Q. Does it show that fact?
A. Yes, sir.

Q. (FURTHER RE-CROSS) And notwithstanding, I ask you now whether or not you insist, in spite of the fact that your attention has been directed to this map, that Tenth Avenue stops at River Avenue — answer that yes or no, please.

A. Yes, it stops.

Q. In spite of what this map shows, you say so, do you?

A. Yes, sir.

Q. Then the map is inaccurate, and does not correctly show the topography?

A. I don't say that.

Q. Well, your statement and the map seem to be in direct conflict?

A. (No answer.)

BY THE COURT:

Q. From the testimony heretofore had that the pavilion rested on Tenth Avenue, and now for the first time under your examination, it appears that the pavilion does not rest at all on Tenth Avenue — from your statement?

A. It rests at the Westerly line of River Avenue — Tenth Avenue stops at the Westerly line of River Avenue; there is no further street West of the West line of Tenth Avenue.

Q. And this paving pavilion rests on the Westerly side of River Avenue?

A. Yes, sir, and extends over that portion of Tenth Avenue which the street would be if extended.

FURTHER RE-CROSS:

Q. Now, I ask you if you ever saw any map, or if you know of any map, official or otherwise, of Belmar, that indicates Tenth Avenue as terminated by the Westerly side of River Avenue?

A. I cannot say that.

MR. COOPER: Objected to.

THE COURT: The objection is overruled.

Q. Now, Mr. Mayor, as the Mayor of the city, you understand that a part of your concern is to protect the highways of the city?

A. Yes, sir.

Q. And you know, as a matter of fact, that one of the tenants of the city is Mr. Buhler?

A. No, sir, it is Mr. Carpenter.

Q. The present occupant of the building shown here upon this map as Buhler's pavilion, is who?

A. Mr. Carpenter.

Q. And Mr. Carpenter pays the Borough of Belmar $50.00 a year by way of rental?

MR. COOPER: Objected to as irrelevant to this issue; I cannot see how it can have any relevancy whatever.

MR. WILSON: If it had no general relevancy, it has a very obvious utility in cross-examining this witness.

THE COURT: I will let it stand.

Q. The present occupant then of Buhler's pavilion pays the city $50.00 a year?

A. Yes, sir.

Q. And that money is paid to the city?

A. Yes, sir.

Q. Under the claim by the city that the pavilion is occupying a part of Tenth Avenue?

A. I won't say that; I don't know.

Q. Do you know of any other theory upon which the city of Belmar could exact payment from Mr. Carpenter or anyone else?

A. No, sir.

Q. So that the city is either forcing the payment of $50.00, for which it has no claim at all, or else it is collecting the $50.00 upon the theory that the pavilion is occupying some part of Tenth Avenue; that is it, isn't it?

A. You say so.

Q. What do you say?

A. The lease has been continued from year to year, and I have not taken the matter up.

Q. Do you know whether it is leased to him as of Tenth Avenue?

A. I don't know.

Q. With your present information, unless the city is exacting the $50.00 from Mr. Carpenter upon the theory that he is occupying a portion of Tenth Avenue, or Tenth Avenue projecting, — is that is not the explanation you know of no other explanation under which the $50.00 would be exacted?

A. No, sir.

Marked "Exhibit D 1 for identification."

RE-DIRECT EXAMINATION BY MR. COOPER:

Q. I direct your attention to this map that was shown you on cross-examination, and ask you to look at the point

where you say Tenth Avenue terminates at River Avenue, and state whether extending out into the river just beyond that, Buhler has a dock?

A. Yes, sir.

Q. How near up to River Avenue does that dock come?

A. Within 40 or 50 feet.

Q. And has Tenth Avenue ever been opened beyond River Avenue West?

A. Not to my knowledge.

Q. And it is not so opened now?

A. No, sir.

RECESS TO 2 P. M.

AFTER RECESS

LAWRENCE J. McCORMICK, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. You reside where?

A. Belmar.

Q. You are the Chief of Police of Belmar?

A. I was.

Q. Were you in December, 1913?

A. Yes, sir.

Q. Do you know the defendant, Abraham Levinsohn?

A. Yes, sir.

Q. Did you serve notice upon him in December, 1913?

A. Yes, sir.

Q. Where?

A. Right in front of the building which he is erecting on the Tenth Avenue side, Tenth Avenue and F Street; I read it to him and gave him a copy of it.

Q. Will you look at the paper which I show you, complainant's "Exhibit 8½" and state whether that is a copy of the notice which you served upon him?

A. It is, yes, sir.

Q. Do you know on what date you served it?

A. December 4th.

Q. What year?

A. 1913.

NO CROSS-EXAMINATION

SAMUEL B. JOHNSON, sworn in behalf of the Complainants, testified as follows:

DIRECT-EXAMINATION BY MR. SNEDEKER:

Q. Where do you reside?

A. Asbury Park, New Jersey.

Q. Your business is what?

A. Photographer.

Q. Asbury Park is located how near Belmar?

A. About seven or eight miles.

Q. Are you familiar with the streets of Belmar?

A. Not very much.

Q. Did you make any photographs of buildings in Belmar recently?

A. Yes, sir.

Q. Look at this photograph, and state whether that is one ——

A. I made this one.

Q. Did you make that photograph?

A. Yes, sir.

Q. Look at all the photographs that I show you, and state whether you made those photographs.

A. Yes, sir.

Q. Were they all made at about the same time?

A. Those of the municipal building were made about a week or ten days ago.

Q. When were the others made?

A. Those were made about three weeks or a month ago.

BY THE COURT:

Q. Were they all on Tenth Avenue?

A. All excepting the municipal building.

FURTHER DIRECT:

Q. Look at this photograph and state if you remember at what point your camera was when you took that photograph; state where your camera was when you took that photograph marked "Exhibit C 10½."

A. It was facing West on the right hand side of the street on Tenth Avenue, — I suppose it is Tenth Avenue; from East to F Street, about 150 feet.

Q. Can you state whether your camera was in the street, or on some property at the time you took that photograph?

A. I think it was on the lawn of one of the properties there.

Q. But you don't know whose property it was?

A. No, sir.

Q. Who was present at the time that you took that?

A. Mr. Cooper, and an assistant of ours from the studio.

Q. Will you look at complainants' "Exhibit C 11½" and state where your camera was placed when you took that picture?

A. Well, this is on the left of the street facing West on Tenth Avenue, almost opposite where this picture was taken ("Exhibit C 10½"); "Exhibit C 11½" was made to show the projection of the building beyond the building line.

Samuel B. Johnson — Cross

MR. SNEDEKER: I will offer this photograph in evidence.

Marked "Exhibit C 12½."

Q. Will you state where your camera was when you took "Exhibit C 12½?"

A. I was across there, F Street, and facing East, taking this building to show the line of the other building in comparison with this one that is being erected.

Q. You were on the West side of F Street placing your camera there, and took a photograph of the defendant's building?

A. Yes, sir, that is right.

MR. SNEDEKER: I offer in evidence this photograph.

Marked "Exhibit C 13½."

Q. Will you state what "Exhibit C 13½" is a photograph of?

A. That is what we call a perspective of the municipal building in the Borough of Belmar.

CROSS-EXAMINATION BY MR. WILSON:

Q. Mr. Johnson, when you went upon the witness stand to qualify as a witness in this case, you were shown a group of photographs, and your attention has been directed to four of these photographs?

A. Yes, sir.

Q. You have said that you took the others at the same time in the same way?

A. Yes, sir.

MR. WILSON:

Will you allow me to take them for the purpose of cross-examination?

MR. FOSTER: No.

THE COURT: I shall limit the cross-examination to a certain point; I don't know what your question was.

MR. WILSON: I have done nothing so far but ask to have them put in my hands for the purpose.

THE COURT: I shall direct that they be put in your hands for the purpose of cross-examination.

MR. FOSTER: This is subject to our objection?

THE COURT: Certainly.

MR. SNEDEKER: May we not have this marked for identification?

MR. FOSTER: We don't want them marked for identification.

FURTHER CROSS:

Q. Directing your attention to complainant's "Exhibit C 10½," Mr. Johnson, that was taken on Tenth Avenue, and is looking West?

A. Yes, sir.

Q. And it shows a lack of uniformity, so far as the human eye can now tell, in the front lines of these houses, doesn't it?

MR. SNEDEKER: Objected to; this witness is not qualified to testify as to what line there may be; the photograph speaks for itself.

THE COURT: Objection overruled.

MR. SNEDEKER: I submit the photograph itself is the best evidence.

Q. (Question read.)

A. Yes, sir, to a certain extent; I made that picture for a certain purpose.

Q. What was the purpose?

A. It is on the lawn of one of the complainants, and I made it to show the position of the building from that man's residence; I think that was the object.

Q. The position of the store building, do you mean?

A. Yes, sir.

Q. This does not even show the store building, does it?

A. Yes, sir, it is right in here, and it shows a projection; you can see it very plainly.

Q. Now, directing your attention to the second house shown on the right hand side of this picture, isn't it a fact that that second house is nearer the street line than the first house shown on the right hand side of the picture?

A. I did not pay any particular attention to that at all.

MR. SNEDEKER: Objected to.

Q. I ask you whether it is not true that the second building shown on the right hand side of this picture is not nearer the street line than the first building shown on the right hand side of the picture?

MR. SNEDEKER: Objected to, on the ground that the witness is incompetent to testify upon that subject, and that the photograph is the best proof of what it shows, in any event.

THE COURT: The objection is overruled.

A. The photograph itself shows.

Q. That is not responsive to my question. (Question read.)

A. I can only answer that question in this manner: We photograph from angles, and the position I was standing in would naturally place this house here more in the foreground (indicating the first house shown on the right hand side). That placed this house more in the back; I got more of that front of the house than I could this house.

Q. Where was the camera located when you took this picture?

A. On the lawn of one of these complainants.

Q. On the lawn shown here on the extreme ——

A. No, sir, a little back.

Q. The camera was standing between the house, between a house and the building line of that street, standing on the lawn between the house and the sidewalk somewhere, wasn't it?

A. Standing on the lawn, somewhere about the center of the lawn.

Q. And you have no independent recollection, aside from what the photograph shows, as to whether this second house shown upon the right hand side is nearer the street than the first house?

A. No, sir, they all look on a line to me, as I recall it.

Q. I show you complainants' "Exhibit C 11½;" is that looking East on Tenth Avenue?

A. That is looking West.

Q. And where was the camera located?

A. This was in the street across from the property where "C 10½" was made.

Q. And made at about a corresponding spot on the other side of the street?

A. No, sir, this was made a little above, on the street.

Q. And was the camera in the street, in the sidewalk, or on the lawn?

A. It was right on the edge of the street.

Q. And the edge of which street?

A. It was at the intersecting point of Tenth Avenue;

I am not familiar with these streets; it was made to the left of the intersecting point of the intersecting street and Tenth Avenue.

Q. And it was at a point considerably to the left of that intersecting point, wasn't it?

A. Yes, sir, I made this picture with the intention —

Q. I don't ask what your intention was; where was your camera?

A. Right along the East of the curb of the intersecting street, and distant some feet from the curb of Tenth Avenue.

Q. And about how far away from the curb of Tenth Avenue would you say?

A. On a line with the lawn.

Q. So that it was relatively, as to the lawn, in about the same location as "Exhibit C 2½?"

A. No, sir, it was further over to the left.

Q. Now, directing your attention to that picture, it does not present, does it, a uniformity of building line of the structures there shown?

A. Yes, sir, I think it does.

Q. Don't you think there is any variation in the nearness of these structures to Tenth Avenue; do you think there is any variation in the nearness of those structures to Tenth Avenue shown in this picture?

A. No, sir, I do not.

Q. You think that the structures shown in this picture show a uniform distance from Tenth Avenue?

A. Yes, sir. The lines of the camera will portray things as seen by the eye, if properly placed.

Q. And at about the same elevation as the eye, I suppose?

A. Yes, sir.

Q. Now, directing your attention to complainants' "Exhibit 12½" that shows the building in process of construction?

A. Yes, sir.

Q. And it appears to be taken from across F Street?

A. Yes, sir.

Q. And looking in what direction at Tenth Avenue?

A. Looking East on Tenth Avenue.

Q. Why didn't you take a picture that showed the relative position of the front of this building upon Tenth Avenue, as compared with the front of the other buildings on Tenth Avenue; why didn't you take a picture of that kind?

A. I don't understand that.

Q. Looking at this building as shown upon this picture, it does not show any other building on that side of Tenth Avenue?

A. No, sir.

Q. Why didn't you take a picture that would show that building on the same side as Tenth Avenue, in order that the eye might have some guide as to how near those other buildings were to Tenth Avenue?

A. I took this to show ——

Q. That is not responsive; why didn't you?

A. I am trying to answer the question.

MR. FOSTER: Objected to.

THE COURT: I don't think the question is proper.

MR. FOSTER: I shall not press this objection.

THE COURT: For the present, I shall not allow that cross-examination to proceed; I will deal with it at a later time; I don't think it is necessary to encumber the record.

Q. What is your recollection of your testimony as to your reason for taking "Exhibit C 12½."

A. I took this to show the building as it stands from F Street, see; and I have taken it to good advantage to try to show the frontage of the building which I have given

you here, and as I told you, I have given all the view because this scaffolding, — if it were not for that you could see the other extreme end of this building, showing that I have given you a good full view of the frontage.

Q. And if it were not for the scaffolding you could see other buildings beyond?

A. No, sir; the scaffolding does not interfere with that; this little strip of scaffolding here obstructs the frontage of that building which would give you the extreme end, showing you the full line of that building on Tenth Avenue.

Q. Now, I direct your attention to this photograph, and ask you if that is a correct representation of the front of this building as you found it that way?

MR. SNEDEKER: That photograph has not been offered in evidence. We have been held to strict proof during the day in many respects, and we intend to hold the other side now to strict proof; it has not been offered in evidence.

THE COURT: The objection is sustained.

MR. WILSON: The testimony of the witness is, that with these very photographs in his hand, that he made them on the same day with all the others excepting the one showing the municipal building; he tells when he made them, and I think the inquiry which I made is legitimate, as a part of the cross-examination of the statement thus made by the witness.

MR. FOSTER: Can it possibly be legitimate? Suppose this witness is examined on a set of photographs that have not been offered and may not be offered; how can it possibly be legitimate within the scope of the cross-ex-

amination, until these things are put in evidence?

MR. WILSON: I think, moreover, if your Honor please, it is competent, and I offer it as competent as a proper cross-examination of what the witness has already sworn to in respect to complainants' "Exhibit C 12½" already offered, which represents the building in question, and my insistence is, that I have a right under the circumstances to cross-examine as to another picture, which is another picture of that same building.

THE COURT: But is it another picture of the same building? The objection will be sustained.

Q. Were you told in making these pictures, to make a picture showing how near the defendant's building was to Tenth Avenue, as compared with other buildings in the same neighborhood; were you told to do that?

A. No, sir, I don't think I was.

Q. What instructions did you have, if any, in respect to making photographs of the defendant's building?

A. Well, I don't know that I can just exactly recall, but I think I was instructed to show the lines of the buildings on Tenth Avenue, and not to show them partially, but to use good judgment and make the pictures impartial — make them from a good artistic standpoint.

Q. If that is true, why haven't you shown us some pictures that you made showing the lines of the buildings at Tenth Avenue, including the defendant's building?

MR. FOSTER: Objected to.

THE COURT: Objection overruled.

Q. (Question read.)

A. All the pictures that I made have been shown.

Q. You don't mean, have been offered in evidence?

A. Well, they were here presented to me.

Q. For instance, this picture was shown to you, and that picture does show the front of this building as compared with other buildings on the street, doesn't it?

MR. FOSTER: I again renew our objection.

THE COURT: Objection sustained.

Q. The picture which you have in your hand has not been offered in evidence?

A. I don't understand your technical terms; I saw these pictures and said that I took them.

Q. And you took that picture?

A. Yes, sir.

MR. FOSTER: I ask to have that stricken out; it is contrary to your Honor's direction.

THE COURT: It is simply repetition.

Q. The only picture that has been offered in evidence that shows a building with respect to other buildings on the street in any comprehensive way, is "Exhibit C 12½;" that has been offered; but you did take other pictures which show more perfectly the front of that building, as compared with other buildings on that street?

MR. FOSTER: Objected to.

THE COURT: Objection sustained.

Q. More accurately, we will say?

MR. FOSTER: I object to it in any form.

THE COURT: The objection is overruled.

MR. FOSTER: I object on the further ground that the picture is not in evidence; I object on the ground that the witness is not competent to express an opinion of that kind.

BY THE COURT:

Q. Did you take other photographs which show more accurately the position of this building with reference to other buildings along this building line?

A. Yes, sir, I think I did.

THE COURT: I shall not allow you to go further on the cross-examination in respect to that.

MR. WILSON: I will have this marked for identification "D 1½ for identification."

Q. Now, I show you this picture "D 1½;" does that picture show more completely the front of this defendant's building as compared with other structures on that street?

MR. FOSTER: Objected to.

THE COURT: Objection sustained.

MR. WILSON: I will make this witness my own witness for this purpose.

MR. FOSTER: I object to his using our pictures for this examination, or as an exhibit on the part of the defendant.

DIRECT EXAMINATION BY MR. WILSON:

Q. Directing your attention again to "Exhibit D 1½ for identification," I think you have said that was one of

the pictures that more completely shows the frontage of this building and others on F Street — more completely than "C 12½;" you have said so, haven't you?

A. I don't think I have; I can answer that question from the camera standpoint.

Q. Does "Exhibit D 1½ for identification" show the front of the defendant's building on Tenth Avenue, and the front of other buildings in that immediate neighborhood on Tenth Avenue; now does it?

MR. SNEDEKER: We object to it, on the ground that he is inquiring of this witness facts in regard to a photograph that has not been offered in evidence, and the witness cannot be examined, on direct examination particularly, in regard thereto.

MR. COOPER: I object also on the ground as calling for a conclusion.

THE COURT: I think I shall sustain the objection. You may call him when you present your case for the defence.

SOLOMON MICHELSON, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Where do you reside?
A. Belmar.
Q. How long have you resided there?
A. Two years.
Q. You resided in West Belmar for how long?
A. 17 years.
Q. How near Belmar is West Belmar?
A. Six blocks away.
Q. They adjoin, don't they; Belmar and West Bel-

mar adjoin; on one side is Belmar and on the other side is West Belmar?

A. Yes, sir.

Q. Do you know the defendant in this action, Mr. Levinsohn?

A. Yes, sir, I know him.

Q. How long have you known him?

A. I have known him for 18 or 19 years.

Q. You know the building in Belmar that Mr. Levinsohn is putting up?

A. Yes, sir.

Q. Did you have a conversation with Mr. Levinsohn in regard to that building before he commenced the erection of it?

A. Yes, sir.

Q. Do you remember when it was that you had that conversation?

A. Of course, I could not exactly tell the day, you know; I think it was in October or November; I could not exactly remember.

Q. What year?

A. 1913.

Q. And was it before or after they had commenced to do any work on the building?

A. It was before, about five or six weeks before.

Q. You know when they commenced to work on this building in question — where was the conversation held?

A. Mr. Levinsohn called me in his store, and he showed me his plans for the building.

Q. Now, Mr. Levinsohn's store is on the opposite corner from where he is putting up his new building?

A. Yes, sir.

Q. And you say that in that store he showed you his plans for his new building?

A. Yes, sir.

Q. And what else did he say to you at that time?

A. He asked me not to go against him if he built over the line.

Q. Did he say what he intended to do?

A. He said he was going to build the store, and I told him I would not go against him for my part — that I would not fight him.

Q. Do you remember what else was said about it?

A. I said, "Mr. Levinsohn, the safest way is for you to go right on straight;" I told him he would be safer and better off.

Q. You own property in Belmar?

A. Yes, sir.

Q. On the avenues?

A. Yes, sir.

Q. Do you know of any building line in regard to property on the avenues?

MR. WILSON: Objected to as being immaterial, his knowledge of it.

Q. Are the buildings that you own, that are situated on avenues North of Twelfth Avenue, back 40 feet from the line?

A. Yes, sir.

MR. WILSON: Objected to; that assumes that he owns property there.

Q. Do you own property on this avenue?

A. Yes, sir, at Ninth and Tenth Avenue.

BY THE COURT:

Q. Are your buildings back 40 feet from the street?

A. Yes, sir.

CROSS-EXAMINATION BY MR. WILSON:

Q. You own houses on Ninth Avenue?

A. Yes, sir.

Q. How many?
A. Five houses on Ninth Avenue.
Q. And do you own any on Tenth Avenue?
A. Yes, sir.
Q. How many?
A. One.
Q. What is it — dwelling-house?
A. No, sir; I live in it myself.
Q. Do you live there alone?
A. Yes, sir.
Q. How far is it away from the Levinsohn store?
A. Right in the same block.
Q. In the same block with the store?
A. Yes, sir.
Q. Has it a piazza?
A. Yes, sir.
Q. How far is the outside of the piazza from the street line?

MR. FOSTER: Objected to. It does not make any difference how far it is; how can it be competent?

THE COURT: I will allow that to stand, and will let him answer that.

A. The piazza is right under the 40 feet.
Q. Do you mean to say that the outside of the piazza, the extreme outside of the piazza, the part of it nearest the street, is 40 feet away from the curb line?
A. No, sir, the main building is 40 feet from the line.
Q. How far is the piazza?
A. The piazza is eight feet.
Q. Eight feet over the line?
A. That is 32 feet from the curb.
Q. Is the piazza enclosed?
A. In the summer time it has been, and in the winter time it is closed with glass.

Q. Has the house any bay windows in front?

MR. FOSTER: Same objection.

THE COURT: Same ruling.

A. No, sir.
Q. Neither upstairs nor down?
A. No, sir.
Q. In the summer time you take down the glass in the piazza?
A. Yes, sir.
Q. Then you enclose the piazza with screens?
A. Yes, sir.
Q. Wire screens?
A. Yes, sir; I don't like mosquitoes.
Q. You cannot stand on one side of the piazza and look through to the other end very handily with the screens up?
A. Oh, yes.
Q. It does not interfere with your sight at all?
A. No, sir, not at all.

JACOB NEWMAN, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Where do you reside?
A. Belmar.
Q. And on what avenue in Belmar?
A. Tenth Avenue.
Q. You are one of the complainants here, are you not?
A. Yes, sir.
Q. And how long have you resided in Belmar?
A. Two years.
Q. Did you erect the building that you are living in on Tenth Avenue?

Jacob Newman — Direct

A. I had it built, yes, sir.

Q. And do you know how far back from the curb line that building is set?

A. Yes, sir.

Q. How far back from the outer edge of the curb near the street ——

A. From the outer edge of the curb near the street, it is 40 feet 3 inches.

BY MR. WILSON:

Q. Are you speaking of your own house?

A. Yes, sir.

MR. SNEDEKER: I will offer in evidence a deed by the Ocean Beach Association to Jeremiah M. Newman, dated September 23, 1881, conveying Lot 1843 on the plan of lots of the Ocean Beach Association, which deed is recorded in the Office of the Clerk of the County of Monmouth, in Vol. 355, page 39, and I wish to call the attention of the Court to this particular part of the deed: "And the said party of the second part, for his heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that he, the said party of the second part, his heirs and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed, any spirituous or intoxicating liquors, or violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said association at any time.

Marked "Exhibit C 13."

Q. Will you look at that deed and state whether that

conveys the property in which you now reside, that you referred to?

A. Yes, sir.

MR. SNEDEKER: I offer in evidence a deed by Jeremiah M. Newman and Anna E. Newman, to Jacob Newman, dated April 2, 1884, conveying lot 1843 on the plan of lots of the Ocean Beach Association, which deed was recorded in the Office of the Clerk of the County of Monmouth in Vol. 437, page 160.

Marked "Exhibit C 14."

Q. And I call your particular attention ——

MR. WILSON: If it is the same covenant that it had in before, why don't you say so?

MR. COOPER: Yes, it has the same words.

Q. Is this the deed of the property which you now occupy; do you recognize that as the deed?

A. Yes, sir.

Q. And you are the grantee therein named?

A. Yes, sir.

Q. How far is your property from the property of the defendant?

A. A little over one and a half blocks; it is on the next block.

BY MR. WILSON:

Q. About 700 feet away, isn't it?

A. A little further than that.

Q. About 800 feet?

A. Yes, sir, it is 900 feet away.

Q. Is it on the same side as the defendant's store?

A. On the other side.

FURTHER DIRECT:

Q. Mr. Newman, your father was employed by the Ocean Beach Association?

A. Yes, sir.

Q. And do you remember assisting your father to set stakes where buildings were to be built?

A. Yes, sir.

Q. How many times have you been over, do you suppose?

A. I could not begin to tell.

Q. Do you know where those stakes were placed when a building was to be placed on an avenue in Belmar?

MR. WILSON: That is objected to.

THE COURT: On what ground?

MR. WILSON: I don't see how it is material.

THE COURT: I think I will allow that to stand.

A. It was all staked out by the Ocean Beach Association; all we had to do was to find the old stakes really; the stakes were placed 40 feet back from the gutter line; there was no curbing then.

BY THE COURT:

Q. On all avenues in Belmar was that?
A. Yes, sir.

FURTHER DIRECT:

Q. Your father is dead, isn't he?
A. Yes, sir.

Q. Now, did you know of the notice being served in the Heyniger suit at the time it was served?

A. I heard about that; I did not know anything about it; I heard about it.

Q. And did you hear about an application being made for a temporary injunction?

A. Yes, sir.

Q. And were you kept posted as to the condition of that suit, up to the time that you commenced your suit?

A. Mr. Levinsohn wanted me to sign ——

Q. That is not the question; did you know about the Heyniger suit being conducted up to the time you commenced your suit here?

A. Yes, sir.

Q. And you knew of the progress that was being made?

A. Yes, sir.

CROSS-EXAMINATION BY MR. WILSON:

Q. And you saw this defendant start to put up his building?

A. Yes, sir.

Q. As soon as he began, you knew it?

A. Yes, sir.

Q. As soon as he broke ground you knew it?

A. Yes, sir.

Q. You were street superintendent, were you not?

A. Not then.

Q. Are you now?

A. Yes, sir.

Q. You are now one of the paid officials of the borough?

A. Yes, sir.

Q. And you have gone by this building every day hearing of its progress?

A. Yes, sir.

Q. Two or three times a day?

A. Yes, sir.

Q. And did you serve any notice upon him?

A. No, sir.

Q. You never told him you objected?

A. I did, yes, sir.

Q. When was that?

A. He asked me to sign a petition to permit him to have his building stand as it was on Tenth Avenue.

Q. Was that after he began?

A. Yes, sir.

Q. Did you tell him that you would be glad to, but you were getting a job from the borough and you were afraid to?

A. No, sir.

Q. You did not tell him that?

A. No, sir.

Q. You joined in this suit finally?

A. Yes, sir.

Q. Who asked you to join in it?

A. Mayor Poole.

Q. Did Mayor Poole tell you that he would pay the bill?

A. I could not say.

Q. Why couldn't you say? Don't you want to tell? Do you know?

A. No, sir, I do not.

Q. What is it you don't know?

A. I don't know who is going to pay the bill.

Q. You have not paid any?

A. No, sir.

Q. And you don't expect to?

A. No, sir.

Q. Did not Mayor Poole say to you that he would pay the bill?

A. No, sir.

Q. Or that the borough would, or words to that effect?

A. He said it would not cost me anything.

Q. You would not have pressed this suit under any other circumstances, would you?

A. Not if I had to pay.

Q. Because the building was so far away from you it did not hurt you any?

A. No, sir.

Q. But when Mayor Poole told you it would not cost you anything, you being then one of the paid officers of the borough, you told him, I suppose, to go ahead and help himself?

A. No, sir; I have a little property there, two properties, and I would hate for anyone to build out to the sidewalk in front of my property, and that is why I did it; it did not interfere with me particularly, but if the man next door, if he built out it would interfere with me, and I would not like it.

Q. So your fear was, that while this building did not hurt you at all — you were 900 feet away and on the other side of the street, yet you were afraid that somebody might build next to you?

A. Yes, sir.

Q. And that was the reason why you thought you ought to join in this suit?

A. Yes, sir.

Q. If the borough was willing to pay the bill and it did not cost you anything?

A. I thought I was doing my duty.

Q. How near is your piazza to the curb line?

MR. FOSTER: Objected to.

A. It is eight feet wide; there is no line for piazzas —

Q. Is your piazza enclosed in winter?

A. No, sir.

Q. Is it wired and screened in summer?

A. No, sir.

Q. Have you got any bay windows on the front of your house?

A. No, sir.

Q. Do I understand that your father staked all the lots shown upon the original map of Belmar?

A. No, sir.

Q. How many did he stake?

A. I could not say; he was staking for 16 years.

Q. How many of the 16 years were you with him engaged in staking these lots?

A. All the time, more or less.

Q. You and he worked for 16 years driving stakes in Belmar?

A. From the time we commenced until the time we quit.

Q. And you were at that continuously for 16 years?

A. No, sir, maybe it would be once a week, and maybe two or three times a week, and maybe not for three months.

Q. Did you drive the stakes when the lots were sold?

A. When anyone was going to build a house they had to get the corners and the lines and the building line, and my father did that business for the Ocean Beach Association.

Q. He did it after the lots were sold?

A. Yes, sir.

Q. Did you do that on the side streets as well as on the avenues?

A. On the side streets they went right up to the sidewalk.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Mr. Newman, the streets in Belmar run North and South, don't they?

A. Yes, sir.

Q. And on those streets you can build up to within fifteen feet of the gutter line; is that right, — or the curb line, on the streets?

A. Yes, sir.

Q. But on the avenues, which run East and West, you

had to build back 40 feet from the curb line; is that correct?

A. Yes, sir.

Q. Now, you say that you are employed by the Borough of Belmar; how long have you been employed by them?

A. Two months.

Q. Were you employed by the Borough of Belmar at the time that you filed your bill in this matter?

A. No, sir.

Q. You were not so employed then?

A. No, sir.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. You were promised a job by the borough, were you not, if you joined in this suit?

A. No, sir.

Q. Sure about that?

A. I am, yes, sir.

Q. When was it you got this promise of a job after you filed the bill?

A. After the man that had it could not keep it and went away, and they asked me to take it — not particularly the Mayor either — it was a Councilman that asked me to take it.

Q. Didn't the Mayor ask you to join in this suit, and didn't he tell you it would not cost you anything, and then you said, "All right, go ahead;" then you went to him and asked him if you could not have this job, and he said, "All right, go ahead?"

A. No, sir.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. The job that you are now filling was filled by whom, before you?

A. Mr. Gleason.

Q. Where is he?

A. In the hospital at Philadelphia.

Clarence C. Wildman — Direct

Q. When he went to the hospital, you took his position?

A. Yes, sir.

Q. And that was within the last two months?

A. Yes, sir.

BY MR. FOSTER:

Q. Do you lose your job when Mr. Gleason comes back from the hospital?

A. I suppose so.

CLARENCE C. WILDMAN, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

MR. SNEDEKER: I offer in evidence a deed by Carrie C. McGronigal, single woman, to Charlotte Wildman, dated April 2, 1907, recorded in the office of the Clerk of the County of Monmouth, in Book 840 of Deeds, page 138, conveying lot 1846 on the plan of lots of the Ocean Beach Association; I call particular attention to the following: "Subject, nevertheless, to all the covenants, conditions and restrictions contained in former deeds for the same premises.

Marked "Exhibit C 15."

Q. Will you look at that deed and state whether your wife is the grantee in that deed?

A. Yes, sir.

Q. And that conveys the property now occupied by you?

A. Yes, sir.

Q. Your wife is one of the complainants in these suits, one of these suits?

A. Yes, sir.

MR. SNEDEKER: I offer in evidence the deed from the Ocean Beach Association to the Seaside Ice Company, dated September 7, 1889, and recorded in the office of the Clerk of the County of Monmouth in Book 453 of Deeds, page 15, and I call particular attention to the fact that said deed contains the same restriction and covenant in the same language as the other deeds that have been offered in evidence from the Ocean Beach Association.

Marked "Exhibit C 16."

Q. Will you look at this deed and state whether that is one of the deeds in the chain of title to your wife of the premises that you have referred to?

A. Well, all I can say by this is, that it is the same number of the lot.

BY THE COURT:

Q. How near do you live to the premises of the defendant?

A. In the next block.

Q. The next block away?

A. Yes, sir.

Q. (FURTHER DIRECT) What is your business?

A. Contractor and builder.

Q. How long have you resided on these premises on Tenth Avenue?

A. On these premises for six years on the seventh of this month.

Q. Did you build this house?

A. Yes, sir.

Q. And it is located how far back from the curb line?

A. 42 feet, to the foundation wall, maybe an inch more; it was intended to keep it 40 feet.

Q. At the time your wife purchased this property, did you look after the matter for her — attend to it for her?

A. Yes, sir.

Q. Did you then have any knowledge of building lines on the avenues in Belmar?

A. Yes, sir; I understood it had to be 40 feet back from the line.

Q. And did you buy this property in question with that knowledge?

MR. WILSON: That cannot be relevant. I object to that; that does not bring knowledge home to this defendant; his knowledge must be one of two types: it must be constructive or it must be actual; now, this class of testimony has no relation to either type. My point is, that his knowledge is not our knowledge; the only knowledge we are chargeable with is actual or constructive.

THE COURT: The objection will be overruled.

Q. Did you buy this property, relying upon that knowledge which you had received?

A. Yes, sir.

Q. Now, you say you are a carpenter and builder?

A. Yes, sir.

Q. Have you worked on the construction of any buildings in Belmar?

A. Several of them.

Q. Well, about how many buildings have you either built yourself or worked on, new buildings, on avenues in Belmar?

A. In the neighborhood of 25, I suppose.

Q. Have you built any on this Tenth Avenue; how

many buildings have you built or worked on on Tenth Avenue, Belmar?

A. I have worked on and built seven on Tenth Avenue, Belmar.

Q. And about 25, all told, on the avenues in Belmar; is that right?

A. Yes, sir.

BY THE COURT:

Q. Have you ever erected any building on Tenth Avenue that was not 40 feet from the curb line?

A. No, sir.

FURTHER DIRECT:

Q. Have you ever erected any building on any avenue in Belmar that was not set back 40 feet from the curb line?

A. No, sir.

Q. How recently have you worked on the construction of any building on any of the avenues — what is the last building?

A. This winter — we still have one under way yet on Tenth Avenue.

Q. That is not yet finished?

A. It is not.

Q. And that is being set back at least 40 feet from the curb?

A. Yes, sir.

Q. Mr. Wildman, when you have built these houses on different avenues in Belmar that you refer to, has your attention to the building line been called by the owners of those properties?

MR. WILSON: Objected to as being wholly immaterial.

THE COURT: The objection is sustained.

CROSS-EXAMINATION BY MR. WILSON:

Q. You are one of the moving parties in this suit?
A. Yes, sir.
Q. Do you own the property or your wife?
A. Both together, I suppose.
Q. Is the title in both your names?
A. No, sir, it is in my wife's name.
Q. And you joined with her?
A. Yes, sir.
Q. In the suit?
A. Yes, sir.
Q. Who asked you to join in the suit — the Mayor?
A. No, sir.
Q. Who did?
A. The attorney asked me if I would.
Q. And who was the attorney, Mr. Cooper?
A. Yes, sir, Mr. Cooper.
Q. Were you told it would not cost you anything?
A. I don't think so; I don't recall that I was.
Q. You have not paid anything?
A. I don't know whether I have or not.
Q. Yes, you do know that better than anyone else on earth.
A. I have subscribed to it.

BY THE COURT:

Q. You subscribed to it?
A. Yes, sir.

FURTHER CROSS:

Q. At whose solicitation did you subscribe?
A. My brother's.
Q. How did you subscribe — did you write your name on a piece of paper?
A. Yes, sir.

Q. And were there other names on the paper?

A. Yes, sir.

Q. How much did you subscribe to the maintenance of your own suit?

A. Nothing yet.

Q. I thought you said you had.

A. Subscribed to the general suit.

Q. How much did you subscribe, I ask you?

A. $5.00.

Q. You subscribed $5.00 to your own lawsuit?

MR. SNEDEKER: I object to the question.

THE COURT: Objection overruled. It is evident that this man has made a mistake; I guess he is not a complainant; the records show, anyhow.

THE WITNESS: That is my fault then.

Q. What is your fault?

A. In saying that I joined with her.

Q. Well, anyhow, so far as you know, the $5.00 represents all the contribution of the Wildmans to this suit?

A. No, sir, I don't think so.

Q. You or your wife?

A. Yes, sir, at present.

Q. And that has not been paid, but only subscribed, is that it?

A. I guess that is it; I don't think I have paid it yet; I have most forgotten whether I have or not.

Q. Now, among the houses you built on Tenth Avenue, you say you built seven?

A. No, sir, I did not say that.

Q. I understood you to say that.

A. That was not the question asked me.

Q. What did you say?

A. I said I had worked on and built seven.

Q. Did you either work on or build No. 413 Tenth Avenue — Ben Cooper's house?

A. No, sir.

Q. Did you work or build upon Cooper's house?

A. No, sir.

Q. Did not work on it at all?

A. No, sir.

Q. Did you build your own house?

A. Yes, sir.

Q. And when did you build it?

A. Six years ago this spring, finished it.

Q. How far back from the street line is the foundation; how far back is the foundation wall from the street line?

A. 22 feet.

Q. Have you piazzas extending in the front?

A. Yes, sir.

Q. How far beyond that, and towards the street line does your piazza extend?

MR. SNEDEKER: Objected to.

THE COURT: The objection is overruled.

A. Ten feet.

Q. And is the piazza open or enclosed?

A. Open.

Q. Enclosed in winter?

A. No, sir.

Q. Enclosed in summer?

A. No, sir.

Q. There is a bay window on your house, isn't there?

MR. SNEDEKER: Same objection.

THE COURT: Objection overruled.

A. Yes, sir.

Q. And the bay window extends to the second story, doesn't it?

A. Is that objected to?

MR. WILSON: Would you like to have it objected to?

THE WITNESS: It makes no difference to me.

Q. (Question read.)

A. No, sir, it is not on the first floor; it is on the second floor.

Q. Then the bay window is on the second story?

A. Yes, sir.

Q. How much does that project out?

A. About two feet.

Q. Not more than two feet?

A. No, sir.

Q. And how large a structure is it?

A. Ten feet, I think, if I recall.

Q. It extends out from the body of the house do you mean ten feet?

A. No, sir, two feet out from the building.

Q. Just describe this bay window in detail, width and height, etc.

A. It is ten feet across at the building line of the house; on the front wall of the house it is ten feet, and extends out two feet, forming a bay.

Q. Has it windows all around it?

A. Yes, sir.

Q. If your house is 42 feet back, the bay window would nearly extend out to your building line, wouldn't it.

A. The bay window would be two feet over; there is a two foot overhang to the building; the upper story hangs two feet over the foundation wall.

Q. So that would make the entire bay window within the restricted line, wouldn't it, outside of the restricted line?

A. Yes, sir.

Q. That is to say, it would be two feet nearer; the bay window would be two feet nearer than 40 feet to the curb line?

A. Yes, sir.

Q. Did anyone inform you when you put this house up, that a bay window was not a violation of the building restriction?

A. I was told it was not a violation of the building ordinance.

Q. Who told you that?

A. Well, I don't know; I cannot recall; my brother for one; I could not tell you who else.

Q. And when you said that you had worked on or built seven houses on Tenth Avenue, and that none of them violated the building restriction, you said that with the qualification in your own mind, at least, that a piazza or bay window would not be a violation of the restrictive covenant, if it extended out into the restrictive place, didn't you?

A. I had not said so, but I do say that. I think the ordinance does not prohibit it; the borough ordinance does not prohibit it.

Q. Your understanding is, that these seven houses that you have referred to, that they might, without any violation, have a bay window extending nearer than 40 feet to the curb, or a piazza nearer than 40 feet to the curb. without violating the restriction; that is your understanding, isn't it?

A. Yes, sir.

Q. And that is also your understanding of the restriction as it is applied generally to the avenues down there?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. You say that you subscribed five dollars, with some others, for the bringing of this matter. Do you know when the Heyniger suit was commenced?

A. I did know, but I could not give you the date now.

Q. I am asking you now whether the time that you subscribed the five dollars was nearer the time that the Heyniger suit was commenced?

A. I think it was at that time.

Q. At that time?

A. If I can recall.

Q. And when you subscribed, it was not at the time that the suit was commenced that your wife is the complainant in, which was commenced some two or three months after that?

A. That was not commenced until afterwards.

Q. When the Heyniger suit was commenced, did you have knowledge of it at about that time that the notice was served in the Heyniger suit, and that it was commenced?

A. Yes, sir.

Q. Did you communicate that knowledge to your wife?

A. Yes, sir, we talked it over.

Q. Did you know of that suit going on — a preliminary injunction being granted, and an argument on that hearing, etc.?

A. Yes, sir.

Q. Did you communicate that to your wife?

A. Yes, sir.

Q. Did you keep yourself posted in regard to that suit down to the time the suit, where your wife was complainant, was commenced?

A. Yes, sir.

Q. And did you communicate those facts to your wife as you learned them in regard to the Heyniger suit?

A. We talked it over continually.

Adjourned to March 20, 1914.

SECOND DAY

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the twentieth day of March, nineteen hundred and fourteen, before HON. VIVIAN M. LEWIS, Vice-Chancellor.

Same appearances as before noted.

LEONARD J. ARROWSMITH, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. What is your business?

A. Title searcher for Monmouth Title Company of Freehold.

Q. How long have you been title searcher?

A. All my life.

Q. You have examined many titles in the County of Monmouth?

A. Yes, sir.

Q. Have you examined the records in the office of the Clerk of the County of Monmouth for deeds executed by the Ocean Beach Association of property that is located in what is now Belmar in Monmouth County?

A. Yes, sir.

Q. And when did you make that examination?

A. Yesterday and last night and this morning.

Q. And how many deeds did you personally find recorded of that nature conveying property by the Ocean Beach Association that was located in what is now Belmar?

A. I personally examined 504 instruments.

Q. Out of those 504 instruments, in how many did you find a covenant referring to restrictions in regard to the nature of the building line?

A. None.

Q. Did you find covenants in those deeds?

A. I did, yes, sir.

BY THE COURT:

Q. What was the covenant; what covenant did you get; have you got a copy of it?

A. Yes, sir.

FURTHER DIRECT:

Q. Did you find a covenant restricting the property as to the sale of liquors, and also restricting it by the by-laws, rules and regulations of the association?

A. I did, yes, sir.

Q. In how many deeds did you find a covenant?

A. 492.

Q. And was the covenant the same in all of those deeds?

A. They were, yes, sir.

Q. Will you read that covenant?

A. "Subject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act, entitled "An Act to incorporate the Ocean Beach Association;" and the said party of the second part, for himself, his heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that he, the said party of the second part, his heirs and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed, any spirituous or intoxicating liquors, nor violate any of the provisions contained in the said act of incorporation, by-laws, rules or regulations made by the said association, at any time."

Q. And that same covenant was in the 492 deeds?

A. Yes, sir.

Q. You spoke of a few other deeds that you found did not have that identical covenant?

A. Twelve.

Q. What deeds were those?

A. Deed made by Ocean Beach Association to Mayor and Council of the Borough of Belmar; it conveys tracts of lands for parks, public parks for public uses.

Q. How many deeds were those?

A. Two to the Mayor and Council.

Q. What other deeds did you find where the covenant was not ——

A. I found three deeds made by the Ocean Beach Association that conveyed land that was not shown on the Ocean Beach map, outside of the Ocean Beach map.

Q. What else?

A. I find two final decrees in Chancery where they were made a party.

BY MR. WILSON:

Q. Deeds made in accordance with the decrees?

A. Yes, sir, afterwards; I find one for a lot on Tenth Avenue, East of Ocean Avenue, for bathing grounds; that has a covenant in it against the sale of liquor, but it is not worded the same as the others. I find another one made by the Sheriff of Monmouth County, in which the Ocean Beach Association was merely a party defendant. The restriction does not appear in that. I find another one made by the Ocean Beach Association to Samuel L. Gillen, conveying a lot on the North side of Tenth Avenue, West of the railroad; the restriction is not in that.

FURTHER DIRECT:

Q. BY MR. SNEDEKER: Did you examine the title, the original title, as to earlier deeds?

A. Yes, sir.

Q. Did you find an earlier deed of the Ocean Beach Association in which the covenant did appear of that particular property?

A. Yes, sir, the first deed appearing from the Ocean

Beach Association was to Henry H. Yard; that covenant appears in that deed, and it did appear.

Q. So in the general chain of title that covenant does appear earlier?

A. Yes, sir.

Q. That is the first deed out of the Ocean Beach Association in which it appears?

A. Yes, sir; I find another one made by the Ocean Beach Association to Elmira Cooper, in which the regular covenant appears, and in addition to that covenant, provides for the removal of the building ——

Q. Give the exact wording, please.

A. It conveys Lots 1361 and 1362, with the building now standing on the said lots, to be removed at least 20 feet South from the Southerly line of Tenth Avenue, within two years from the date of this indenture.

Q. That was in addition to the regular covenant?

A. Yes, sir.

Q. Have you conferred — did someone else make search for deeds besides you, at the same time that you did?

A. Yes, sir, my assistant, Mr. Joseph F. Murphy.

Q. Is he in Court?

A. Yes, sir.

Q. How many deeds did you and he together examine, if you know?

A. 740 all together.

Q. And do you know whether that includes all the deeds recorded in the office of the Clerk of the County of Monmouth, executed by the Ocean Beach Association?

A. From our examination, that is as many as we could find.

Q. Did you look for all of them?

A. Yes, sir, right down to yesterday.

Q. And you have examined every one of them, either you or your assistant?

A. Yes, sir.

Q. It seems that you accounted for 11 or 12 deeds

that you say did not have the covenant; there seems to be one more?

A. Oh, I said there were two to the Borough of Belmar, but I say now there are three to the Borough of Belmar.

Q. Those deeds are parks for public purposes?

A. Yes, sir, and streets.

CROSS-EXAMINATION BY MR. WILSON:

Q. Did you find more than three deeds from the association to the borough of Belmar?

A. No, sir, I did not.

Q. You don't know whether there were more than three?

A. There were only three in the one I examined.

Q. Have you the lot numbers of the three that you did examine?

A. No, sir, I have not; I don't think they are lot numbers ——

Q. Have you the description of the three that were conveyed to the borough?

A. No, sir.

Q. You cannot identify them, then, of course?

A. I have got a memorandum of what they did convey, but it is not the same as the record; it is just an abstract.

Q. I know, but can you identify the general location of the property from your memorandum?

A. I think I can, yes, sir.

Q. What is the location of the property?

A. The first one is a tract of land East of Ocean Avenue, on the East side of Ocean Avenue; the second is a tract on the North line of Fifth Avenue, West of D Street; the next tract is on the North side of Eighth Avenue, West side of the railroad. The next tract, the East side of Ocean Avenue.

Q. Now, the next tract?

A. South side of North Lake Avenue; that is all in

that deed. The next deed I have five tracts of land on Silver Lake, and the lands ——

Q. What is the next?

A. There are only two to the Ocean Beach Association ——

Q. I don't understand you.

A. I say there are only two deeds made to the Ocean Beach Association instead of three.

Q. And you have given us the descriptions briefly, contained in those two deeds?

A. Yes, sir.

Q. Now, according to your examination, in which your assistant joined, you examined 740 deeds?

A. Yes, sir.

Q. And you believe them to be all the deeds on record conveying lands by either the Ocean Beach Association, or its successor in title?

A. No, sir, just the Ocean Beach Association.

Q. Were all these 740 deeds made to the Ocean Beach Association?

A. Yes, sir.

Q. Has the land, so far as you know, formerly owned by the Ocean Beach Association, gone over to some other company?

A. Not that I know of, no, sir.

Q. And that company is still extant?

A. I think so.

Q. So all these deeds were made to the Ocean Beach Association, and in every one of those deeds except twelve, you find this general reservation which you have read?

A. Yes, sir.

Q. First, a reservation which refers to intoxicating liquors, and then a covenant that nothing will be done by the grantee in violation of the by-laws, rules or regulations made by said association at any time?

A. Yes, sir.

Q. These exceptions to which you have alluded — the first of these were the deeds to Belmar?

A. Yes, sir.

Q. We have just directed your attention to that?

A. Yes, sir.

Q. And you were in error in saying there were three of them; there were only two?

A. Yes, sir.

Q. So their number would be reduced to eleven and not twelve?

A. Yes, sir, eleven exceptions.

Q. You spoke of a deed of the bathing ground?

A. Yes, sir.

Q. Was that deed made by the Association direct?

A. Yes, sir.

Q. And have you the full covenant?

A. Yes, sir.

Q. Set forth in that deed?

A. Yes, sir.

Q. Will you read it to us?

A. This is the Ocean Beach Association to William H. Burnett: "Subject, however, to these covenants, conditions and restrictions that the said party of the second part, his heirs, executors and assigns shall not sell or suffer to be sold on the premises hereby conveyed, any spirituous or intoxicating liquors."

Q. And nothing else?

A. No, sir.

Q. Nothing else in that deed?

A. No, sir.

Q. Do you know where those bathing grounds are located by the deed?

A. They are between Tenth and Eleventh Avenue.

A. On what street?

A. East of Ocean Avenue, on the beach.

Q. Then you found one deed made by the Sheriff?

A. Yes, sir.

Q. Well, when that title to that lot passed from the association, was that restrictive covenant in it which is uniformly found in the other deeds?

A. That was located on the Ocean Beach Association map; I am not sure about that.

Q. I don't see why you should mention it as an exception at all, if it is a deed made by the sheriff to somebody?

A. Well, I was instructed to examine every deed made by the Ocean Beach Association.

Q. That is the very reason why I do not see why you should direct our attention to a deed made by the sheriff.

A. Well, it was in the index; it was indexed, because they were made defendants in the suit; that is the only reason.

Q. You are in doubt whether the land described in that deed was in the original association tract or not?

A. I am in doubt on that.

Q. And you don't know whether the original deed from the association to this first grantee, contained this restrictive covenant or not?

A. I could not tell, because I am not sure about the land.

Q. You found a deed to Samuel L. Gillen for a lot on the North side of Tenth Avenue, West of Eleventh Avenue?

A. Yes, sir.

Q. That had no restriction in it?

A. No, sir.

Q. And what was the date of that deed, Mr. Arrowsmith?

A. November 27, 1899.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. What is the name of your assistant?

A. Joseph S. Murphy.

Joseph S. Murphy — Direct

JOSEPH S. MURPHY, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. What is your business?

A. Title examiner for the Monmouth Title Company of Freehold.

Q. Do you know the last witness who was on the witness stand?

A. Yes, sir.

Q. Have you examined many titles of property in Monmouth County?

A. Yes, sir.

Q. In the County Clerk's Office at Freehold?

A. Yes, sir.

Q. Have you made an examination of deeds by the Ocean Beach Association of property located in the Borough of Belmar in Monmouth County?

A. Yes, sir.

Q. When did you make that examination?

A. Yesterday afternoon and last night and this morning.

Q. And how many deeds did you personally find made by the Ocean Beach Association of property located in Belmar?

A. 236.

Q. Did you find in those deeds a covenant in regard to the sale of spirituous liquors, and in regard to the by-laws, rules and regulations of the association?

A. I did, all but three.

Q. You found a covenant in all the deeds but three?

A. Yes, sir.

Q. Was the covenant the same in all those deeds?

A. Except those three.

Q. Will you read that covenant?

A. "Subject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act, entitled

'An Act to incorporate the Ocean Beach Association,' and the said party of the second part, for himself, his heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that he, the said party of the second part, his heirs and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed, any spirituous or intoxicating liquors, nor violate any of the provisions contained in the said act of incorporation, by-laws, rules or regulations made by the said association at any time."

Q. Did you confer with Mr. Arrowsmith, the last witness on the witness stand, when you were running down your indices?

A. Yes, sir.

Q. And did you examine every deed that was indexed against the Ocean Beach Association as grantor, you and Mr. Arrowsmith together?

A. Him and I together, yes, sir.

Q. And you say that all those that you examined, there were three that did not contain this particular covenant?

A. Yes, sir.

Q. Will you inform us what those three deeds were?

A. One was a deed of the Ocean Beach Association to the New Egypt and Farmingdale Railroad Company; this conveys a tract of 3 46/100 acres for the purpose of constructing a railroad.

Q. What was the next deed in which you did not find the covenant?

A. The next was a deed made by the Ocean Beach Association to the Long Branch and Sea Girt Railroad Company.

Q. What was the third one?

A. The third one was a deed which had the word "Rules," left out of the conditions; the conditions were the same except one word, the word "Rules;" that was left out of the restriction.

Joseph S. Murphy — Direct

BY MR. WILSON:

Q. To whom was that deed?
A. To Christopher Werts.

FURTHER DIRECT:

Q. What property does it convey?
A. Lots 535 and 536, Southeast corner of River and Third Avenues, Ocean Beach.
Q. And in that deed the covenant was exactly the same, the exact language that you have read, except the word "Rules?"
A. The word "Rules" was omitted, yes, sir.
Q. Now, the second deed you refer to as having the covenant omitted, was to the railroad company, the Long Branch and Sea Girt Railroad; was there anything in that deed to indicate for what purpose the property was to be used?
A. For the exclusive use and purpose of a railroad.
Q. Can you state from what date to what date your period of examination covered?
A. I don't think so.
Q. Did you and Mr. Arrowsmith check up your examination of the indices together?
A. Yes, sir.
Q. And did you commence with the beginning of the world every deed by the Ocean Beach Association; did you commence with the first volume of indices?
A. Yes, sir.
Q. And did you run the indices down to date?
A. Yes, sir.
Q. And you and he have reported — you have heard his testimony?
A. Yes, sir.
Q. You have reported every deed that was indexed against the Ocean Beach Association?
A. Yes, sir.

Joseph S. Murphy — Cross

CROSS-EXAMINATION BY MR. WILSON:

Q. You did not, in point of fact, begin with the first book of indices, did you?

A. Yes, sir.

Q. How far does the first book of indices go back?

A. 1656, I think.

Q. You began with that, did you?

A. With that book, we used that book.

Q. Did you begin at the beginning and run forward?

A. Yes, sir; there are very few deeds made by corporations beginning with the letter O — at that time — at that period.

Q. To that, as a matter of convenience, you did not begin at the time when the Ocean Beach Association was incorporated?

A. No, sir.

Q. Well, now, are the three deeds that you directed our attention to, three exceptions, in addition to the exceptions that Mr. Arrowsmith found, 12, and you found 3?

MR. FOSTER: He said 11 exceptions now.

Q. So that the result of your joint effort was to present 14 exceptions?

A. Yes, sir.

Q. Now, the conveyance of this land to the New Egypt and Farmingdale Railroad Company, is that land a part of the land now occupied by the depot at Belmar?

A. I could not say; it is a very indefinite description; it says just three and 46/100 in the Township of Wall, but it describes it as beginning at a stake in a certain point; they did not give any street lines or anything.

Q. Does it make any reference to any streets?

A. I would not say; I have not got the full abstract of it here; I have a little memorandum of it.

Q. Will you read from your memorandum?

A. It says, "Conveys tract of 3 46/100 acres, more

or less, for the purpose of constructing a railroad.

Q. That is all you have in your memorandum?

A. Yes, sir, except the date.

Q. What was the date?

A. Dated September 6, 1875.

Q. And the deed to the Long Branch and Sea Girt Railroad, the date of that?

A. November 13, 1875.

Q. And what about that description; can you locate the land by that description?

A. No, sir, acres 63/100, Wall Township, for the exclusive use and purpose of a railroad.

Q. Did you find any conveyance to the New York and Long Branch Railroad Company?

A. Not in my examination.

Q. And you found no conveyance to the Central Railroad?

A. No, sir, only those two that I have just mentioned.

Q. Then you found a third made to one Christopher, with the word "Rules" left out?

A. Yes, sir, the word "Rules."

GEORGE H. HEYNIGER, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Where do you reside?

A. Belmar.

Q. How long have you resided in Belmar?

A. All my life.

Q. And where do you reside in Belmar?

A. 509 Tenth Avenue.

Q. Between what streets?

A. Between D and E Street.

Q. You are the complainant in this action?

A. Yes, sir.

New Jersey State Library

George H. Heyniger — Direct

Q. When did you buy that property that you are now living in?

A. It is about five years ago, a little over five years ago.

MR. SNEDEKER: I offer in evidence deed by the Ocean Beach Association to David H. Wilson, dated December 20, 1873, recorded in the office of the Clerk of the County of Monmouth in Book 356 of Deeds, at page 351; conveys Lot 1944 on the plan of lots of the Ocean Beach Association, and I call particular attention to the covenant in the deed, which is the same covenant as was in the other deeds by the same association, that we have offered.

Marked "Exhibit C. A. 1."

Q. Do you know what the lot number of your property is on that Ocean Beach Association map?

A. 1944.

Q. The lot number?

A. Yes, sir.

MR. SNEDEKER: I will offer in evidence a deed by Alfred J. Wildman and Gussie A. Wildman, his wife; Clarence C. Wildman and Charles Wildman, his wife, and Frank C. Du Bois to George H. Heyniger, dated December 22, 1908, recorded in the office of the Clerk of the County of Monmouth in Book 842 of Deeds, page 490, conveying Lot 1944 on the plan of lots of the Ocean Beach Association.

MR. WILSON: To whom is that conveyance made?

George H. Heyniger — Direct

MR. SNEDEKER: To this witness, George H. Heyniger.

Marked "Exhibit C A. 2."

Q. Mr. Heyniger, at the time that you bought your property, I assume that you examined the neighborhood before buying it?

MR. WILSON: Objected to.

THE COURT: It is immaterial whether he did or not.

MR. WILSON: And it is leading; the question itself is leading.

Q. Did you examine the neighborhood, the character of the buildings, before buying?

A. Yes, sir.

Q. Did you notice how the buildings were built in reference to a line, before you bought?

A. Yes, sir.

Q. How were they built, on a line or not?

A. Yes, sir.

Q. And how far back from the curb were they built?

A. 40 feet.

BY THE COURT:

Q. Did you take measurements?

A. Yes, sir.

FURTHER DIRECT:

Q. And had you any knowledge before you purchased, of an established building line on the avenue?

A. Yes, sir.

Q. And did you rely upon that line being observed when you bought your property?

MR. WILSON: We object to that; it is leading, to begin with, and whether he relied upon it or whether he did not is of absolutely no consequence in the consideration of this case. I don't understand, in an inquiry of this kind, that even a party to a suit can be permitted to say what he did or did not rely upon. He may disclose what the facts were upon which he might have relied; and it is for the Court to say whether he did rely upon them or not.

THE COURT: I don't think it is at all material to the issue whether he did rely upon them or not. I think I will sustain the objection to that question.

Q. What is your business?

A. Mason and contractor.

BY THE COURT:

Q. When you put down your building, did you put it down 40 feet back?

A. Yes, sir.

Q. How did you happen to do that?

A. All the houses were back of the line; I did not go by the other houses.

Q. What did you go by?

A. By the curb — 40 feet back from the curb.

Q. You had a measurement made, a survey?

A. No, sir, 40 feet back from the curb.

George H. Heyniger — Direct

FURTHER DIRECT:

Q. You say you are a mason?
A. Yes, sir.
Q. Did you lay the foundation wall of your building?
A. I helped to lay it.
Q. Did you make a measurement from the curb back to the point where you laid your foundation wall?
A. I helped make it.
Q. And what was that distance?
A. 40 feet from the curb, outside of the curb.
Q. Now, why did you go back 40 feet?
A. Because that was the established line of the town.
Q. Building line?
A. Yes, sir.
Q. That all houses on the avenue must be 40 feet back from the curb line?
A. Yes, sir.

BY THE COURT:

Q. Where did you get knowledge of this?
A. From my deed.
Q. Does your deed contain a restriction?
A. Yes, sir; and from the older contractors and different ones that had houses built.
Q. Did you go to see your neighbors who had put houses up there?
A. No, sir.
Q. You say you got it from the people there, what people did you get it from?
A. When the people would have houses built, — they would tell you that you would have to live up to the building restrictions.

MR. WILSON: I move to strike that out; it is wholly impersonal.

MR. FOSTER: I don't think it should be stricken out.

THE COURT: I think I will let it stand.

FURTHER DIRECT?

Q. I will call attention to the following, in "Exhibit C. A. 2:" "Subject, nevertheless, to all the covenants, conditions and restrictions contained in former deeds of the same premises;" that is why you did it?

A. Yes, sir.

Q. Because of that restriction in your deed?

A. Yes, sir.

Q. Now, you were asked if you had had any talks with other owners of property there before you built, as to the building line.

A. Yes, sir.

Q. What had they told you about it?

MR. WILSON: Objected to.

THE COURT: That is objectionable.

Q. Did that influence you in determining this building line, as to what other owners had told you in connection with the building line?

A. Yes, sir.

MR. WILSON: Objected to.

THE COURT: I will let that stand.

Q. Now, as a mason builder, have you had to do with the erection of other houses on avenues in the Borough of Belmar?

A. Yes, sir.

George H. Heyniger — Direct

Q. And have those other houses been erected on a line 40 feet back from the curb?

MR. WILSON: Objected to as leading.

THE COURT: Objection sustained.

Q. How many houses have you had to do with, either in the erection yourself, or assisted in the erection of, on the avenues of Belmar?

A. I have worked at so many that I could not tell you the number.

Q. About how many?

A. Oh, over 100.

Q. And on those houses, how far back from the curb was the foundation laid?

MR. WILSON: Objected to as immaterial.

THE COURT: I will allow it to stand and note the objection to it.

Q. (Question read) — the houses you worked on?

A. Well, to my knowledge — I have not measured — I did not measure them all ——

Q. Have you measured any of them?

A. Yes, sir.

Q. I want to take in such houses as you have worked on, where you know the distance that the foundation wall was back from the curb?

A. I know many of those I worked on were back of the curb; I have not measured them all.

Q. They are all back of the line?

A. Back of the line, I mean.

Q. Those that you have measured were how far back from the curb?

A. 40 feet.

BY THE COURT:

Q. How many have you measured yourself?
A. Well, I will say 50.
Q. You have taken the measurements yourself?
A. Yes, sir, approximately 50 houses.

FURTHER DIRECT:

Q. Do you know how many on Tenth Avenue you have measured, either measured or helped to measure?
A. Two, that I know of.
Q. Where were those — how far back from the curb?
A. One was 42 feet and a few inches back from the curb, and the other one about 42 feet back from the curb.
Q. Now, you are talking of houses you have worked on yourself; is that right?
A. Yes, sir.
Q. Now, have you measured the distance from the curb to the North wall of the defendant's house?
A. I have, yes, sir.
Q. At the Southeast corner of F Street and Tenth Avenue?
A. I have, yes, sir.
Q. And what is that distance from the curb to the North wall?
A. It is 46 feet 6¼ inches; now, that is not exact.
Q. What do you say the distance is?
A. 46 feet 6¼ inches back from the curb.
Q. Do you think you have understood my question?
A. Yes, sir, to my knowledge.
Q. Do you understand, Mr. Heyniger, that by your answer you have located the buildings over 6 feet within the building line?

MR. WILSON: Objected to; that is an indirect method of leading.

THE COURT: It is not a fair question. Of course, this witness is difficult to obtain information from.

Q. What did you measure it with?
A. With a steel tape.
Q. Do you mean 36 feet or 46 feet?

MR. WILSON: That is objectionable.

THE COURT: This is an important witness — that is objectionable.

A. Well, I will say that I don't understand that question.

Q. Mr. Heyniger, will you kindly collect your thoughts now — just calm yourself a moment; I simply want to know what the distance is from the North wall of the defendant's store, that he has erected, to the curb line?

A. 36 feet 6¼ inches.
Q. But you said a moment ago 46 feet?
A. 36 feet 6¼ inches is correct.
Q. Do you know why you said 46 feet?
A. No, sir, I do not.
Q. There is no doubt but what the 36 feet 6¼ inches is the correct measurement?
A. That is correct.
Q. Who was with you when you made this measurement?
A. Mr. Cooper.
Q. Did you make a memorandum of it at the time you made the measurement?
A. Yes, sir.
Q. Have you got that memorandum with you?
A. Yes, sir.
Q. State what the measurement was, after refreshing your recollection from that memorandum.

MR. WILSON: Objected to.

BY THE COURT:

Q. Have you got a memorandum?
A. Yes, sir, it is right here.
Q. Well, looking at your memoranda?
A. 36 feet 6¼ inches.

CROSS-EXAMINATION BY MR. WILSON:

Q. Now, one minute. May I look at that memorandum; may I see that memorandum?

A. (Witness hands memorandum to Mr. Wilson.) It is the bottom figure, this one here.

Q. What is the top figure?

A. I don't know what that is; I have forgotten that.

MR. SNEDEKER: Let him see it.

Q. Now, you tell me it was the bottom figure, 36 feet 6¼ inches?

A. Yes, sir.

Q. Well, that is this, is it: 36 feet 6¼ inches?

A. Yes, sir.

Q. What are the figures below that?

A. That is from the pilaster.

Q. What is that?

A. That is like a pier.

Q. Is the pier nearer the sidewalk than the main body of the building?

A. Yes, sir.

Q. Now, what is the top measurement?

A. That is taken from another distance that did not suit me exactly right.

Q. Did not suit you?

A. It did not suit me because there were different

things in the way and I could not get to the curb close enough, as I could with this here figure here.

Q. What kept you from getting to the curb?

A. There were different things in the road.

Q. Well, you did not have to get to the road to get to the curb, so if they were in the road, that did not hinder you from getting to the curb?

A. No, sir.

Q. Then there must have been some other reason why this first measurement did not suit you; have you given us all the reasons you can think of?

A. I have, yes, sir.

Q. Now, when did you make this measurement?

A. Last night.

Q. You made no measurement before that time?

A. No, sir, I did not.

Q. And Mr. Cooper was with you?

A. Yes, sir.

Q. He is your brother-in-law?

A. No, sir.

Q. Another Cooper is that — haven't you got a brother-in-law named Cooper?

A. Yes, sir.

Q. But it was not that Cooper?

A. No, sir.

Q. Didn't you ever measure this before?

A. I did not, no, sir.

Q. Now, Mr. Heyniger, what is the number of your house at Tenth Avenue?

A. 509 Tenth Avenue.

Q. And you built it about the year 1908?

A. Yes, sir.

Q. And you have said that it conformed generally to the building line of the avenue?

A. Yes, sir.

Q. How many buildings have you measured on Tenth Avenue, prior to this suit, with a view of determining how far back they were from the street?

A. Why, two that I know of.

Q. And what buildings were they?

A. One was my brother's, and the other one was my own.

Q. And with these two exceptions prior to this suit, those are the only houses that you have any definite knowledge of by reason of measurement on Tenth Avenue?

A. No, sir — up to last night ——

Q. I am asking you, before this suit began — that is right, isn't it?

A. Yes, sir.

Q. Now, how many have you measured since the suit began; you measured one other — you measured that building last night?

A. Three.

Q. That means that adds to your list, the building last night?

A. Yes, sir.

Q. And when you have testified as you have here today, the distance back from the curb line of the various houses on Tenth Avenue, you had no definite knowledge derived from measurements, excepting the three cases you have named? That is true, isn't it?

A. That is so, yes, sir.

Q. When you got ready to build your property in 1908, you made a measurement with a tape line?

A. Well, I forget now whether it was a tape line, or whether I used a shingle reed, marked off into feet.

Q. At any rate, you made a definite measurement?

A. Yes, sir.

Q. And you located the front wall of your building just 40 feet away from the curb line?

A. No, sir.

Q. How many feet away; I ask you how much back of 40 feet it was?

A. Well, within 42 feet and some inches to the foundation.

Q. And that is where you located the front wall of your house?

A. Yes, sir.

Q. Now, in the construction of the houses did you have any bay windows?

A. I have.

MR. FOSTER: Same objection goes to the bay windows; I object to it as immaterial and irrelevant.

MR. WILSON: Upon the theory that a bay window cannot be an encroachment.

Q. How far does this bay window project from the main wall of your house?

A. About two feet.

Q. So that it's outside lines are still distant — or distant how far from the curb line?

A. It is supposed to be right on to the line.

Q. I don't ask you how it is supposed to be —I ask you how far back of the building line, if it is back at all, is your bay window?

A. On the line, 40 feet.

Q. Now, are you sure of that?

A. Well, from the surveyor's measurements.

Q. What about your own measurements — you are a contractor — you can measure; haven't you measured, and haven't you found out, and don't you know as a matter of fact, that your bay window is more than three inches within the 40 feet?

A. No, sir; I have not measured that fine.

Q. Well, why haven't you measured that fine? Because you did not want to find out the fact? Were you afraid to make the measurement?

A. No, sir.

Q. Dare you say now that your bay window on the

first story of your house is not three inches, at least, over the building line — yes or no?

A. I mean it is not over the line.

Q. And you are certain about that?

A. To my knowledge.

Q. Well, to your knowledge, do you mean to say that you have knowledge or that you have not knowledge?

A. I have knowledge.

Q. And your knowledge is, that the bay window is not three inches or any other distance over the restricted line; is that right?

MR. FOSTER: Objected to; this is repetition of the same question.

THE COURT: Objection overruled.

Q. (Question read.)

A. Well, I told you that I helped to measure the foundation, 42 feet some inches back from the line; this bay window was built — it was supposed to be two feet out.

Q. Did you measure it?

A. No, sir.

Q. So that really you don't know; is not that the truth of it?

A. Yes, sir.

Q. Now, what about the cornice of the building — the overhang of the building; does that invade the 40 foot distance from the curb?

MR. FOSTER: Objected to.

THE COURT: Objection overruled.

A. I think that is over the line.

Q. You have not measured that?

A. No, sir.

Q. But you merely venture that as your opinion?

A. Yes, sir.

Q. You have a piazza on your house too, haven't you?

A. Yes, sir.

Q. How far is the piazza over the line?

MR. FOSTER: Same objection.

THE COURT: Objection overruled.

A. I think it is a 9 foot porch.

BY THE COURT:

Q. That is, 9 feet each way?

A. 9 feet from the house towards the curb.

Q. Are you able to say that your piazza, as now constructed, is not at least 9 feet 9 inches over the building line?

A. I said about 9 feet.

Q. I know you did — now, I ask you another question (question read).

A. I cannot say that.

Q. You really don't know, do you?

A. No, sir.

Q. Did you work on your brother-in-law's house, Mr. Cooper's house?

A. I did.

Q. When did you work on that?

A. About two years ago.

Q. Well, that was built over the line, wasn't it?

A. Not to my knowledge.

Q. You worked on it?

A. I did.

Q. And that is one of the houses that you measured?

A. No, sir.

Q. I think you said you measured your brother-in-law's house and your house?

A. My brother's house, I said.

Q. You don't know whether that is over the line or not?

A. No, sir; I did not lay it out.

Q. You are not able to say whether it is not four or five or more feet over the line?

A. I don't know anything about the Cooper house.

Q. Now, you knew that the defendant here was intending to build this store, didn't you?

A. Yes, sir.

Q. And you bid for the work?

A. Yes, sir.

Q. And you knew where the store was to be located — where the building was to be located, didn't you?

A. Well, I knew the corner that it was to be located on.

Q. Where was it supposed to be located?

A. 40 feet back from the curb.

Q. Who told you that?

A. As you are supposed to do through all the deeds and everything.

Q. You had the plans in your possession?

A. Yes, sir.

Q. And that showed the location of the building on the lot, didn't it?

A. Not to my knowledge, no, sir.

Q. Well, is there anything the matter with your knowledge?

A. No, sir.

Q. Do you recollect having seen the plans and specifications?

A. Yes, sir.

Q. And you cannot remember whether they showed the location of the building on the lot or not?

A. Not to my knowledge; I don't think it showed the lot line.

Q. Where did you find out where the building was to be erected?

A. I don't know when I got the plans.

Q. When you got the plans — you think that from the

plans you got the information that the building was to be erected over the building line ——

A. No, sir.

Q. I ask you when you did get the information that the building was to be erected over the building line?

A. I did not get it, not until the foundation walls were up about level with the ground, all the first floor beams.

Q. You remember that the plans showed a 40 foot building, don't you?

A. I don't know the measurements now.

Q. Well, the size of the building was shown upon the plan, I suppose?

A. Yes, sir, either to a scale or the figures, I forget which.

Q. And it also showed the size of the lot, didn't it?

A. Not to my knowledge.

Q. You knew the size of the lot; you knew it was a 50 foot lot?

A. No, sir, I did not.

Q. You don't know yet?

A. No, sir.

Q. You lived at Tenth Avenue?

A. Yes, sir.

Q. You passed up and down there every day?

A. Yes, sir.

Q. You saw this building in progress of construction?

A. Yes, sir.

Q. And you saw them when they began it, and watched it through its entire progress, didn't you?

A. Yes, sir.

Q. Why could not you have told the proposed location of the front wall as soon as ground was broken, if you were walking back and forth every day?

A. Well, because they dug a hole that does not say they are going to put a building there.

Q. You never knew that there was a building to be built, and you saw them digging the hole; that would be a

pretty good intimation that it was a foundation for that building, wouldn't it?

A. No, sir.

Q. That would not mean anything to you as a contractor?

A. No, sir, not in a way.

Q. You bid on this job and did not get it?

A. I did.

Q. Do you remember who did get the job; do you remember Mr. Traub?

A. Yes, sir.

Q. Do you know him?

A. Yes, sir.

Q. Do you know he got the contract for the work you bid on?

A. Yes, sir; I saw him working on the job.

Q. Did you have a conversation with him after he got the contract, about this case?

A. I did, yes, sir.

Q. Did you tell him that you did not care anything about the matter — that if you had got the contract you would not have made any kick, or words to that effect?

A. No, sir.

Q. You had no such conversation with him?

A. No, sir.

Q. What was it prompted you to bring this suit?

MR. FOSTER: Objected to.

Q. Did you have any arrangement with the Mayor of Belmar by which you were to bring it?

MR. FOSTER: Objected to.

THE COURT: Objection overruled.

A. Yes, sir.

Q. What was that arrangement?

George H. Heyniger — Cross

MR. FOSTER: Objected to.

THE COURT: Objection overruled.

A. He wanted me to bring suit against Mr. Levinsohn for building over the line.

BY THE COURT:

Q. The Mayor did?
A. Yes, sir.

FURTHER CROSS:

Q. Why should he come and seek you out?

MR. FOSTER: Objected to.

THE COURT: Objection sustained.

Q. How far away is your house from this store?
A. I suppose between eight and nine hundred feet.
Q. This proposed construction of this building 3 feet and some inches out beyond the building line would not cut off your vision any from your place, would it?

MR. FOSTER: Objected to as immaterial.

THE COURT: Objection overruled.

A. No, sir.
Q. And why was it, then, that you are interested in bringing this suit?

MR. FOSTER: Objected to.

THE COURT: Objection overruled.

George H. Heyniger — Cross

Q. From the fact that the Mayor asked you to bring the suit, was that the reason why you brought it?

A. No, sir.

BY THE COURT:

Q. Why did you bring it?

A. Because three lots on one side of me, there is an empty lot; on the other side of me, I think it is the third lot, that is an empty lot, and there are about four empty lots in there; now, I did not know but that at any time someone might come along and buy that property and put up a house and go right on out to the lot line.

Q. Wouldn't it be time enough to stop a man who did that when he tried to do it?

MR. FOSTER: Objected to as immaterial.

Q. Was that the way in which the Mayor put it to you when he suggested that you bring this suit?

A. No, sir.

Q. You thought that all out independently?

A. Yes, sir.

Q. And did he agree to see that the suit did not cost you anything?

A. Why, yes.

FURTHER CROSS:

Q. You gave Mr. Levinsohn notice that he would have to stop building in the present location, didn't you?

A. I did.

Q. When did you give him that notice?

A. I think it was in November, 1913; I think it was about the 13th day of November, and it was served the day that I made it.

Q. And who prepared the notice for you?

A. Mr. Cooper.

Q. Do you mean Mr. Cooper, the attorney for the borough here?

A. Yes, sir.

Q. And who suggested the giving of this notice?

A. The Mayor.

Q. And when did he suggest the giving of the notice?

A. A day or so before I served the notice, or had the notice served.

Q. And where were you when he suggested that to you?

A. At my home.

Q. You knew that the Mayor — he told you, I suppose, that he had had the lot surveyed by the city, — borough engineer?

A. Yes, sir.

Q. And he told you that that survey showed that the building was over the building line?

A. Yes, sir.

Q. He told you that?

A. Yes, sir.

Q. And when did he tell you that?

A. That evening.

Q. Hadn't you talked with him about the matter before that?

A. I did not, no, sir.

Q. You had not talked with him about the matter until two or three days before that notice was prepared?

A. I did not, not on this suit.

Q. Had you talked with Mr. Cooper about the location of the building before that?

A. No, sir.

Q. Did you talk with anybody about the location of the building?

A. No, sir.

Q. Do you know the Borough Surveyor?

A. I do, yes, sir.

Q. Who is he?

A. Mr. Emlen was the surveyor.

Q. Did you ever ask him whether the building was over the building line?

A. I don't remember.

Q. You remember he surveyed the lot — fixed the building line, before the building was begun, and then he surveyed it again shortly after ground was broken, you remember that?

A. No, sir.

Q. You never heard of that?

A. No, sir.

THE COURT: You are now speaking of the defendant's property?

MR. WILSON: Yes.

Q. You never heard of that until I asked you that question now?

A. No, sir.

Q. What is the trouble?

A. I heard tell of it before you told me of it just now.

Q. When did you hear tell of it, and from whom?

A. I could not answer that question; I cannot remember the days, and whom I did ask.

Q. Well, it was sometime ago, wasn't it?

A. I don't remember.

Q. You don't remember from whom you heard it?

A. No, sir.

Q. Do you remember from whom you heard it?

A. Why, when Mr. Poole came around to the house that evening, and he gave me the measurements then.

Q. Hadn't you heard it before that, that the surveyor had surveyed this lot?

A. I did not, no, sir.

Q. You never heard it before that time?

A. No, sir.

Q. Well, if you had been awarded this contract that

you bid on and did not get, you would not have brought this suit, would you?

A. Yes, sir, I would.

Q. You would have brought it just the same?

A. Yes, sir.

Q. Whether the Mayor had asked you or not?

A. Yes, sir.

Q. You knew that this building was planned to be beyond the building line as soon as the front walls began to be erected, didn't you?

A. As soon as the foundation wall was laid — the foundation wall; it is concrete.

Q. Do you mean the foundation wall in the front or on the rear, or all three?

A. The concrete foundation on Tenth Avenue.

Q. And as soon as you saw them working on that, then, of course, you knew where the building was to be?

A. I did, yes, sir.

Q. Do you remember when that work on the foundation wall began, about when?

A. Oh, I don't.

Q. Well, you watched the work, I think you have already said, every day?

A. Yes, sir.

Q. You went back and forth on the street?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Mr. Heyniger, in walking by your property, could you, from mere observation, tell whether an excavation was being made 36 or 40 feet back from the curb line?

A. No, sir, I could not.

Q. And in your walk past this property, after they had made the excavation, could you have told the exact line, the distance that it was back from the curb line?

A. I could not.

Q. Could you have told it from observation; were

you able to tell from observation the location of that wall back from the curb line?

A. No, sir.

Q. That is, whether it was within the 40 foot limit or not?

A. I could not.

Q. Could you have told that at the time the first floor beams were laid, from observation?

A. No, sir.

Q. Mr. Heyniger, you were asked whether you were to pay the expense of this suit; do you know of a popular subscription being made in Belmar to bear the expense of this suit?

A. I did.

Q. Did you contribute to that subscription?

A. I did, yes, sir.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. What did you contribute?

A. $5.00.

Q. And have you paid that?

A. No, sir.

Q. And who brought you the subscription list?

A. Mr. Wildman.

Q. Now, I understand you to say in response to your counsel's inquiry, that in passing along the street and seeing the walls constructed, that you could not tell whether that was within or without the building line?

A. I could not.

Q. Is that what you say?

A. I could not.

Q. What did you mean by telling me that you discovered that this building was inside the building line, from having discovered the location of the cement in the front wall; were you mistaken when you made that statement?

A. No, sir, I was not.

Q. How do you reconcile the two statements?

George H Heyniger — Re-cross

MR. FOSTER: Objected to; there is no reconciliation needed.

THE COURT: I will let him explain if he can.

MR. FOSTER: It simply tends to confuse him.

Q. At any rate, whether you could or could not, your statement stands that you did make up your mind that that building was beyond the building line when you saw the concrete used in the building of the front wall; that is what you said, isn't it?

A. Well, I can answer that in a different way.

Q. You need not answer it in a different way; I ask you, didn't you tell me that a few minutes ago?

A. I did not, not that I know of.

Q. That is your recollection of your testimony, is it?

A. Give me that question again, will you?

Q. (Question read.)

A. I don't understand that question; I cannot get it clear.

BY THE COURT:

Q. When did you first discover that this building was beyond the building line?

A. When Mr. Poole told me.

Q. You got the information from Mr. Poole?

A. Yes, sir.

Q. Did you go down there then and look at it?

A. No, sir.

FURTHER RE-CROSS:

Q. That was the first knowledge you had of it?

A. Yes, sir.

Q. You feel quite sure that is the first notice you had of it?

A. Yes, sir.

Q. The first time you had any definite suspicion about it even, I suppose?

A. Yes, sir.

Q. So that your observation of the foundation wall as it progressed, really did not suggest anything to you; that is not where you got your knowledge from?

A. No, sir.

Q. You made an affidavit, which was accompanied by the original bill that you filed in this case, didn't you?

A. Yes, sir.

Q. I ask you if you did not, in your affidavit, incorporate this statement: "Deponent further says, that seeing workmen engaged in erecting the building hereinbefore referred to, and seeing the foundation wall on Tenth Avenue side thereof projected over said building line, and so being or had been erected nearer to the street line of Tenth Avenue than 20 feet; and the defendant intending to erect his said building on said foundation wall, he caused the following notice to be served on the said Abraham Levinsohn and on the contractor in charge of such building." Did you swear to that?

A. I did, yes, sir.

Q. Is it true?

A. Yes, sir.

Q. It is true, is it?

A. It is true that I swore to it.

Q. Now is it true, not only that you swore to it, but that the statement contained in your statement is true; was that true, yes or no; did you swear to what was true, or did you swear to something that is untrue?

A. I swore to the truth.

Q. Then, you did not swear to the truth just now?

MR. FOSTER: I object to that; it is a case of intimidating the witness.

THE COURT: Strike out the question on the ground that it is improper in form.

George H. Heyniger — Re-cross

Q. You have sworn, as I understand it, that this statement which I read to you from the affidavit, was the truth?

A. Yes, sir.

Q. You have said that?

A. Yes, sir.

Q. I ask you if that is the truth, how you are able to explain your statement made here a few moments ago, that your knowledge of the erection of this wall, as it progressed, had not anything to do with your discovery that this building was over the building line?

MR. FOSTER: Objected to.

THE COURT: I will allow the question, and the witness may answer.

Q. (Question read.) Do you understand the question that has just been read?

A. Yes, sir.

Q. What is your answer; are you obliged to think before answering it?

MR. FOSTER: Objected to.

THE COURT: Objection overruled.

A. I am, yes, sir.

Q. Now, then, take all the time you want; I shall not interrupt your thoughts. Do you understand the question?

A. I do not.

Q. If you don't, I won't waste any further time in cross-examination.

HARRY R. COOPER, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. You are an attorney-at-law and counsellor-at-law of this State?

A. Yes, sir, I am.

Q. You are the solicitor for the complainants in these suits?

A. Yes, sir.

Q. You are also the counsel for the Borough of Belmar?

A. Yes, sir.

Q. Did you serve a notice in behalf of the complainant, Mr. Heyniger, in regard to the building of the defendant?

A. Yes, sir.

THE COURT: That is all a matter of record, isn't it?

MR. SNEDEKER: No, sir.

Q. When did you serve that notice?

A. On November 14th.

Q. Of what year?

A. 1913.

Q. How did you serve it?

A. I served it by delivering a copy of it to Mr. Levinsohn, personally, who was then on the premises on which the building was being erected, and I also served one on the party who said he was a Mr. Traub, one of the contractors, who was also on the premises.

Q. Was Mr. Traub working on the building at that time?

A. I think he was.

Harry R. Cooper — Direct

Q. Have you a copy of that affidavit that you served?

A. It is with the papers there; yes, sir, I have.

Q. Is this a true copy of the notice that you served on the defendant and the contractor?

A. It is, yes, sir.

MR. SNEDEKER: I will offer it in evidence.

Marked "Exhibit C. A. 3."

Q. How soon after you served that notice, did you commence the suit in behalf of Mr. Heyniger?

A. I think the bill was filed on the 19th or 20th of November.

Q. Did you obtain a preliminary injunction?

A. We obtained a stay — order to show cause containing a stay.

Q. There was an order to show cause for a preliminary injunction?

A. Yes, sir.

Q. Do you remember when that came on for argument?

A. December 1st; it was before his Honor, Vice-Chancellor Lewis.

Q. And was it decided on that same day?

A. The stay was dismissed on the same day.

Q. Did you make a further application for a preliminary injunction in that suit?

A. I made an application for a re-hearing in the same suit.

Q. And when did that matter come on before his Honor; when did you make that application?

A. Well, just a day or two after that; I think I made the application for a re-hearing; no order to show cause was granted.

Q. Then, did you service any notices in behalf of the complainants, Wildman and Newman?

A. I did, yes, sir.

Q. When did you serve those notices?

A. On December 6th.

Q. How did you serve them?

A. I offered to give them to Mr. Levinsohn in his store, and he would not take them, so I laid them on the counter and called his attention to them.

Q. What did you say to him?

A. I said, "Mr. Levinsohn, I shall have to serve you with a couple of more notices in regard to your building."

Q. Have you copies there?

A. Yes, sir.

Q. What did he say to you?

A. He said, "I don't want any more notices; don't you never come in this store again."

MR. SNEDEKER: I offer these in evidence.

Marked "Exhibits C. A. 4" and "C. A. 5."

Q. Between the time that the notice in the Heyniger suit was served and the time that the Borough suit was commenced, did you have frequent conversations with the Mayor of Belmar, with the other complainants?

A. I saw him or had him on the telephone myself every night.

Q. When you refer to "him," you mean whom?

A. The Mayor; I also saw Mr. and Mrs. Wildman at their house several times.

Q. What about Mr. Newman?

A. And I saw Mr. Newman once or twice, probably oftener.

Q. Did you or didn't you, keep them posted in regard to the transactions in the Heyniger suit?

A. I did, yes, sir.

Q. Where did you live?

A. Belmar, New Jersey.

Q. What part?

A. 609 Sixth Avenue.

Q. And did you see the defendant's building being erected?

A. I did, yes, sir.

Q. Did you notice the property when the excavation was first made?

A. I did not, no, sir.

Q. Did you notice it when they commenced to work on the foundation walls?

A. I did not.

Q. Did you notice it after they had commenced to work on them?

A. I think the first I saw of the property was when I served the notices.

Q. And did you see the condition of the property at the time that you served the Heyniger notice?

A. Yes, sir.

Q. What was the condition of the property at the time that you served the Heyniger notice?

A. The condition of the whole property?

Q. No, the Tenth Avenue side.

A. The wall on the Tenth Avenue side was erected just to the height of the floor boards, on the ground floor.

Q. How far was that above the street?

A. I did not measure it, but I should think not more than one foot, or one and a half feet, if that much.

Q. The photographer who was a witness in this case, has stated that when he took the photograph "Complainants' Exhibit C 10½," he was standing on a lawn; I ask you to look at this photograph and state whether you were in company with the photographer at the time he took it, and if so, on whose lawn the camera was placed when that photograph was taken?

A. I was with Mr. Johnson on a Saturday afternoon; the camera was placed on the lawn of Charlotte Wildman's property.

Q. Is that the property that has been testified to was owned by Mrs. Wildman?

A. Yes, sir.

Q. In this suit?

A. Yes, sir.

Q. Look at "Exhibit C 11½" and state where the camera was placed when that photograph was taken.

A. The camera was placed at the intersection of Tenth Avenue and E Street.

Q. The witness, Mr. Heyniger, has testified that you were present with him when a measurement was made of the distance from the curb line to the North wall of this property?

A. He said "a Mr. Cooper;" I was the Mr. Cooper who was with him.

Q. And what was that distance?

A. The distance was 36 feet 5¼ inches, I think; it was 36 feet and some inches.

Q. Mr. Heyniger said that he attempted to make a measurement at some other place, and spoke of something being in the road; do you know about that?

A. Yes, sir, there were bricks, not in the road, but in the road between the building and the path that we would have to walk on between the building and the curb; there were bricks and timbers, and there was ice and snow lying around there, one or two trees at different places inside the curb.

CROSS-EXAMINATION BY MR. WILSON:

Q. You are the Borough attorney?

A. Yes, sir.

Q. And were as late as last September and October?

A. Yes, sir.

Q. When were you directed or requested by any borough official to give any attention to this building — this proposed building?

A. After it had been started, after the Heyniger suit had been started by the borough officials.

Q. You started the Heyniger suit?

A. Yes, sir.

Q. That was started by you in your private capacity?

A. Yes, sir.

Q. Was not there some action taken by the Mayor?

A. The Mayor and I were in communication about it.

Q. Before the Heyniger suit?

A. Yes, sir.

Q. And you understood my original question, didn't you?

A. Well, did you mean official action? I understood you to mean official action.

Q. I did not say so; I ask you when any official of the borough requested or directed you to give this matter any attention?

A. Well, it was somewhere around — Mayor Poole and I talked the matter over about the time that the notice was served in the Heyniger suit.

Q. That was not served until about the 14th of November?

A. That is correct, the 14th of November.

Q. Do you mean to say you understand that you had no talk with the Mayor about this proposed construction until about the 14th of November?

A. You did not ask me that; you asked me when I was directed to give attention to it; I said about that time.

Q. When, prior, to that time, did you have any talk with the Mayor about this proposed construction?

A. Around the first of November; the first few days in November, I think.

Q. Did you have any talk with him until after the suit had started?

A. I did, yes, sir.

Q. Well, the building did not start until the 9th of October; your present statement is, that you talked with him about it before the building was started; is that right?

A. I did not say that.

MR. SNEDEKER: I object to that, because there is nothing on the record when the building started.

THE COURT: It is improperly put in that way, I think; strike it out.

Q. If it should appear that this building was started on or about the 9th of October, it would follow, therefore, that you had talked with the Mayor about this matter at or about that time, wouldn't it?

MR. SNEDEKER: I object to that.

THE COURT: I think the form of that question is all right.

A. No, sir, not necessarily.

Q. In view of your previous statement, wouldn't it follow that you had talked with him before, or about the time the building was started?

A. Well, before I knew that the building had been started; I don't know when the building was started; I did not see the building when it was started.

Q. When did you first know that the building was started?

A. I first knew that the Tenth Avenue wall was in course of construction ——

MR. WILSON: That is not responsive.

Q. When did you first know that the building was in process of construction — not the Tenth Avenue wall ——

A. I think a few days before the notice was served in the Heyniger suit.

Q. You knew of the proposed construction sometime prior to that?

A. Yes, sir.

Q. How long prior to that?

A. I did not make any record of the time; it could not have been very long.

Q. You think you did have some knowledge of the proposed construction about the time the building began?

A. I knew there was some talk that he intended to put a building there.

Q. You knew that before he built the building?

A. Yes, sir.

Q. And from whom did you get that?

A. It was generally talked around the town that Mr. Levinsohn was going to put up a nice building.

Q. Did Mr. Heyniger come to see you about this affair, about bringing this suit?

A. Yes, sir.

Q. Where did he see you?

A. At my house, 609 Sixth Avenue.

Q. He says that he made an arrangement by which he was not to pay for the cost of this suit; did he make that arrangement with you?

A. He did not.

Q. You knew of that arrangement?

A. Yes, sir.

Q. And had not demanded any payments from him for your services for that individual suit?

A. No, sir.

Q. And you don't expect to?

A. I don't know but what I do.

Q. Do you mean to say that you do, in face of your knowledge of an arrangement by which he was to be relieved of any expense; you say you have knowledge of that arrangement?

A. Yes, sir.

Q. Do you remember being present as a member of the Borough Council, at a meeting of the Borough Council before ground was even broken on this lot, in which the matter was brought to the attention of the Council, that the defendant here proposed to construct a building within the restricted building line?

A. I don't remember it, no, sir.

Q. You don't deny you were at such a meeting?

A. Unless you can fix a time.

Q. I say, before the suit was begun?

A. I don't deny it, because I don't remember it.

Q. Do you remember attending any meeting where this building line was discussed?

A. Yes, sir, but whether it was before or after we started, I don't recall; my impression is, that it was not until after the building was started that they held the meeting.

Q. But you are not sure of that?

A. No, sir — if you can fix a date ——

Q. What better off would you be if I should fix the date?

A. I don't know that I would be any better off.

Q. How many meetings did you attend about this building restriction, particularly in reference to this — I ask you if it is not true that two weeks before you filed a bill in that Heyniger suit, there was a meeting of the Council at which you were present, when the whole matter of this building was discussed, and the propriety of having this suit instituted was made; did you attend every meeting?

A. Not every meeting, no, sir.

Q. Don't you recall being present at such a meeting, and at the time indicated, at which Mr. Levinsohn was present?

A. I recall one meeting when Mr. Levinsohn was present.

Q. But you don't know when?

A. No, sir; my impression is, however, that he was present and brought up the question after the Heyniger suit had been started.

Q. So that your best recollection is now, that there was no such episode before the suit was started?

A. I did not say that; I said I knew of one meeting when he was present after the Heyniger suit was started —

Q. Have you got the Borough minutes here?

A. No, sir, I have not — what minutes do you want?
Q. The Borough minutes.
A. They are in several volumes.
Q. For October and November of last year?
A. I have not, no, sir.
Q. Have you got any of the Borough minutes here?
A. Yes, sir.
Q. Covering what period?
A. I don't see that that is relevant.

THE COURT: I think it is relevant.

A. I think they started in 1901.
Q. How far do they go down?
A. I don't remember.

MR. WILSON: May I examine the minutes?

THE WITNESS: I have no objection.

Q. Are you willing, without further notice or formality, to produce the minutes of the Board covering the months of September, October, November and December, 1913?

A. Yes, sir, but I have not got them here, they are in Belmar.

Q. But you will produce them at the subsequent hearing without any further notice?
A. Yes, sir.
Q. You measured this building last night?
A. Yes, sir.
Q. Why did you do that?
A. To satisfy ourselves how far out it was.
Q. Hadn't you been satisfied before?
A. Only from your admissions and your pleadings.
Q. If you were satisfied, why did you measure again?
A. To satisfy ourselves.

Joseph McDermott — Recalled — Cross

Q. You allege that the building was 3 feet 9 inches over, in the bill?

A. Yes, sir.

Q. Your measurements last night did not bear you out, did they?

A. No, sir.

Q. Whose fault was that?

A. It was dark in the first place; there was ice in the way, and there was any amount of debris and building material between the curb and the building.

Q. And all that goes to prove that we are not to put much reliance on the measurements you made last night?

A. I don't know that you can put much reliance on the measurements made last night.

JOSEPH McDERMOTT, being recalled for cross-examination, testified as follows:

CROSS-EXAMINATION BY MR. WILSON:

Q. You have already produced a map of Belmar?

A. Yes, sir.

Q. Filed in your office?

A. Yes, sir.

Q. Is there still another map of Belmar on file in your office?

A. Yes, sir.

Q. Have you the original of it here?

A. No, sir.

Q. I show you this, and ask you what it is.

MR. SNEDEKER: I object to him answering, unless he first states that he knows what it is.

Q. State what it is, if you know.

A. Yes, sir.

Q. What is it, sir?

Joseph McDermott — Recalled — Cross

A. This is a map of Belmar, formerly Ocean Beach, Monmouth County, New Jersey, made in 1895 by J. H. Whittaker, a surveyor of Trenton; this is a reproduction of that map.

Q. Of which map?

A. This is a reproduction of the map in the County Clerk's office, made by Mr. Whittaker.

Q. And filed by him?

A. I cannot tell you who it was filed by. I know it is filed.

Q. And it purports to be signed by whom?

A. The names of the directors are printed upon it, the directors of the Ocean Beach Association, are printed upon it.

Q. Are they printed upon the original, too?

A. My recollection is, that they are printed upon the original.

MR. WILSON: I offer this in lieu of the original map.

THE WITNESS: These marks in pink are not upon the original map.

Q. But in other respects, it is the same?

A. It is a reproduction of that map.

Q. And when you speak of the spots in pink, are you alluding to certain lots shown upon the map, or tracts of land shown upon the map?

A. Yes, sir.

Q. You are not alluding to the red line which is indicated to you as the commissioners' exterior line; you are not alluding to that?

A. My recollection is, that that is upon the original map.

MR. WILSON: I offer it.

Joseph McDermott — Recalled — Cross

MR. SNEDEKER: I object to it as not the best proof.

THE COURT: I allow it as to competency — if the original is produced here, I will admit it in evidence.

BY THE COURT:

Q. How long has that map been in the office?
A. Since 1896.

FURTHER CROSS:

Q. What use, if any, has the Ocean Beach Association made of the map, within your knowledge?

MR. SNEDEKER: Objected to; he is incompetent to testify to that.

THE COURT: Objection overruled.

A. I have no knowledge whatever about it.
Q. Do you know by whom this was filed in the office?
A. No, sir.
Q. And do your memorandums show when it was filed?
A. July ——
Q. Is there anything to show by whom it was filed?
A. No, sir; that was not put on the maps at that time; I do it now.
Q. And you are unable to say whether the names of the directors, as they appear upon the map, are in writing or printed?
A. I am quite sure that they are printed, sir.

BY THE COURT:

Q. Printed on the map?

Joseph McDermott — Recalled — Cross

A. Yes, sir.

FURTHER CROSS:

Q. And this legend, either printed or written, appears upon the map: "Directors of Ocean Beach Association;" then follow their names, with offices of president, vice-president, treasurer and secretary designated, and beneath, the legend "For information pertaining to title, the title numbers of lots, etc., inquire of either of the above directors;" that is also upon it, is it?

A. I don't remember that; I don't remember the bottom part.

THE COURT: I will sustain the objection to the offer of this map at present.

MR. WILSON: You will have to produce the original map, Mr. McDermott. There is only one other question I want to ask you.

Q. Do you know, as a matter of fact, whether the Ocean Beach Association is still extant as a corporation, or was, to your knowledge, up to quite recently?

A. It was up to quite a recent time.

Q. It was doing business?

A. I know that deeds were put on by them within two or three years last past.

Q. Did you notice the dates of the deeds?

A. No, sir.

Q. Do you know whether or not the company deeds have been recorded, purporting to come from the company, since 1895, that made reference to this map?

A. I cannot answer that question.

Q. Will you look that up as a part of the information for us when you come again?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. When you state that the Ocean Beach Association was extant some few years ago, you base that information simply on the fact that some deeds had been recorded in the office?

A. No, sir, upon some information that I had about it.

Q. But not with any personal transaction with the association?

A. No, sir.

MR. SNEDEKER: Then I move to strike out that answer, if your Honor please. I move to strike all his testimony out.

THE COURT: That part can be struck out.

Q. The deeds that were recorded, you don't recall even the date of those deeds?

A. No, sir.

Q. Do you know whether Whittaker is living or not?

A. No, sir.

RECESS TO 2 P. M.

AFTER RECESS

ARCHIBALD WOLVERTON, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. What is your business?

A. Mason and builder.

Q. Do you know Mr. Levinsohn, the defendant in this case?

A. Yes, sir.

Q. Were you the contractor or sub-contractor of this building?

A. Sub-contractor.

Q. Did you do the mason work on this building?

A. Yes, sir.

Q. Before you commenced the erection of this building Mr. Levinsohn built at the Southeast corner of Tenth Avenue and F Street, did you make any measurements to determine where the building should be set?

A. Yes, sir.

Q. Will you state what measurements you made, and from what point?

A. As near as I can measure from the way the curb was, it was 40 feet, from the outside of the curb.

Q. Did you set stakes in that position?

A. Yes, sir.

Q. Was the building erected in that position with the Tenth Avenue wall 40 feet back from the curb?

A. No, sir, it was not.

Q. How far back from the curb was the building erected?

A. I did not measure it.

Q. Did you make any other measurements, except the 40 feet that you measured off back from the curb?

A. No, sir.

Q. Did you set stakes in any other position except the 40 feet that you measured off from the curb?

A. Not that I remember of.

Q. Do you not recall, Mr. Wolverton, that you set your stakes approximately on the 38 feet line from the curb?

A. I set my stakes 40 feet.

Q. Originally, you are speaking of?

A. Yes, sir.

Q. After you set your stakes 40 feet from the curb, did you reset those stakes?

A. The surveyor pulled my stakes out.

Q. Before that, did a surveyor set stakes on the property?

A. He set an iron stake there.

Q. In what position were they?

A. He pulled mine out, practically; he set his 40 feet back.

Q. How near the place where you set your stakes were these stakes of the surveyor placed? In the same hole?

A. I should imagine within three-quarters of an inch.

Q. If you set your stakes originally, did you have occasion to re-set those stakes, or did you re-set those stakes after you first set the stakes?

A. I told Mr. Levinsohn that that was the building line.

Q. What did Levinsohn say to you?

A. He said, "Move them over."

Q. Did he tell you how far to move them over?

A. About two feet, I guess.

Q. Did you re-set those stakes in accordance with Mr. Levinsohn's instructions?

A. Yes, sir.

Q. You said you set them over; do you mean two feet over towards the curb, or two feet back?

A. I don't just get that question.

Q. When you set the stakes down again, put them down again, were your instructions to put them two feet nearer the curb?

A. We had to move them over.

Q. How many feet ——

A. About two feet.

Q. Nearer the curb?

A. Yes, sir.

Q. Now, after you re-set those stakes two feet nearer the curb, do you know what Mr. Levinsohn did to the stakes; what did you see Mr. Levinsohn do with the stakes after you had put them down the second time? After you fixed those corners, what did Mr. Levinsohn do with the stakes, if you know?

A. I don't know anything about what he did with the stakes.

Q. Do you know whether he re-set those stakes after you had set them?

A. No, sir, I don't know.

Q. Did he, or didn't he, move those stakes?

A. I don't know whether he did or not.

Q. You know whether or not you erected that structure on the line on which you re-set the stakes, or whether you erected it on some other line nearer the curb; now, as a matter of fact, was that erected nearer the curb than you set the stakes?

A. Nearer than I set the original stakes.

Q. How far, if you know, nearer the curb was that building erected than you set the stakes originally?

A. I did not measure them from the curb.

Q. How far North of the line of stakes, as you reset them, approximately, was that building erected?

A. About 3 feet 9 inches from the original stake.

Q. Now, how did you come to erect that building so much further North of the building line than you originally staked it out?

A. According to Mr. Levinsohn's instructions.

Q. What were those instructions to you from Mr. Levinsohn?

A. "There is the line — build it there."

Q. Then Mr. Levinsohn told you where he wanted the stakes of that building set, and where he wanted you to commence and build a foundation?

A. Yes, sir.

Q. And you set those stakes over and beyond the 40 foot line, and beyond the 38 foot line, and erected the foundation of that building nearer to the curb, 3 feet 9 inches nearer the curb than the building line?

A. We did not drive stakes to draw a line on the stakes.

Q. You lined it up?

A. Yes, sir.

Q. Your building was erected on that line, approximately 3 feet 9 inches nearer the curb than the 40 foot line?

A. Yes, sir.

Q. In accordance with Levinsohn's instructions.

A. Yes, sir.

Q. Did you call Mr. Levinsohn's attention to the fact that he was going over the building line?

A. Yes, sir.

Q. What did he say to you in response to that?

A. He said he did not have room enough to put his building up and go over that distance.

Q. Did you call his attention to the fact that by going over that line he might get into trouble?

A. I said they might serve an injunction on him.

Q. Didn't you have some question in your mind as to whether you might not be responsible?

A. He said he would take the responsibility.

Q. When you called his attention to that fact?

A. Yes, sir.

Q. Was anyone present at the time, at this conversation with Mr. Levinsohn?

A. I can recall one, Mr. Rosenfelt.

Q. Is Mr. Rosenfelt in the room?

A. Yes, sir.

Q. Were there any others that you know of?

A. There were others there, but I cannot recall their names.

NO CROSS-EXAMINATION

JACOB ROSENFELD, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Mr. Rosenfeld, where do you live?

A. Belmar.

Q. On what avenue?

A. Tenth Avenue.

Q. On the corner of Tenth Avenue?

A. Corner of Tenth Avenue and E Street.

Q. On what side of the street?

A. On the same side as Mr. Levinsohn's building, and in the same block.

Q. Were you present at a conversation between Mr. Wolverton and Mr. Levinsohn in regard to setting his stakes?

A. Yes, sir.

Q. Will you give the substance of the conversation that you heard between Mr. Levinsohn and Mr. Wolverton?

A. I just happened to be round there when Mr. Wolverton staked out the building, and after they were all through, Mr. Wolverton measured from the curb up to the stake, and made the remark, "Mr. Levinsohn is over the building line."

Q. Made that remark to Mr. Levinsohn?

A. Yes, sir.

Q. Did he say how far?

A. I cannot remember, but I believe it was over two feet.

Q. Do you know what Mr. Levinsohn said to Mr. Wolverton in response to that question?

A. The remark Mr. Levinsohn made, he said, "It is all right, go on."

Q. At that time, Mr. Rosenfeld, no part of the building had been erected?

A. No, sir.

Q. Had any excavation been made, any digging?

A. No, sir, no digging yet.

Q. Now, two or three days after this line was given, which was apparently, you think, two feet over, did you have occasion to pass the property again?

A. Well, yes, I stopped there one morning.

Q. Did you notice anything particularly in regard to the line as it then appeared to be laid out?

A. There were several others standing round there, and one of them said, " This is more than two feet."

MR. WILSON: Objected to.

Q. Was Mr. Levinsohn there then?

A. No, sir, Mr. Levinsohn was not round there.

Q. What did you notice; did you notice anything in regard to line; you saw where the line was originally set?

A. It looked like as if the stakes had been removed.

Q. In what direction?

A. Towards the curb.

Q. Approximately, what distance?

A. I would not like to say, because I did not measure it.

Q. Was it as much as six inches?

A. Probably a little over.

Q. Was it as much as a foot?

A. (No answer.)

Q. Now, Mr. Rosenfeld, did you say anything to Mr. Levinsohn at the time in regard to the line apparently being placed nearer the curb than where he had originally placed it?

A. I did not have any conversation with Mr. Levinsohn; the only one I had a conversation with was Mr. Wolverton.

NO CROSS-EXAMINATION

FREDERICK G. LAKE, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. What is your business?

A. Architectural designer.

Q. Where do you live?

A. Newark, New Jersey.

Q. Were you the architect — do you know Mr. Levinsohn?

A. Yes, sir.

Q. Were you employed by him to draw the plans of the building that was erected at the Southeast corner of Tenth Avenue and F Street, Belmar, New Jersey?

A. Yes, sir.

Q. Did you draw those plans?

A. Yes, sir.

Q. Did those plans show on them the building in relation to any line, or was there no building line shown?

A. No, sir, there was no building line shown.

Q. Did the plans show the location, on the property, of the building?

A. No, sir, no lot map.

Q. What were the dimensions of the building on the F Street front?

A. 40 feet.

Q. Did you have any conversation with Mr. Levinsohn at or just previous to the time you drew these plans in regard to the placing of his building?

A. Well, I looked the property over in common with Mr. Levinsohn, and I asked about the building being situated on the property.

Q. You knew, Mr. Lake, didn't you, that there was a building line in the Borough of Belmar?

MR WILSON: Objected to.

THE COURT: I don't think it makes any difference.

Q. Did you call Mr. Levinsohn's attention to the fact that he had not observed the building line?

A. No, sir.

Q. Did you discuss with him in any way the question

of where the building was to set in regard to the relation of the building line?

A. No, sir.

Q. Or in relation to the curb?

A. No, sir.

Q. Did you ever talk to him at all about the building line?

A. No, sir.

Q. Did he ever talk to you at all about the building line?

A. No, sir, the building line question was never taken up with me.

CROSS-EXAMINATION BY MR. WILSON:

Q. The plan showed a building design fronting on Tenth Avenue?

A. It being a corner building, there was a frontage on F Street and also on Tenth Avenue.

Q. And did the plan show the width of the building on Tenth Avenue?

A. That is the length of it — what I call the length.

Q. It also showed the depth of the building at F Street?

A. Yes, sir.

Q. Did you furnish those plans to any of the contractors?

A. I furnished them all to Mr. Levinsohn, who, in turn, furnished them to the contractor.

Q. You had nothing to do with the distribution?

A. No, sir.

RE-DIRECT EXAMINATION BY MR. COOPER:

Q. Was there more than one set of plans?

A. Yes, sir.

Q. You say there was more than one set of plans?

A. Yes, sir, I belivered five sets of plans and specifications.

Q. Was the width of the building as shown on all these plans the same?

A. Oh, yes, they were all alike.

WILLIAM A. ROBINSON, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Where do you live?

A. Belmar.

Q. How long have you lived there?

A. I have been there about 31 years.

Q. What is your occupation?

A. Contractor and carpenter.

Q. How long have you been a contractor and builder?

A. About in the neighborhood of 18 years, I should judge.

Q. During your experience as a contractor and builder, have you built or worked on many buildings in the Borough of Belmar?

A. Yes, sir, several of them.

Q. About how many?

A. Well, about seven or eight.

Q. On avenues?

A. Yes, sir, running East and West.

Q. Now, on the avenues running East and West of these buildings that you have erected, where did they set, approximately, in relation to the curb?

MR. WILSON: Objected to as immaterial.

THE COURT: Objection overruled.

A. 40 feet from the curb.

CROSS-EXAMINATION BY MR. WILSON:

Q. There have been a good many buildings located less than 40 feet from the curb, too, haven't they?

A. That I know nothing about — about the buildings less than 40 feet.

Q. How did you happen to know about buildings that are just 40 feet?

A. Because I build them myself, or worked on them.

Q. How many have you worked on?

A. Well, I don't know exactly how many.

Q. Seven or eight, did you say?

A. That I have built myself, and I have worked on some others.

Q. Did you work on any on Tenth Avenue?

A. No, sir, not new ones, no, sir.

Q. You worked on no buildings on Tenth Avenue?

A. Not new ones, no, sir.

Q. And when you speak of buildings being constructed 40 feet distant from the curb line, you are confining yourself wholly to buildings that you worked on, and so knew about?

A. Yes, sir.

Q. Some seven or eight in number?

A. Yes, sir.

Q. The buildings that you did not work on and did not build yourself, you don't know whether they are inside or outside?

A. No, sir.

Q. You say you are a general contractor?

A. Yes, sir.

Q. You took down the foundation walls?

A. I generally employed the masons to do that.

Q. Is it a custom of your business to recognize this 40 foot line on the avenues, when you are putting up any buildings?

A. Yes, sir.

Q. And the buildings that you constructed, you made the main wall 40 feet from the curb line?

A. Yes, sir, as a general thing I put it an inch more so as to be sure of it.

Q. And these buildings that you constructed, did they have any bay windows on them?

A. I don't think they had, that I can remember just now.

Q. You don't remember?

A. I don't think they had ——

Q. You say you don't remember?

A. I say I don't think there were.

Q. You have no very distinct recollection of it?

A. If I had time to take it up, I could tell you.

Q. Did they have piazzas in front?

A. Yes, sir.

Q. Did the piazzas go out into the 40 foot limit?

A. Yes, sir.

Q. Your statement is, that you made the front wall 40 feet 1 inches for good measure?

A. About that — I generally try to get it a little over 40 feet so as to be sure of it.

Q. Did these houses that you constructed have an overhang to them — did the eaves overhang?

MR. COOPER: Objected to.

A. One did, but that one the wall set back two feet to allow for the overhang on the second floor — that one.

Q. What one was that?

A. That is on Ninth Avenue, next door to where Mr. Poole lives, between E and D Streets, second house from E Street on the North side of Ninth Avenue; Mr. Frazey lives in it.

Q. And it was because you regarded the overhang as a part of the violation of the building line, that you moved that house further back?

A. I set the foundation back far enough to allow for an overhang overhead.

Q. So that it could not be said to be an encroachment on the building line?

A. So that the two foot floor would come within the restriction of the 40 feet.

Q. And if you had been building a house with a bay window, you would have set it back so as to allow for a bay window?

MR. COOPER: Objected to.

THE COURT: Objection overruled.

A. Yes, sir.

Q. Was that the customary rule of building there?

A. That I could not tell you exactly; I would set it back myself if I had it to do, so as to be inside of the restrictions?

Q. But what other people did, you don't know?

A. No, sir, because we never measured up to find out.

BY THE COURT:

Q. You regarded that as within the prohibited restrictions?

A. I would think so; that is my view of it.

Q. How many contractors are there down in Belmar?

A. Six or eight of them.

Q. You are familiar with the trade, are you?

A. Yes, sir.

Q. Is this 40 foot line recognized generally in the trade that you are a member of?

A. Yes, sir.

FURTHER CROSS:

Q. You have said that this 40 foot building line was generally recognized in the trade?

A. Yes, sir.

Q. And does the trade generally recognize the need for a bay window?

A. I don't know anything about what the rest would consider; I would put it back myself.

Q. What about the overhang?

A. The overhang — I consider that the main building.

Q. Is that what is generally considered among the contractors, that the overhang is a part of the main building?

A. Yes, sir.

Q. And generally considered so in the street?

A. Not the bay windows.

RE-DIRECT EXAMINATION BY MR. COOPER:

Q. What do you mean by "overhang?"

A. Your foundation is here, your first story there, and your second story ran over.

Q. So you mean a second story encroachment?

A. Yes, sir.

Q. What about the eaves?

A. I never paid any attention to them, because they are part of the cornice and not part of the building.

Q. Now, Mr. Robinson, what is your knowledge as a contractor and carpenter, of the way the carpenter there in general has treated piazzas in Belmar?

MR. WILSON: Objected to.

THE COURT: In what respect?

MR. COOPER: As a carpenter and builder.

THE COURT: Where?

MR. COOPER: In Belmar.

THE COURT: I will let him testify to that.

MR. WILSON: We ask to enter our objection.

THE COURT: Yes, and the objection is overruled.

Q. What is your knowledge as a carpenter and builder? How long have you been in the contracting and building business?

A. About 18 years.

BY THE COURT:

Q. Do you regard piazzas as part of the main building or not?

A. No, sir, I do not.

Q. Now, Mr. Robinson, what is your knowledge as a contractor and carpenter of the way the carpenter there in general has treated piazzas in Belmar?

A. They are not considered as part of the building; that is, as far as the restriction goes to keep back the 40 feet.

Q. You are a property owner in the Borough of Belmar?

A. Yes, sir.

Q. On some of the avenues?

A. On Eighth Avenue.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. Have you got any overhang on your house?

A. No, sir, not the second story, only the cornice, that is all.

Q. How far back is your house?

A. 40 feet, it may be 40 feet 1 inch.

Q. Do your eaves overhang any?

MR. COOPER: Objected to.

A. The eaves do, yes, sir.
Q. Overhang into this 40 feet?
A. Yes, sir.
Q. How much?
A. They overhang about 18 inches, probably it might be 20 inches.
Q. Have you any bay windows in your house?
A. No, sir.
Q. Have you got a piazza?
A. Yes, sir.
Q. That goes out into this building line?
A. Yes, sir; the house is back about 40 feet, and the porch is on that; the porch on two of them is 10 feet, it might be 9 feet 8 inches or 9 feet 10 inches, or 9 feet 11 inches.
Q. Then the porch would extend out 9 or 10 feet beyond the building line?
A. Yes, sir.
Q. You have two houses, you say?
A. A double house and two single houses together, all owned by me.
Q. Any bay windows on any of them?
A. No, sir.

DR. CHARLES EVERETT, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. How long have you lived in the Borough of Belmar?
A. A little over 21 years.
Q. And where in the Borough of Belmar do you live?
A. Ninth Avenue and E Street — second house from the corner.

Q. That is adjoining the church?

A. Yes, sir.

Q. And you are the pastor of that church?

A. I am, yes, sir.

Q. Have you, since you have lived in the Borough of Belmar, ever had people speak to you in regard to the observations of this building line?

MR. WILSON: Objected to as immaterial.

THE COURT: I will rule it out.

Q. What is the general knowledge of the people of Belmar, that you have conversed with?

MR. WILSON: Objected to.

THE COURT: Objection sustained.

Q. Dr. Everett, do you know how far back from the curb line the parsonage in which you live is erected?

A. I do not, by measurement — but by sighting it with the houses on the line, it is beyond or at the 40 foot line from the curb.

Q. When you say "beyond" you mean within?

A. Yes, sir.

Q. Have you measured it?

A. No, sir.

Q. The parsonage then appears, doesn't it, to line up with the other houses in the block in which you live?

A. It does.

MR. WILSON: Objected to as leading.

Q. Does the parsonage in which you live appear to line up with the other houses on the block?

A. It does, yes, sir.

Q. Do you know, Dr. Everett, of this building line restriction?

A. Yes, sir, I know of it as referred to in the deeds, and then from frequent conversations with builders and those who are proposing to erect structures; I have talked with many of them, all the years I have been in Belmar.

Q. How long have you known of this, Dr. Everett?

A. 21 years; all the time I have been in Belmar it has been spoken of frequently.

Q. So far as your observation goes, has that line been conformed to?

MR. WILSON: Objected to.

Q. (Continued) Referring to the 40 foot line from the curb?

A. It is uniformly observed.

Q. During the time that you have resided where you now reside, was a building next to you erected, a building on the West?

A. Yes, sir.

Q. When was that, approximately?

A. I should think about seven or eight years ago.

Q. Do you know whether, when that building was in the course of erection, it was set on a line with the other buildings?

A. Yes, sir, an injunction was served when they began.

Q. Was it set over the line in the first instance?

MR. WILSON: Objected to as immaterial.

MR. COOPER: I am speaking of the building on the West of him that was erected during his residence in Belmar.

THE COURT: The objection is overruled.

A. The foundation and first story were erected on the line, and a portion of the second story was constructed, and then they began running out extensions for the overhang — that is referred to in the second story — of two feet; and the adjoining neighbor called attention to the fact, and insisted that it be moved back. Of course, he paid no attention until an injunction was served, and work was stopped for some time, and just preceding the hearing of the case the lawyers advised ——

MR. WILSON: I submit we cannot be bound by this.

Q. What was done with the building?

A. The building was moved back to conform with the building line.

CROSS-EXAMINATION BY MR. WILSON:

Q. This overhang was in the nature of a bay window?

A. No, sir.

Q. What was the matter with it?

A. The foundation of the building and the first story was erected on the building line, and the second story ran on the floor joist, ran out two feet beyond, in order to have more bedrooms upstairs. This being beyond the line, was the reason for the objection.

Q. What has been your knowledge of the rule which prevailed there in respect to bay windows?

MR. FOSTER: The same objection.

THE COURT: Objection overruled.

A. My observation has been that there has been an allowance made in the foundation for the purpose of building the bay windows.

Q. That is to say, they moved the foundation a little further back?

A. They started it.

Q. And that is what they do in the case of an overhang?

A. Yes, sir.

Q. And you speak of the 40 foot rule being generally observed on Tenth Avenue; do you know how many houses there are on Tenth Avenue?

A. I do not ——

Q. Would you say there are, approximately, 100?

A. I would think that more than one-half of the lots are occupied.

Q. Houses and other structures?

A. Yes, sir.

Q. On Tenth Avenue you would think there are about 100?

A. I would think so, yes, sir; I think about half of all the lots on Tenth Avenue are built upon.

Q. Now, doctor, do you know whether any of those 100 structures on Tenth Avenue have bay windows or an overhang, extending into this building restriction region?

MR. FOSTER: Same objection.

THE COURT: Objection overruled.

A. I think not, Mr. Wilson; I have simply sighted them out from the general line.

Q. You have not made any measurements?

A. No, sir.

Q. And if you were told that any particular house had an overhang or a bay window invading this 40 foot strip, you would have no definite knowledge by which you could contradict it?

A. No, sir.

Q. What avenue is your house on?

A. Ninth Avenue and E Street, or second to the cor-

ner — the church is on the corner — we are the second lot.

Q. How far is the church back?

A. All on the 40 foot line.

Q. The church is?

A. Yes, sir.

Q. You mean the main foundation?

A. Yes, sir.

Q. That is right on the 40 foot line?

A. Yes, sir; it lines up with the others.

Q. Is there any overhang on the church?

A. The eaves.

Q. The eaves overhang, don't they?

A. Yes, sir.

MR. COOPER: Objected to.

THE COURT: Objection overruled.

A. (Continued) It is not the eaves; I think that is a portion of the roof that runs over.

Q. Does the gable end of the roof, then, run over this 40 foot line?

A. Yes, sir.

Q. How much — two or three feet?

A. Well, it is a pretty good solid roof; I should think somewhere near two feet.

Q. Has the church a stoop?

A. It has a vestibule, but nothing on the avenue; it has two sides, on the rear and in the front, but not in the front of the building, not adjacent to the street.

Q. Does the church front on E Street?

A. Yes, sir.

Q. How near to E Street is the front of it?

MR. COOPER: Objected to as immaterial.

THE COURT: What is the object of the question?

MR. WILSON: Well, the object of the question — I don't think that in the proofs we are confined at all to any building line that may have obtained upon Tenth or Ninth, or any other avenue. I think we are entitled to show what rule prevails in all the streets of Belmar, and whether that rule was such as to lead the Court to conclude, as a matter of fact, that there had been an abandonment of a scheme, provided it was shown there ever had been a scheme. (Continues argument.)

THE COURT: I will allow the question to stand.

MR. SNEDEKER: We object to it on the ground that it is immaterial and irrelevant to this issue entirely.

THE COURT: The objection is overruled.

Q. I ask how near it was to E Street?

A. I think it is beyond the 15 feet — that is, it is back further than the 15 feet.

Q. How much further than 15 feet; it is considerably less than 40 feet from the curb, isn't it?

A. Yes, sir.

Q. It is considerably less than 40 feet, isn't it?

A. Yes, sir.

EGBERT NEWMAN, sworn in behalf of the Complainants, testified as follows:

BY THE COURT:

Q. Where do you live?

A. Belmar.

Q. What is your business?

A. Mason and contractor.

Q. Have you constructed any houses there?

A. Probably 50 or 100.

Q. How long have you lived there?

A. I have lived in Belmar proper since 1907; I have been in business 14 years.

DIRECT EXAMINATION BY MR. COOPER:

Q. You have laid the foundations, or help to lay the foundations, of many houses in Belmar?

A. Yes, sir.

Q. What has been your custom in measuring for the setting of those foundations on the avenues?

MR. WILSON: Objected to.

A. In some cases the owners provided a survey; in other cases, we would either take a tape line or measuring rod, and measured back at least 40 feet, in some instances more.

Q. 40 feet from what point?

A. From the curb.

Q. Did you ever put down a building within the 40 foot line?

A. One — that is, not a whole building — I started an addition to one.

Q. Where was that?

A. That was on Tenth Avenue, between F Street and the railroad.

Q. What building was that?

A. That was Barcalow stables.

Q. Did you finish that building?

A. No, sir.

Q. Why not?

MR. WILSON: Objected to as immaterial.

Q. What did you do with it?

A. We got the foundation up to the top of the ground. and were served with an injunction to stop.

Q. Did you complete that on the foundation on which you started to erect it?

A. It was not completed.

Q. Did you ever work on it afterwards?

A. No, sir; it was simply an office building for the front of his stable.

Q. You never worked on it afterwards?

A. No, sir, no one did.

Q. Was the building ever completed?

A. No, sir.

NO CROSS-EXAMINATION

WILLIAM L. HEYNIGER, JR., sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Where do you live?

A. Tenth Avenue and E Street, Northwest corner.

Q. Borough of Belmar?

A. Yes, sir.

Q. How long have you lived there?

A. About 11 years this April.

Q. How long have you lived in the Borough of Belmar?

A. Most of the time for about 40 years.

Q. What is your business?

A. I follow the mason business.

Q. How long have you been in the mason business?

A. Thirty odd years.

Q. During all that time in the Borough of Belmar?

A. No, sir.

Q. How long have you worked in the Borough of Belmar as a mason?

A. I suppose, all together, about 25 years.

Q. Have you built or worked as a mason in the Borough of Belmar?

A. Yes, sir.

Q. On how many buildings?

A. At least 50 or more.

Q. How did you get knowledge of this restriction?

A. We always understood by the deeds, that we had to keep back 40 feet, and that was always understood among the builders, to keep back 40 feet from the curb line, with the main building.

Q. Did you ever put down a building over the line?

A. Years ago, I started mason work on two houses on Fifth Avenue; it was found out that they were two feet over the line on the second story, and they were moved back; I did mason work on another one on Ninth Avenue, and when we had the work partly done, the owner found he was partly over the line with bay windows or something, and he said, "We don't want any trouble with this, put it back;" and he moved it back. There was another one on the Tenth Avenue corner of River Avenue, belonging to Mr. John Osborne; the foundation was over the line, I think; and there was a porch over that, a kind of a basement like, and the main building is back of that, now, I don't know just how much.

Q. The superstructure of the main building of that house is about how far back from the curb?

A. I imagine it is about 40 feet.

Q. The main structure is about 40 feet?

A. I think so; I never measured it.

CROSS-EXAMINATION BY MR. WILSON:

Q. Do you remember two cases where you laid out the foundation 40 feet away from the curb, and then you stopped work because the second story projected out beyond the main foundation?

A. That was quite awhile ago.

Q. I don't care when it was — was not that what you said a little while ago?

A. That was quite a little while ago, and I think there was an overhang of two feet on the second story; a great many houses in Belmar are built that way.

Q. What did you do?

A. Those houses were moved back.

Q. Did you lay out those buildings?

A. I think I helped to lay out the foundations.

Q. Were you the contractor?

A. Yes, sir, I was the contractor with another man named Hulitt.

Q. How did you come to move the house back?

A. I think it was through the carpenter, who found out he was wrong, and it was moved back, and we moved the wall back two feet, about that.

Q. And they were wrong because that was a violation of the building line?

A. Supposed to be.

Q. Now, you remember another case where the foundation was all right and there was a bay window, and you moved the foundation back?

A. I am not sure whether it was a bay window or an overhang, but there was something wrong about it that brought the house over the 40 foot line, and the owner did not want to have any trouble, and he said "Get on the line."

Q. Told you that?

A. Yes, sir.

Q. And there is still another house, the Osborne house, did you work on that?

A. I did the mason work on that.

Q. Was that moved back too?

A. No, sir.

Q. Why did you refer to that?

A. I was asked the question whether I had done any work where the walls were over the line.

Q. And the wall of this house is over the line?

A. I am quite sure it is, yes, sir.

Q. And that is on Tenth Avenue?

A. That is Tenth Avenue and River Avenue, Southeast corner.

Q. You live on Tenth Avenue yourself?

A. Yes, sir.

Q. And is your house on the line?

A. I think it is; I never measured it.

Q. Did you put it up?

A. No, sir.

Q. Don't you know it is over the line?

A. I don't know anything about it.

Q. You don't want to think it is over the line, do you?

A. If it is there, it is there.

Q. Has your house got any bay windows on it?

A. No, sir.

Q. Got any piazzas?

A. Yes, sir.

Q. Is the piazza over the line?

A. Yes, sir; there has never been any objection about piazzas.

Q. What about the eaves, do they overhang?

A. I suppose they do.

Q. How much do they overhang?

A. I suppose 12 or 15 inches.

Q. Are not there a number of houses on Tenth Avenue where there is an overhang over the line?

A. I have not measured them.

Q. You would not say they were not?

A. I don't know.

Q. Who constructed your house?

A. I cannot tell you; I think it was over 30 years ago that that house was built.

Q. You have worked on houses where there was an overhang over the line, haven't you?

A. I don't know that I have; I never measured them.

Q. You would not like to say you didn't?

A. I would not say.

Q. Haven't you worked on houses where there were bay windows over the line?

A. I cannot say.

Q. Why not?

A. Because I never measured them; I did not bother my head about the bay windows; it was only the brick work and the plaster; the bay windows were up to the carpenters.

Q. You had to lay the foundation for the bay windows?

A. Yes, sir.

Q. Then it was up to the mason too, wasn't it?

A. Yes, sir.

Q. Then you ought to know something about them; don't you know, as a matter of fact, that you have worked on houses with bay windows over the line?

A. No, sir, I do not.

Q. Your memory is frail about that?

A. I would not say that I had or that I had not. I will tell you what I do know, if you will let me.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Have you ever worked on any house where you have known that it was over the line?

A. I have mentioned three or four.

MR. WILSON: He had forgotten that when he asked you that.

MR. COOPER: Outside of them, he means.

A. No, sir.

Q. Did you ever work on a house where the owner deliberately instructed you to violate the building line?

MR. WILSON: Objected to.

THE COURT: Objection sustained.

W. M. BURROUGHS, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Where do you live?
A. Belmar.
Q. What is your business?
A. Carpenter.
Q. How long have you lived there?
A. All together, about 28 years.
Q. How long have you followed your trade?
A. 45 years.
Q. Have you worked on many houses?
A. Let me say this: if you want me to understand what you say, don't be afraid to speak up.
Q. Have you worked on many houses in Belmar?
A. About 25 or 30, probably more.
Q. Those houses that you have worked on, what has been your custom in measuring — how far back from the curb ——
A. On the avenues, 40 feet from the curb — 20 feet from the lot line.
Q. Mr. Burroughs, you worked on a house, didn't you, a good many years ago on Fifth Avenue in the Borough of Belmar?
A. No, sir, I did not; I don't think I did any work on that house.

BY THE COURT:

Q. Where was it?
A. There were two, one belonging to Mrs. Hall and the other to Mrs. Moore.
Q. I am speaking of the Moore house?

A. Between A Street and Ocean Avenue.

Q. Before they started the erection of that house, or when they started the erection of it, how far back from the curb, if you know, was that foundation set?

A. 40 feet beyond.

Q. Was there an overhang to that house?

A. There was, on the second floor.

Q. How far, about, did that overhang project?

A. Two feet.

Q. Was any complaint or remonstrance made in regard to that overhang projecting two feet?

A. There was, yes, sir.

Q. What was done in regard to that?

A. The house was removed back.

Q. How far?

A. Two feet.

Q. So that when that house was moved back, the overhang was ——

A. It was on the line of the 40 feet from the curb.

BY THE COURT:

Q. You do not measure, of course, yourself, you being the carpenter?

A. I lay the foundation, sometimes.

Q. What avenue do you live on?

A. I live on Ninth Avenue.

Q. About six or seven years ago, was a house erected on Ninth Avenue, directly on the East, adjoining your house?

A. Yes, sir.

Q. When that house was erected, or the construction of it commenced, was that house set 40 feet back from the curb, do you know?

MR. WILSON: Objected to as irrelevant.

THE COURT: Objection overruled.

A. That foundation was put back 40 feet from the curb.

Q. How about the upper story?

A. On the upper story it run out two feet.

Q. What was done?

A. There was an injunction served against the parties.

Q. At whose request, who was the party that had the injunction served in that suit?

A. It was my father.

MR. WILSON: Objected to as calling for the record.

THE COURT: The objection is sustained.

Q. What was done with the building after the injunction was served?

MR. WILSON: That is objected to.

Q. Was or was not the building moved back?

A. The building was moved back two feet.

CROSS-EXAMINATION BY MR. WILSON:

Q. Is your knowledge of the building line in Belmar to the effect that any overhang of the building must be back of the 40 feet?

A. Yes, sir.

Q. And you have cited two instances where you know that rule was enforced?

A. Yes, sir.

Q. And the same would apply to bay windows?

MR. COOPER: Objected to.

THE COURT: Objection overruled.

A. The bay window is supposed to go back to the 40 foot line; that is the rule; that is considered a part of the body of the house.

REAN VANNOTE, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Where do you live?
A. Belmar.
Q. How long have you lived there?
A. Since 1876.
Q. On what avenue do you live?
A. Fifth Avenue.
Q. How far back from the curb is your house set?
A. 40 feet.
Q. How far from the curb do other houses in the Borough of Belmar set, if you know?
A. 40 feet.
Q. On the avenues?
A. Yes, sir.
Q. What is your occupation?
A. Painting and decorating.
Q. In your trade and occupation you have had occasion to work on a good many houses in the Borough of Belmar?
A. Yes, sir.
Q. And you have observed the way the houses line up on the avenues?
A. Yes, sir.
Q. Do the houses on the avenues in the Borough of Belmar apparently present a uniform appearance?

MR. WILSON: Objected to as leading.

THE COURT: Objection sustained.

Q. From your observation, what have you noticed in regard to the houses on the avenues, as set back from the curb?

A. On Fifth Avenue they line up.

Q. What about the other avenues?

A. They line up, as far as I know.

CROSS-EXAMINATION BY MR. WILSON:

Q. You live on Fifth Avenue?

A. Yes, sir.

Q. And you don't get very far away from home?

A. No, sir, not very far.

Q. Are there any houses on Fifth Avenue that have an overhang beyond the 40 feet?

A. I think there are.

Q. Quite a number, are there not?

A. I would not like to say how many.

Q. And there are quite a number of houses have bay windows in those 40 feet, are there not?

A. I think there are some.

RE-DIRECT EXAMINATION BY MR. COOPER:

Q. What do you mean by an overhang, Mr. Vannote?

A. I mean the projection of the roof.

Q. Of the eaves?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. I mean by "overhang," not only the eaves, but wherever there is any part of the structure of the house that extends out beyond the foundation ——

A. I don't recall any at present.

Cortlandt Heyniger — Direct

CORTLANDT HEYNIGER, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Where do you live?
A. Tenth Avenue, Belmar.
Q. What is your occupation?
A. Mason.
Q. Have you erected or worked on many buildings in Belmar?
A. Quite a few.
Q. About how many, if you can state?
A. I would say about 15.
Q. When you have erected the foundation of these buildings, have you made the measurements for them?
A. I have some.
Q. The buildings that you have measured — how far back from the curb have you measured, in order to set the foundation wall?
A. I measured one 42 feet and some inches.
Q. You are referring now to streets or avenues?
A. To avenues.
Q. How many buildings on Tenth Avenue have you built or worked on?

MR. WILSON: What is the object of this testimony?

MR. COOPER: It is to show a general practice.

MR. RHOME: We submit that the conduct of this witness, his evidence of what was done, would not constitute any general scheme.

Q. On what part of the buildings have you worked?
A. I have started from the foundation and done the general mason work through —

Q. In a preliminary way, and before you put down a foundation wall, what did you do in regard to this line that you have mentioned?

A. My own house — starting with the foundation — I measured back 40 feet to be sure I was back the distance; my rule is, to keep 40 feet back of the curb.

Q. You did that in every instance?

A. Yes, sir.

Q. And you took a measurement yourself?

A. I sometimes have helped; I cannot very well do it myself.

Q. Your house is erected on what avenue?

A. Tenth Avenue.

Q. And your house is how far back from the curb?

A. 42 feet some inches back of the curb.

BY THE COURT:

Q. You live on this street and go back and forth every day?

A. Yes, sir.

Q. Have you observed any violation along the street?

A. I have observed Levinsohn's building with the general run of the other houses.

Q. Does it project beyond them?

A. It seems to project out by the hotel.

Q. Have you noticed any porte-cocheres or bay windows, piazzas, that project over the line?

A. I have not paid attention to it otherwise.

Q. Is this the only building that you know of that projects beyond this line?

A. Yes, sir.

CROSS-EXAMINATION BY MR. WILSON:

Q. You are a brother of the gentleman who brought the first suit?

A. Yes, sir.

Q. Was that the reason why the Levinsohn building was the only building that you have noticed?

A. No, sir, not for that reason.

Q. You say you have worked on five houses on Tenth Avenue?

A. Yes, sir.

Q. One of them was yours?

A. Yes, sir.

Q. Now, name the other four?

A. Well, my father built one; I worked for my father at the time. Benjamin Cooper built a house on Tenth Avenue, and I worked on that.

Q. Is he your brother-in-law?

A. No, sir.

Q. Do you remember what his number was?

A. I do not.

Q. Are you prepared to say that no part of that house has an overhang within the 40 feet?

A. I know nothing about it.

Q. What about your father's house; has that got an overhang?

A. I have not looked it over.

Q. Now, you have named two; what is the third that you built on Tenth Avenue?

A. Well, I worked on Levinsohn's hotel.

Q. What Levinsohn is that?

A. The defendant.

Q. Has that got any encroachment on the 40 feet?

A. I have not looked into it that far.

Q. The hotel has got a two-story porch, hasn't it?

A. Yes, sir.

Q. Don't you know that that two-story porch overhangs into this 40 feet, beyond this 40 foot line?

MR. COOPER: Objected to as immaterial and irrelevant.

THE COURT: Objection overruled.

A. It goes over the 40 foot line.

Q. What is the other house on Tenth Avenue that you worked on; can you think of it?

A. Yes, sir.

Q. Tell us which one it was.

A. It was my brother's.

Q. Well, has that got any overhang in the 40 foot strip?

A. Only the porch.

Q. Any bay windows?

A. No, sir, not on the front.

Q. Is the porch on the second story?

A. No, sir.

Q. These are the only five houses or structures which you claim to have any particular knowledge of on Tenth Avenue?

A. Yes, sir.

WILLIAM L. HEYNIGER, 3d, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Where do you live?

A. Belmar, Tenth Avenue.

Q. What is your business?

A. Mason.

Q. How long have you been a mason?

A. About seven or eight years.

Q. How many buildings, if you know, have you worked on, in Belmar?

A. Well, about two or three.

Q. I am speaking now on the main avenues, regarding the streets?

A. Two.

Q. Where were they?

A. On Tenth Avenue.

Q. And what did you do?

A. Mason work.

Q. In erecting those buildings, how far back from the curb did you measure to get the foundation wall?

A. 40 feet, and 40 feet 1 inch.

Q. You have just erected a new building on Tenth Avenue?

A. Yes, sir.

Q. How far back does that set?

A. 40 feet 1 inch.

Q. Do you know whether on Tenth Avenue, the building line is observed?

A. As a rule it is, yes, sir.

Q. And how do the houses on Tenth Avenue set with reference to the foundation walls, back from the curb; how far back as a rule, do the foundation walls set?

A. 40 feet or more.

CROSS-EXAMINATION BY MR. WILSON:

Q. Are you a brother of the complainant — one of the complainants?

A. I believe so.

Q. Don't you know?

A. Yes, sir.

Q. Are you in doubt about it?

A. I said "yes."

Q. You did not say "yes;" you said you "believed so."

BY THE COURT:

Q. Don't you know whether you are a brother of one of the complainants?

A. Yes, sir.

FURTHER CROSS:

Q. You say you have worked on two buildings on Tenth Avenue?

A. Yes, sir.

Q. Do you wish to confine it to two?

A. We will let it go at three.

Q. Why do you let it go at that; did you work on two or three?

A. I worked on two or three.

Q. What are these two or three buildings you worked on?

A. Houses.

Q. First of all, you worked on your brother's building; where is that?

A. On Tenth Avenue, between E and D Streets.

Q. Now, where is the other one you worked on?

A. My own, between C and D Street.

Q. Now, what other buildings did you work on?

A. Well, one of my father's.

Q. A family affair, was it?

A. Yes, sir.

Q. So that it was, in point of fact, three buildings that you worked on?

A. Yes, sir.

Q. Now, when did your building go up?

A. In September.

Q. Last September?

A. Yes, sir.

Q. And you set the foundation yourself, did you?

A. I did.

Q. And you got it 40 feet 1 inch?

A. Yes, sir.

Q. Have you got any bay windows to your house?

A. None that I know of.

Q. Would there be any that you did not know of?

A. No, sir.

Q. Is there a piazza to your house?

A. Yes, sir.

Q. How far does that poke out into this 40 foot strip?

A. About 10 feet.
Q. Is it an open or a closed piazza?
A. Open.
Q. How far do your cornices overhang?
A. About 18 inches.

MR. COOPER: Objected to.

Q. What about your brother's building that you worked on; did you lay that out too?
A. No, sir.
Q. What did you do on that?
A. Helped to plaster it.
Q. Then you don't know anything about it being laid out on the ground?
A. No, sir.
Q. How about your father's building?
A. I don't know anything about that.
Q. The one you built last summer is the only one you know anything definite about?
A. Yes, sir.

WILSON E. ALLEN, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. You live where?
A. Belmar.
Q. How long have you lived there?
A. Since the second day of June, 1882.
Q. What is your business, Mr. Allen?
A. Architect.
Q. Have you recently erected any houses of your own in Belmar?
A. I have, yes, sir.
Q. On what street or avenue?

A. Fifth Avenue.

Q. How far back from the curb, if you know, did that house set?

A. I don't know.

Q. As much as 40 feet, do you know?

A. Yes, sir.

Q. Did you take a measurement?

A. Yes, sir.

Q. Then you do know that it is 40 feet back from the curb?

A. I do not, no, sir.

Q. How did you measure to arrive at that conclusion?

A. I measured from the lot line.

Q. How far back from the lot line did your house set?

A. 35 feet.

CROSS-EXAMINATION BY MR. WILSON:

Q. Your house, Mr. Allen, has it got any bay windows to it?

A. No, sir.

Q. Any overhang to it?

A. Not on the front.

Q. Does not the roof with the eaves project over and beyond the main body of the house?

A. On the gables, yes, sir.

Q. How much do they project?

A. 18 inches.

Q. Has it a piazza in front?

A. Yes, sir.

Q. What is the width of it?

A. 10 feet.

Q. You have your whole house, piazza and all, back of the so-called building line, haven't you?

A. No, sir, not the piazza. May I explain a lot line?

THE COURT: Just answer the question.

Wilson E. Allen — Cross

Q. You say that you measured back to keep your foundation line 35 feet from the lot line, didn't you say that?

A. Yes, sir.

Q. Now, the building line is set to be, by resolution, 20 feet from the street line?

A. Yes, sir.

Q. So that, if you got back 35 feet from the street line, you were 15 feet further back than you were required to go?

A. Yes, sir.

Adjourned to a day to be fixed by the Court.

THIRD DAY

Transcript of testimony taken in the above-entitled causes, before HON. VIVIAN M. LEWIS, Vice-Chancellor, at the Chancery Chambers, Jersey City, New Jersey, on the twenty-second day of September, 1914.

Same appearances as before noted.

NATHAN C. KING, sworn in behalf of the Complainants, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. You are one of the Councilmen of the Borough of Belmar?

A. Yes, sir.

Q. How long have you been a Councilman?

A. Five years this coming January.

Q. You have been in the Council continuously during that time?

A. Yes, sir.

Q. And do you know the defendant, Abraham Levinsohn?

A. Yes, sir.

Q. Did you see a building that he was erecting, in the course of construction?

A. Yes, sir.

Q. About the time that the foundations of this building were being constructed, did you have a conversation with the defendant, Mr. Levinsohn?

A. I did.

Q. State to the Court the substance of that conversation.

A. Why, I called there that morning; Mr. Levinsohn was on the job, and we were talking it over, and I was

saying to him that I understood there was an injunction being gotten out to serve onto him for the infringement over the line, and Mr. Levinsohn said, "Well," he says, "I laid away $500.00 to fight this case, and if I win it," he says, "it will be worth $500.00 to me." And I said, "That is very true, Mr. Levinsohn;" that was practically about all that was said.

CROSS-EXAMINATION BY MR. WILSON:

Q. Which Mr. Levinsohn are you referring to?

A. The elder Mr. Levinsohn, the father.

Q. And was there anyone present during that conversation?

A. No, sir, there was not anyone present.

Q. Where did the conversation occur?

A. At the Tenth Avenue corner.

Q. Where were you standing?

A. Right on the lot — right where they were laying the foundation for the building.

Q. There were other people around there?

A. No, sir, not where we were; there were people in the rear of the building where they were working.

Q. Mr. King, didn't you have a conversation there on the premises with the defendant when his son was present?

A. After this occurred we walked, I remember it, we walked towards the East end of the building, and his son came up there, and I just forget now who it was, but someone wanted a bill changed, or some money or something — there was some money involved in it; and I heard his father say to him, "Now, Charlie, be careful of the money," or something of that sort.

Q. All that is not responsive to my inquiry. (Question read.)

A. Yes, sir, I did.

Q. About this very matter, when the son was present?

A. No, sir.

Q. Didn't you have a conversation with the father in which you spoke of an ordinance passed by the Borough, fixing a building line; didn't you refer to an ordinance that the Borough had passed, fixing the building line?

A. I don't remember it.

Q. You don't deny that you made mention of the fact, do you, in a conversation with the father?

A. I may, of course; there is an ordinance to that effect; I cannot recall that just now, what the words were.

Q. Was not this ordinance referred to, and did not the defendant say to you that the Borough had no right to pass such an ordinance, or something of that sort?

A. Oh, no; oh, no.

Q. Were you a member of the Borough Council when that ordinance was passed?

A. No, sir.

Q. You knew there was such an ordinance?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. When did you erect your building?

A. Eight years ago.

Q. Your building is located where?

A. Tenth Avenue, between D and E Streets, on the South side of the street.

Q. How far from Levinsohn's new building?

A. About a block and a half from Mr. Levinsohn's corner.

Q. At the time you built, did you know that there were any restrictions; did you know of any restrictions?

MR. WILSON: Objected to.

Q. How far from the curb did you place your building?

A. 40 feet to the foundation.

Q. Why did you place your building 40 feet from the curb?

MR. WILSON: Objected to; I don't know that anything he did or did not do, would bind us; the fact is, that he says he erected his building 40 feet back from the curb; now, that is a fact in this case; if he had a deed with a restrictive covenant in it, he was bound, under their theory, to perform that restrictive covenant. Now, to ask this witness why he put up his building at a particular spot — it being nowhere near the place where he may have put it under the restrictive covenant, it seems to me cannot be evidence in this case; he may have built it there for a thousand reasons; it was 40 feet back; it could have come up as close as 20 feet.

Q. (Question read.)

A. The contractor, of course, he advised me to do it —

MR. WILSON: I move to strike that out.

Q. Question read.

A. Because the other houses stood back, and I kept on the line with the other houses in my neighborhood.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. You put your building up eight years ago on Tenth Avenue?

A. Yes, sir.

Q. About a block and a half away from this building in dispute?

A. Yes, sir.

Q. East or West of the building?

A. East.

Q. Was your building a home, a residence?

A. Yes, sir.

Q. Not devoted to business purposes at all?

A. No, sir.

Q. You knew your deed had in it a restrictive covenant which prevented you from getting nearer to the curb than 40 feet?

A. Yes, sir.

Q. When you said you built 40 feet from the street, you did not mean the side line of the street, you meant the curb?

A. Yes, sir.

Q. So that, in point of fact, to be accurate, you could have built, if you had chosen, as near as 20 feet to the side of the street?

A. I think not.

Q. I think you have said so, and I think that is true.

A. No, sir, I think not; I did not say so, because I could not have done it; they would not allow me to do it.

Q. The covenant in the deed is not 40 feet from the curb; it is 20 feet from the street line?

A. Yes, sir.

Q. So that I am correct in saying that, according to your restrictive covenant, you could not go as near as 20 feet to the street line?

A. No, sir.

Q. Why not?

A. It could not.

Q. The curb line is 20 feet further out than the street line?

A. Yes, sir.

Q. So that you could, if you chose, have built as near as 20 feet to the street line, couldn't you?

A. I call the street line the curb.

Q. I am calling the street line the side of the street, as it conforms to the end of the lot?

A. I cannot just get that clear.

Q. If you cannot get it clear, I have no doubt you did have it very clear in your mind when you put your house there?

A. Yes, sir.

Q. Now, do I understand you to say that all the buildings on Tenth Avenue, when you put your house up eight years ago, had conformed to the building line?

A. I could not say about all the houses; I spoke of those in my neighborhood.

Q. Had all of them in your neighborhood?

A. Yes, sir.

Q. Were there none in your block nearer than 40 feet to the curb line?

A. In my block, I think not.

Q. You don't know?

A. No, sir.

Q. And you never made any measurements to ascertain?

A. No, sir.

Q. And whether they are nearer or not is a mere matter of conjecture with you now?

A. Yes, sir.

MR. FOSTER: We do not recall whether we have offered all our exhibits that have been mentioned during the progress of the case, and if we have not, we would like the privilege of offering them.

COMPLAINANT RESTS

DEFENCE

Mr. Wilson opens for the defence.

JAMES EMLEN, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Have you any official relation to the Borough of Belmar?

A. I do their work.

Q. You mean as a surveyor?

A. Yes, sir.

Q. And how long have you been so engaged?

A. About seven years.

Q. And you made affidavits for the Borough that were used in this case, in the preliminary stages of the case?

A. Yes, sir.

Q. Now, have you been asked to make any measurements in fixing the location of buildings on Tenth Avenue in Belmar?

A. Yes, sir.

Q. And who made that request of you?

A. Mayor Poole, and also Mr. Levinsohn, the defendant.

Q. Did you determine by measurement the location of each building on Tenth Avenue?

A. For Mr. Levinsohn, — yes, sir; that is, for each building over the line — Mr. Levinsohn said he did not care about anything that was back of the restrictive building line so-called.

Q. You reported only on such buildings as you found were not back of the building line?

A. Yes, sir.

Q. Now, did you make any measurement in respect to the Borough Hall?

A. Yes, sir.

Q. And what did you find its location to be?

A. May I use this list?

Q. If you have a memorandum there, which you need to refresh your memory, I presume the Court will permit you to use it.

Q. Where is Borough Hall located?

A. Southeast corner of Ninth Avenue and E Street.

Q. Tell us what you found its location to be?

MR. FOSTER: I object to it on two grounds; in the first place, there is nothing to indicate when the Borough Hall was built; second, I think under the proofs in the case, and under your Honor's ruling, the proofs should be limited to structures on Tenth Avenue.

BY THE COURT:

Q. Where does this building face?

A. Ninth Avenue.

MR. WILSON: I would like to be clear upon this proposition, unless your Honor is clear that this testimony ought to be received.

THE COURT: I am not clear yet.

MR. FOSTER: Your Honor said you would be inclined to follow the rule in the Newbury case.

BY THE COURT:

Q. When was the structure erected?

A. I don't know.

MR. WILSON: About three years ago.

THE COURT: If it was erected before the scheme was laid out, it would be entirely excluded.

MR. WILSON: It would seem to me it was not irrelevant, but it was not important to show precisely when this building was erected. Now, upon the other proposition, let me say this to your Honor, and I think this is the time to say it. Vice-Chancellor Howell, who settled the Barcalow case, said this: (continues argument).

THE COURT: Is not this a matter for final argument?

MR. WILSON: The matter was opened up by this objection.

THE COURT: My ruling is, that we shall confine ourselves in the present examination to violations along Tenth Avenue, and no other avenues.

MR. WILSON: And that is the ruling of the Court so far as all testimony of this character is concerned?

THE COURT: Yes.

MR. WILSON: My recollection is, that your Honor will find that in the Barcalow case the Court received testimony, and afterwards made judicial comment as to what was the weight of it.

THE COURT: Yes.

James Emlen — Direct

(Further argument.)

MR. WILSON: There is another view of the matter; the testimony is expressly offered now, because the rule has been fairly recognized in this Court that if one of many mutually bound by a restrictive covenant, seeks relief in a court of equity, and that person has himself or itself violated this restrictive covenant, so far as it may relate to any portion of the land scheme, if that be shown, then that fact is an important fact, and this testimony is now offered on the ground also that it will establish or tend to establish that the Borough, within the limitations of this land scheme on Ninth Avenue, has itself done something in violation of this restrictive covenant.

THE COURT: I have great doubt about the admissibility of this testimony; however, under the rules adopted by the Court, I will admit it at present.

MR. FOSTER: On behalf of the complainants, I object to it as not competent.

THE COURT: I shall limit it only as to the municipality.

Q. You did make some measurement with a view of ascertaining the location of the municipal building?

A. Yes, sir.

Q. May I ask when did you do that?

A. December 4, 1913.

Q. What did you find about the foundation walls?

A. The foundation wall is four inches clear of this restricted building line.

Q. In other words, the foundation wall is at least 20 feet 4 inches from the side of the street?

A. Yes, sir.

Q. Now, what part of the building, if any, did you find nearer the street than 20 feet?

MR. COOPER: We want to object to that on the ground that anything extending beyond the building line is not to be considered as material.

BY THE COURT:

Q. What did you find as to other parts of the building, with respect to the building line?

A. The pilasters are 4 inches over the line.

FURTHER DIRECT:

Q. How large are they?

A. The ones at the corner are 5 feet 8 inches wide.

Q. Is the solid masonry 5 feet 8 inches wide?

A. Yes, sir.

Q. How many of them are there on the front of the building?

A. There are two that size, and one is 4 feet 8¼ inches; there is one on each end and one in the middle.

Q. Are all three of them the same distance from the street?

A. They are all the same distance.

Q. You measured back from Ninth Avenue?

A. Yes, sir.

Q. I direct your attention to the premises of Charlotte Wildman; did you make a measurement of that?

A. Yes, sir, to the building upon a lot, that is on Tenth Avenue.

Q. What did you find it to be?

MR. COOPER: I object to that, unless he confines the question to the foundation wall of the building itself.

THE COURT: All right.

A. The foundation is back of the line.

Q. Did you find any portion of the building as within the 20 foot limitation, and if so, what?

MR. COOPER: We object to that on the same ground as has been stated.

A. The bay window on the second floor is two feet over the restricted line.

Q. What did you find out about the piazza?

A. That is over the line.

Q. How much over the line?

A. Ten feet over.

BY THE COURT:

Q. How was that piazza constructed?

A. It is open; it was frame.

Q. And the house was frame?

A. Yes, sir.

Q. Was the piazza set upon a foundation, or did it stand on punches?

A. I don't know about that.

Q. Was it open on the sides, or was it enclosed?

A. It was open.

Q. Do you know whether, in point of fact, it was enclosed in winter time?

A. I don't know about that.

Q. Now, directing your attention to No. 103 Tenth Avenue, on the South side, what did you find there; what did you find in respect first, as to the foundation wall?

A. The foundation is clear of the restrictive building line.

Q. How much?

A. Just clear.

Q. Can you give us anything in inches?

A. In other words, it is right on the line.

Q. What did you find in respect to bay windows, or any part of the structure?

MR. COOPER: Objected to on the same ground.

THE COURT: We will note a general objection to this line.

A. The second floor is built out over the porch, or part of it, and is 9 feet 11 inches over the restricted line.

Q. What about the piazza?

A. The piazza extends as much out over the line as the upper floor does.

Q. 9 feet 11 inches?

A. Yes, sir.

Q. Is that piazza open or enclosed?

A. It is open, as I recall it.

Q. You don't know whether it has been in winter or not?

A. I don't know.

Q. Do you know what sort of a foundation was underneath the piazza?

A. No, sir.

Q. You did not make any observation in respect to these details in any of these cases?

A. No, sir, I only made the measurements.

BY THE COURT:

Q. Does this second story extend solidly out over the building line?

A. Yes, sir.

FURTHER DIRECT:

Q. So that standing at either end you can see buildings that lie along the building line?

A. Not from the floor.

Q. Drawing your attention to No. 105 on Tenth Avenue, on the South side, what did you find in respect to that property?

A. The foundation is one inch over the restricted line.

Q. The main foundation wall is one inch over, did you say?

A. Yes, sir.

Q. That is to say, it is one inch too near the street?

A. Yes, sir, it extends over the restricted line.

Q. What did you find in respect to bay windows, if anything?

A. 5 feet 8⅜ inches over the line.

Q. Is that bay window on the first story or second story, or both?

A. On the second story.

Q. Were there any bay windows on the first story?

A. No, sir, I have not any record of any.

Q. What do you find in respect to the piazza?

A. That is 11 feet 11 inches over the line; it is an open porch.

Q. Was this piazza open on both ends when you observed it, or was it enclosed in any way?

A. Open, as I remember it.

Q. You were not asked to make any special observation as to whether the piazzas were open or not?

A. No, sir.

MR. WILSON: I think our testimony in respect to that detail we shall have to get from other witnesses.

Q. Now, what is the structure immediately Southeast of the building in litigation here; what is that structure?

A. It is an hotel.

Q. What is the number of it on the street, do you know?

A. (No answer.)

THE COURT: I just want to indicate to you the length to which Vice-Chancellor Leaming has gone (reading Ocean City Land Co. vs. Webber).

Q. Do you know the number of that structure?

A. I do not, no, sir.

Q. Have you made measurements with a view to determining how near that is to the street line?

A. Yes, sir.

Q. What do you find?

A. I find the foundation is 2¼ inches over the restricted building line.

Q. Is there any structure in front of the main building?

A. There is a porch.

Q. Does that extend along the entire front of the building?

A. Yes, sir.

Q. And is that the building immediately next to this building complained of?

A. Yes, sir, to the East.

BY THE COURT:

Q. The defendant's building?

A. Yes, sir.

FURTHER DIRECT:

Q. I show you this photograph and ask you if the building in respect to which you have been testifying is fairly represented in the photograph?

A. Yes, sir.

BY THE COURT:

Q. It is fairly representative?
A. Yes, sir.

MR. WILSON: This is the building complained of, and this is the hotel.

FURTHER DIRECT:

Q. This structure in front, shown in this picture, extends beyond the foundation wall near the street; how much nearer?

A. 10 feet 4¾ inches.

Q. This appears here to be a piazza, with two floors, one on the level of the ground and one above?

A. Yes, sir.

Q. With a roof?

A. Yes, sir.

Marked "Exhibit D 1."

Q. Does this picture fairly represent the building in litigation, now finished, this picture?

A. Yes, sir.

Q. And does it fairly represent the relation of this building to the hotel building behind it to which your attention has just been directed?

A. From the photographer's standpoint, yes.

Q. Now, Mr. Emlen, directing your attention to the building next to the hotel building, as shown in this picture, how near is that to the street line?

MR. FOSTER: Give us the number of that building that you are now examining him about.

THE WITNESS: No. 613.

Q. What did you find in respect to that?

A. The foundation is 3 inches clear of the restricted line, of the main foundation.

Q. Now, were there any bay windows on the property?

A. Yes, sir, a bay window on the Northwest corner, which is 2 feet 5½ inches over the restricted line.

Q. Any piazza?

A. Yes, sir.

Q. What is the location of that?

A. It extends part way into the bay window, and then crosses the front of the house.

Q. How far, if at all, is it beyond the building line?

A. 2 feet 6¼ inches over the restricted line.

Q. This bay window of which you speak, at the corner of the house, really ascends as a tower, doesn't it?

A. Yes, sir.

Q. And it projects itself above the roof of the house?

A. Yes, sir.

Q. And does it start at the ground and go all the way up?

A. Yes, sir, it does.

Q. It rests upon the earth?

A. Yes, sir.

BY THE COURT:

Q. Has it a foundation under it?

A. I imagine there must be a foundation under it.

FURTHER DIRECT:

Q. It has, in point of fact, a concrete foundation, hasn't it?

A. I did not examine it.

James Emlen — Direct

Q. I direct your attention to No. 301 Tenth Avenue, on the South side?

A. Yes, sir.

Q. What did you find about that, Mr. Emlen?

A. The foundation is half an inch clear of the restricted line; the main foundation is one-half an inch clear.

Q. Is it clear?

A. Yes, sir.

Q. Clear of the restricted building line?

A. Yes, sir.

Q. Now, what about bay windows, did you find any?

A. There is one on the Northeast corner.

Q. Did that run from the ground to the top?

Q. Second story only?

A. Yes, sir.

Q. How much of an extension was that?

A. One foot 8 inches.

Q. And any piazzas?

A. The second story is built out over the piazza, yes, sir, the piazza is open underneath.

Q. The main foundation wall, as I understand it, is approximately at the restricted line?

A. Yes, sir.

Q. The second story has a projection of some kind over the piazza?

A. Yes, sir.

Q. How much of a projection is it?

A. One foot 8 inches.

Q. Is that a solid structure?

A. It is, yes, sir.

Q. Now, in front of that, on the second story wall is a piazza, on the second story, extending beyond that?

A. Yes, sir.

Q. And how far beyond that does it extend?

A. Three feet three inches.

Q. Is there a piazza down below on the ground floor?

A. Yes, sir.

Q. How much does that extend beyond the foundation wall?

A. I have not made a note of that.

Q. Will you make some measurement of it and let us know in the future?

A. Yes, sir.

Q. I direct your attention to No. 319 on Tenth Avenue; what about the foundation wall?

A. The foundation wall is clear of the restricted line.

Q. How much clear?

A. 1 foot 10 inches.

Q. What about the bay windows; are any bay windows on it?

A. There is a bay window on the first floor.

Q. Resting on the ground?

A. Yes, sir.

Q. How much does that invade the building line?

A. 4 feet 9⅝ inches.

Q. Do you know whether that bay window is on a foundation?

A. I don't know.

Q. What about the piazza?

A. The piazza extends over the line.

Q. How much?

A. 4 feet 9¾ inches.

Q. Is that measurement taken from the outside of the bay window?

A. It is taken from the bay window.

Q. Then, from the main body of the house the extension would be further, wouldn't it?

A. Not over the line, no, sir.

Q. And the outside then of the piazza is how far over the restricted line?

A. I have it 4 feet 9¾ inches here.

Q. I direct your attention to No. 413 Tenth Avenue; what did you find there first as to the foundation wall?

A. The foundation wall is 3 feet 8 inches clear of the line.

Q. Did you find any bay windows?

A. No bay windows, no, sir; there is an extension on the second floor.

Q. How did you find out about that; what sort of an extension was it?

A. Well, I hardly know how to explain that; there seems to be an open piazza in the middle, and on the side it seems to be built in, enclosed in.

Q. How much does that extend beyond the restricted line?

A. Four feet.

BY THE COURT:

Q. What do you mean when you say four feet over the line; do you mean that the whole porch is four feet over the line?

A. No, sir, I mean this particular open part; I mean this, on the second story is a room that extends part way over the open porch which is underneath.

Q. What extension is that room; what is it?

A. It is about two feet, as near as I can measure it; it is back of the restricted line.

MR. WILSON: If it is back of the restricted line it becomes inconsequentil from our point of view.

Q. Is any part of that structure over the restricted line?

A. Yes, sir.

Q. What part of it?

A. Part of the porch and part of the second floor.

Q. And what part of the second floor is over the restricted line?

A. There is part of the open porch on the second floor, and the roof runs right down; there is a funny kind of a building, and I cannot just explain it; it runs right out

and covers the top of the porch, the roof does; in the middle of this opening there is an open porch in there, an opening; it takes in part of the roof; cuts it away.

Q. How much is the roof of the house, as it comes down over this upper porch, over the restricted line?

A. 4 feet 6 inches.

Q. Is any other part of the building over the restricted line?

MR. COOPER: Just a moment ago the witness was confused in regard to the line being in 3 feet 8 inches, or the foundation wall, and I would like to have the witness clearly take that into consideration in giving this answer now, so that we may be clear as to what the true facts are.

BY THE COURT:

Q. Is this porch that you speak of, 7 feet some inches from the foundation wall?

A. It is 9 feet 6 inches beyond the foundation wall.

FURTHER DIRECT:

Q. And is this porch open upstairs in the second story — is the porch open at both ends, or closed at both ends?

A. I think it is closed by the roof on both ends.

Q. Do you know whether it is closed or not on both ends?

A. It is closed by the construction of the roof.

Q. (BY THE COURT) If you stood on a ladder — these avenues run East and West; now, if you were on a ladder on one side of this porch, could you see any house erected behind the building line, or on the building line?

A. If the ladder was on the building line, you could not see anything beyond it.

Q. Because of the obstruction?

A. Because of the shape of the roof coming down on the slope.

MR. WILSON: Now, between now and the next sitting of the Court, I wish you would go and look at that place again.

FURTHER DIRECT:

Q. Is there a bay window on that property?

MR. COOPER: He has already testified there was not.

A. No, sir.

Q. I direct your attention to No. 503 Tenth Avenue, on the South side?

A. Yes, sir.

Q. What do you find there?

A. I find the main foundation 1⅛ of an inch over.

Q. Over the restricted line?

A. Yes, sir.

Q. What do you find as to bay windows or piazzas?

A. Piazzas 10 feet 1 inch over.

Q. Is that an open or a closed piazza?

A. Open.

Q. Is it one story or two stories?

A. One.

Q. You don't know whether it is on a foundation or not?

A. I don't know.

Q. Are there any bay windows?

A. No, sir.

Q. Is there any portion of the upper story of the building that extends over the building line?

A. Eaves.

Q. How much?

A. I don't know.

MR. COOPER: Then we ask to strike it out.

MR. WILSON: You cannot strike it out.

MR. COOPER: He says he does not know how much it is over. Now, how can he swear it is over, if he does not know?

THE COURT: Let it stand that he does not know.

MR. WILSON: Between now and the next hearing, make a measurement to determine that, won't you, Mr. Emlen?

Q. Is there any other part of the building to which I have not directed your attention, that overreaches the building line?

A. No, sir.

Q. I direct your attention to No. 509 Tenth Avenue; what about that?

A. The bay window on the first floor is three inches over — the main foundation is clear.

Q. Does that bay window go upstairs as well as down?

A. No, sir.

Q. Is that on a foundation, do you know?

A. I think not; I am not sure.

Q. Any projection in the upper story over the building line?

A. No, sir, there is not.

Q. Any piazza over the restricted line?

A. Yes, sir.

Q. How much?

A. 8 feet 2¼ inches.

Q. I direct your attention to No. 603 Tenth Avenue?

A. Yes, sir.

Q. What do you find about that?

A. Main foundation three inches over.

Q. Any bay windows?

A. No, sir.

Q. Any piazzas?

A. Yes, sir.

Q. How much?

A. 8 feet 2½ inches.

Q. Over the restricted line?

A. Yes, sir.

Q. Is it an open or enclosed piazza?

A. Open.

Q. Is there anything in the second story of the structure that goes over the restricted line?

A. Only the eaves.

Q. How much are the eaves over?

A. I don't know, sir.

Q. No. 605 Tenth Avenue; tell us what you found there.

A. Main foundation, 2½ inches over the restricted line.

Q. What about bay windows?

A. No bay window.

Q. What about piazzas?

A. 7 feet 10½ inches over the restricted line.

Q. Is the piazza one story or two?

A. One.

Q. Nothing in the third story of the house over the restricted line?

A. No, sir.

Q. I direct your attention again to No. 603; you just testified about No. 603?

A. Yes, sir.

Q. Has not Number 603 an enclosed piazza, or don't you recall?

A. It is enclosed in the winter time with glass.

Q. Directing your attention to No. 607 Tenth Avenue; what did you find out about that?

A. The main foundation is 3¾ inches over.

Q. Any bay windows?

A. No, sir.

Q. Any porch?

A. Yes, sir.

Q. How much is the porch over?

A. 7 feet 2 inches.

Q. Open or closed, as you recall, or don't you remember?

A. I don't remember.

Q. Any second story obstructions?

A. No, sir.

Q. No. 609 Tenth Avenue?

A. Yes, sir.

Q. What did you find there?

A. The main foundation is 4 inches over the restricted line.

Q. Any bay windows?

A. No, sir.

Q. Any porch?

A. Yes, sir.

Q. How much?

A. 7 feet 2 inches.

Q. Is it open or closed, or don't you remember?

A. I don't remember.

Q. No. 613 Tenth Avenue?

A. Yes, sir.

Q. Before we pass on to that, let me ask you about 609 Tenth Avenue; was there any part of the superstructure that was over the line?

A. Only the eaves — yes, sir, the whole building was over four inches.

Q. Was there anything in the second story that was more over the restricted line than the lower story?

A. Only the eaves.

Q. Now, then, No. 613 Tenth Avenue, again; what about that? Is the foundation wall over?

A. Yes, sir.

Q. Did you testify as to No. 613?
A. Yes, sir.
Q. When?
A. Probably half an hour ago.
Q. When you had this picture in your hand?
A. Yes, sir.
Q. I direct your attention to No. 511 Tenth Avenue?
A. Yes, sir.
Q. What did you find there; did you find the foundation wall over?
A. Yes, sir.
Q. How much?
A. Five inches over.
Q. What else did you find over, if anything?
A. The portico.
Q. How much over?
A. 8 feet 3 inches.
Q. What is that; an enclosed portico?
A. No, sir.
Q. Do you mean a piazza?
A. Yes, sir.
Q. Any bay-windows?
A. No, sir.
Q. Any projection of the upper part of the house?
A. Only the eaves.
Q. I direct your attention to the moving picture house on the South side of Tenth Avenue; how about that foundation?

MR. COOPER: May we have the location of that?

MR. WILSON: It is the moving picture house on the South side of Tenth Avenue.

MR. COOPER: Let this witness specify where it is.

Q. Where is the house — the moving picture house?

A. South side of Tenth Avenue, 200 feet West of F Street.

Q. What did you find in measuring that building?

A. The foundation is clear.

Q. Did you find any part of it that is over?

A. They have an office extended out 18 inches over the line — a sort of ——

Q. What is the nature of that structure; you say an office; what is the nature of it; is it a solid structure going up?

A. It is a frame office, covered with tin.

BY THE COURT:

Q. Does it rest on the earth?

A. I don't know about that.

Q. Has your attention been directed to the Osborne Hotel; I direct your attention to the Osborne Hotel on the South side of Tenth Avenue?

A. Yes, sir.

Q. How much is that, if any, over the restricted line?

A. The brick foundation ——

MR. COOPER: May we have the location of that, if your Honor please; how far it is from the side streets?

BY THE COURT:

Q. Where does it stand?

A. Southeast corner of Tenth Avenue and River Avenue; it faces River Avenue.

MR. FOSTER: How far South from F Street?

MR. WILSON: I submit, your Honor, these interruptions are improper.

Q. Won't you tell us where it is?

A. Southeast corner of River Road and Tenth Avenue.

Q. Does it front on Tenth Avenue or on River Road?

A. On River Road.

FURTHER DIRECT:

Q. Is it adjacent to Tenth Avenue on the side?

A. Yes, sir.

Q. How near is that structure to Tenth Avenue?

THE COURT: The foundation first.

MR. COOPER: We raise the objection to this on the ground that it is shown that this property does not front on Tenth Avenue.

THE COURT: Does the restriction refer entirely to houses that front on the avenue?

MR. WILSON: Not at all.

THE COURT: Then I overrule the objection.

MR. COOPER: Even if we include all the avenues, the only question is whether there is a restriction on the avenue at the street ——

THE COURT: Here is a house which is built, as I understand it, along the avenue, part of it; I shall allow the question.

Q. (Question read.)

A. The foundation is 13 feet 9 inches over the building line.

Q. How far along, parallel with Tenth Avenue, does

that foundation extend on the lot; is that a mere point in the foundation?

A. It extends right along.

Q. Are there any extensions beyond that on the Tenth Avenue side, bay windows?

A. No, sir.

Q. Or any projection in the upper story?

A. The house itself is 9 feet 3 inches over the line; the basement is used for selling confectionery at the present time. The main building itself is back of the basement, foundation; the upper portion of the building is 9 feet over the restricted line.

Q. I direct your attention to No. 102 Tenth Avenue, on the North side — is any part of the foundation over the building line?

A. Yes, sir, it is.

Q. How much?

A. One inch.

Q. Has it any bay windows?

A. Yes, sir.

Q. How far are they over?

A. 1 foot, 2 inches, on the second floor.

Q. How high up do they continue?

A. I don't know; it is in the second floor.

Q. Do they run down to the foundation, or to the top of the porch?

A. I only have it "on the second floor" here as a note.

Q. Is there a piazza on that house?

A. Yes, sir.

Q. Does that extend over the building line?

A. No, sir, it does not.

Q. Is there any other encroachment on that building, other than a bay window?

A. No, sir.

Q. I call your attention to house No. 200 Tenth Avenue?

Q. Is any part of the main part of the house extending over the building line?

A. Yes, sir, the foundation is 2 feet 1 inch over.

Q. Does that continue up?

A. Yes, sir.

Q. Any bay window in addition to that?

A. No, sir.

Q. Any piazza?

A. The porch is 10 feet and ½ an inch over the restricted line.

Q. What number is that?

A. 200.

Q. Are there any obstructions above the porch?

A. No, sir.

Q. I call your attention to No. 208 Tenth Avenue?

A. Yes, sir.

Q. Does any part of the main part of the house extend over the building line?

A. Yes, sir, the foundation is 2 feet over.

Q. Does that continue clear up?

A. Yes, sir.

Q. Are there any bay windows on the house?

A. Bay windows on the second floor.

Q. What additional encroachment does that make?

A. It is about three feet over.

Q. Does that extend down to the roof of the porch?

A. Yes, sir.

Q. To what extent does the porch encroach?

A. 10 feet 2½ inches, that is open.

Q. Refer to house No. 210?

A. Yes, sir.

Q. Do you find any encroachment there as to the main part of the house?

A. Yes, sir, the main foundation, 2 feet 2 inches over the restricted line.

Q. Does that continue clear up to the roof?

A. Yes, sir.

Q. Are there any bay windows on the house?

A. No, sir.
Q. No bay windows?
A. No, sir.
Q. Is there a porch?
A. Yes, sir, 10 feet 4½ inches.
Q. Are there any other encroachments?
A. No, sir, except the eaves.
Q. I refer to house No. 214 Tenth Avenue?
A. Yes, sir.
Q. What do you find there as to encroachments?
A. The foundation is 1 foot over the restricted line.
Q. Does that extend clear up to the roof?
A. Yes, sir.
Q. Are there any bay windows?
A. No, sir.
Q. Is there a porch?
A. The porch is 6 feet 10 inches.
Q. Are there any other encroachments on that, other than what you have mentioned?
A. No, sir.
Q. I refer to house 216?
A. Yes, sir.
Q. What do you find there as to encroachments?
A. The foundation is 1 foot 1 inch over.
Q. Does that encroachment extend clear up to the roof?
A. Yes, sir.
Q. Are there any bay windows?
A. None that extend over.

THE COURT: How many houses are on this avenue?

Q. What did you state as to bay windows?
A. I said the bay window was not over.
Q. It is the porch?
A. The porch is 7 feet over.

James Emlen — Direct

Q. Are there any other encroachments other than the main part of the house and the porch?

A. No, sir.

Q. Refer to house No. 218 Tenth Avenue?

A. Yes, sir.

Q. To what extent does the main part of the house encroach?

A. 1 foot 2¼ inches over.

Q. That extends clear up?

A. Yes, sir.

Q. Are there any bay windows?

A. The bay window on the first floor is 3 feet 2¼ inches.

Q. Is there a piazza?

A. Yes, sir.

Q. To what extent does that encroach?

A. 9 feet 10 inches over the line.

Q. Are there any other encroachments up above, that is, on the second story?

A. No, sir.

Q. Refer to house No. 302 Tenth Avenue.

A. Yes, sir.

Q. What did you find there as to encroachments?

A. The foundation is 5¼ inches over.

Q. Does that extend clear up to the roof?

A. Yes, sir.

Q. Are there any bay windows?

A. No, sir.

Q. Is there a porch?

A. Yes, sir.

Q. To what extent does that encroach?

A. 7 feet 6½ inches.

Q. Are there any other encroachments up above the first floor?

A. Nothing but the eaves, no, sir.

Q. Referring to house No. 304 ——

MR. FOSTER: There is a feature of this examination which occurs to me — it seems to me, as I am informed by my associates, that a number of these houses that have been testified to, and which we have taken up time with, were all in existence, and the alleged violations were called to the attention of the court in the Newbury case, decided in 1909; the question that I wish to submit to your Honor is this: whether additional violations from the date of that decision are not the pertinant things that should now be brought to your Honor's attention?

THE COURT: I suppose it is proper evidence: I don't see how I can exclude it, without permitting error; the point made by the defence is, that this case must rest on the evidence produced before the court, and in that case it cannot be res adjudicata; of course, I am not aware of what evidence was taken in the Newbury case.

(After further argument by counsel.)

THE COURT: We will admit the evidence, which I now regard as competent; I shall have to take it, I think.

Q. What do you find there as to encroachments?

A. The foundation is 5 feet 3/8 of an inch over the restricted line.

Q. Does that extend up to the roof?

A. Yes, sir.

Q. Do the eaves still encroach further than that?

A. Yes, sir.

Q. Are there any bay windows?

A. No, sir; there is an open porch on the second floor, which is 5 feet 6 inches over.

Q. An open porch on the second floor?

A. Yes, sir.

Q. Is there a porch on the lower floor?

A. Yes, sir.

Q. To what extent does that encroach?

A. 12 feet 2⅝ of an inch over the restricted line.

Q. Did you state that their porch was an open porch?

A. Yes, sir, a sort of a balcony.

Q. Is it enclosed at either end?

A. No, sir.

Q. Or in the front?

A. It is in the front, it is not enclosed.

Q. Are there any other encroachments above the lower porch?

A. No, sir.

Q. Referring to house No. 306 Tenth Avenue?

A. Yes, sir.

Q. Does the foundation wall encroach on the building line?

A. No, sir, it is clear.

Q. What about any porches or bay windows?

A. No bay windows.

Q. How about the porch?

A. The porch, and also a room on the second floor, is 7 feet 7⅜ of an inch over the line.

Q. That room you refer to, is that a part of the main body of the house?

A. Yes, sir, the rooms are built out.

Q. And that is a part of the main part of the house?

A. Yes, sir.

Q. Are there any bay windows?

A. No, sir.

Q. To what extent does the porch extend?

A. The same thing.

Q. That is on the line with the upper room referred to by you?

A. Yes, sir.
Q. What about the eaves?
A. The eaves are still further out over the line?
Q. How far over the line, then, are the eaves?
A. I don't know.
Q. Approximately?
A. They are at least 8 feet.
Q. Refer to house No. 308 Tenth Avenue?
A. Yes, sir.
Q. How far does the main part of the house encroach?
A. The main part is clear.
Q. Are there any bay windows?
A. On the second floor, yes, sir, six feet over.

BY THE COURT:

Q. Is there anything else over?
A. There is a bay window on the second floor, which is 7 feet 1⅞ inches over.
Q. How far up does that extend?
A. It is a bay window; it extends up to the roof.
Q. Is the extension carried into the roof?
A. I cannot say about that.
Q. Is there a porch?
A. A porch, yes, sir.
Q. How far does that encroach?
A. 8 feet 9 inches.
Q. Are there any other encroachments other than the porch and bay window?
A. In the room extending out over the porch on the second floor.
Q. There is a room there also that extends out?
A. Yes, sir.
Q. Is there a porch on the second floor, as well as the first?
A. No, sir, the bay window is on the second floor.
Q. Do the eaves extend over?
A. Yes, sir.

Q. Refer to house No. 312?

A. Yes, sir.

Q. Does the main part of that house extend over?

A. No, sir.

Q. Are there any bay windows?

A. There is an extension on the second floor on a room out over the porch; a regular room 5 feet 10¼ inches over the line.

Q. Is that a part of the main part of the house?

A. Yes, sir.

Q. Are there any piazzas?

A. Yes, sir.

Q. To what extent does that extend over?

A. 5 feet 11 inches.

Q. Do the eaves extend over?

A. No, sir.

Q. Refer to house No. 314.

A. Yes, sir; the main foundation is clear.

Q. Are there any bay windows?

A. No, sir, and the room extended out over the porch on the second floor.

Q. To what extent?

A. 5 feet 6 inches.

Q. Is that a part of the main body of the house?

A. Yes, sir.

Q. Is there a porch?

A. Yes, sir.

Q. To what extent does that encroach?

A. 5 feet 6 inches.

Q. Is the porch one story?

A. Yes, sir.

Q. Are there any other encroachments other than the projection of the second story?

A. No, sir.

Q. Do the eaves extend over?

A. Yes, sir.

Q. How much?

A. I don't know.

Q. Referring to house No. 316.

A. Yes, sir.

Q. Does the main part of that house extend over?

A. No, sir, it is clear.

Q. Are there any bay windows or upper story projections?

A. Bay window on the second floor, 4 feet 6 inches over.

Q. Is there a porch?

A. Yes, sir.

Q. To what extent does that encroach?

A. 7 feet 2¼ inches.

Q. Do the eaves extend over?

A. Yes, sir.

Q. Are there any other encroachments other than stated by you?

A. No, sir.

Q. How much do the eaves extend over?

A. I have made a record here of 8 inches in this particular case on the bay window, 8 inches; the eaves on the bay window are 8 inches beyond the bay window itself.

Q. How much is the bay window over?

A. 4 feet 6 inches.

Q. Does that bay window run clear up to the roof?

A. To the second floor.

Q. Refer to house No. 318.

A. Yes, sir, the foundation is 7¼ inches over.

Q. Does that extend clear up to the roof?

A. Yes, sir.

Q. Are there any bay windows or other story projections?

A. No, sir.

Q. None?

A. No, sir; there is a piazza 10 feet 6 inches over.

Q. Is the piazza up one story or two stories?

A. Only one story.

Q. Do the eaves extend over?

A. The eaves in the house, yes, sir.

Q. Do you know how much?
A. 15 inches.
Q. Referring to house No. 418?
A. Yes, sir.
Q. Does any part of the main part of that building extend over?
A. The foundation is two inches over.
Q. Does that continue clear up to the roof?
A. Yes, sir.
Q. Are there any bay windows?
A. The bay window on the first floor is 3 feet 2¼ inches over.
Q. Is there a piazza?
A. Yes, sir.
Q. To what extent does that encroach?
A. 10 feet 1 inch over.
Q. Do the eaves also encroach?
A. Yes, sir.
Q. To what extent, if you know?
A. 12 inches.
Q. Is that a one story or a two story porch?
A. One story.
Q. Referring to the house at the corner of C Street and Tenth Avenue on the North side?
A. Yes, sir.
Q. What corner is that?
A. It would be the Northwest corner.
Q. Please state as to the encroachment.

MR. COOPER: May we find out where this house faces?

BY THE COURT:

Q. Does it face on Tenth Avenue or on the street?
A. It faces on Tenth Avenue.
Q. What about the foundation wall; is that over the line, or ——

A. The foundation is 4 feet and ¾ of an inch over the restricted line.

Q. Does that extend clear up to the roof?

A. Yes, sir.

Q. Are there any bay windows?

A. No, sir.

Q. Any porches?

A. The porch is 8 feet 4¾ of an inch.

Q. Are there any other upper story projections?

A. No, sir.

Q. Do the eaves extend over also?

A. Yes, sir, 18 inches.

Q. Refer to house No. 500 Tenth Avenue; what about the foundation wall?

A. The foundation is cleared.

Q. Any porches?

A. There is a bay window on the first floor, which is 1 foot 4 inches over the building line.

Q. Is there a porch?

A. The porch is 7 feet over.

Q. Are there any other story projections?

A. Yes, sir.

Q. What are they?

A. There is a bay window on the second floor.

Q. To what extent do they encroach?

A. One foot 4 inches.

Q. Do they go clear up to the roof?

A. I don't know.

Q. Refer to house No. 512 Tenth Avenue?

A. Yes, sir.

Q. Does the main part of the body of the house encroach?

A. No, sir.

Q. Are there any bay windows?

A. Yes, sir, two feet over.

Q. Is there a porch?

A. There is a porch, yes, sir.

Q. How far does that extend over?

A. 9 feet 11 inches.

Q. Are there any upper story projections other than the bay windows?

A. No, sir — the eaves.

Q. How far do they extend over?

A. I have no record of them.

Q. I refer to house No. 514 Tenth Avenue?

A. Yes, sir.

Q. Does the foundation extend over?

A. The foundation is clear.

Q. Are there bay windows?

A. The bay window on the second floor is about 18 inches over.

Q. Are there any other projections on the second floor?

A. None but the eaves.

Q. How far do they extend over?

A. I have not got them.

Q. Is there a porch?

A. Yes, sir.

Q. How far does that extend?

A. 8 feet over the line.

Q. Is that a one-story?

A. Yes, sir.

Q. Refer to house No. 604.

A. Yes, sir.

Q. How far does the main body of the house extend over, if at all?

A. Three inches.

Q. Does that extend clear up to the roof?

A. Yes, sir.

Q. Are there any bay windows or other projections on the houses?

A. Bay window on the first floor, 2 feet 3 inches over.

Q. Is that all?

A. That is all, excepting the porch.

Q. How far does that extend over?

A. 8 feet 4 inches.

Q. Does the eaves encroach?

A. Yes, sir, 24 inches.

Q. Are there any other encroachments?

A. No, sir.

Q. Did I ask you as to a piazza?

A. Yes, sir.

Q. Now, I direct your attention to Sanborn's pavilion on Tenth Avenue; is that on the ocean front?

A. Yes, sir.

Q. How far does this pavilion invade the confines of Tenth Avenue?

MR. COOPER: One moment; we object to that on the ground that this has reference to a building that is on the East side of Ocean Avenue, and Tenth Avenue does not extend beyond the West side of Ocean Avenue; it is on the ocean front and has nothing to do with this avenue whatever; Tenth Avenue does not extend as far as this building is erected.

THE COURT: I will allow the question for the present, and will deal with it on the final disposition when I have an opportunity to look at the map.

Q. What do you find out about that; how far does that, if at all, project into the confines of Tenth Avenue?

MR. COOPER: We object to that, because there is nothing to show that there is any Tenth Avenue at this particular point, and there is no testimony that there was any projection.

BY THE COURT:

Q. Is this on Tenth Avenue, this pavilion?

A. No, sir, it is on the opposite of Ocean Avenue.

Q. Where does this building stand in relation to Tenth Avenue?

A. It is East of Ocean Avenue and very nearly on the South line of Tenth Avenue.

FURTHER DIRECT:

Q. And if we assume that the sides of Tenth Avenue might be projected along Ocean Avenue, would this building be within the confines of these projected sides on Tenth Avenue?

MR. COOPER: We object to that, on the ground that we have no right to assume any facts, and on the ground that Tenth Avenue does not extend beyond that, and we are dealing with Tenth Avenue.

THE COURT: I shall sustain the objection.

Q. What part of this building would it be necessary to remove in order to make a clear passageway?

A. It would be necessary to take part of the second story.

Q. How much of it would be necessary to take off?

A. 20 feet 3¾ inches.

Q. Then how far over the restricted building line is any part of that building?

A. 23 feet 3¾ inches.

Q. This Sanborn Pavilion, is that a matter in private ownership, or is it a pavilion owned and controlled by the borough?

MR. FOSTER: That is objected to.

THE COURT: Objected to on the ground that it is not the best proof?

MR. FOSTER: Yes.

Q. In whose possession, if you know, is the pavilion now?

MR. FOSTER: Objected to.

THE COURT: I will rule it out on the ground that it is not the best evidence.

Q. Directing your attention to Buhler's pavilion, where is that located with reference to Tenth Avenue?

A. It is opposite the Westerly end of Tenth Avenue, on the West side of River Road.

Q. How much does it extend out into Tenth Avenue?

MR. FOSTER: We object to that on the ground that it has been shown that this is a building facing upon River Avenue.

THE COURT: I will allow the question to stand, and deal with it on final disposition.

Q. How far does it extend out into Tenth Avenue, if at all?

A. 45 feet over the restricted building line, if the building line was continued.

Q. Is this the pavilion which is in the possession and control of the borough?

MR. FOSTER: Objected to on the ground that it is not the best evidence.

THE COURT: Objection sustained.

Q. Has that building been reconstructed, to your knowledge, since 1909?

A. There was some work done on the front of it, yes, sir; I don't know about the other part.

Q. When you speak of the front, do you speak of the portion on Tenth Avenue?

A. No, sir, I mean the portion on the River Road.

Q. Hasn't it been generally rebuilt since 1909?

A. I don't know.

Q. Do you know who occupies it now?

MR. SNEDEKER: Objected to; it is not the best proof.

MR. WILSON: I think he may say who occupies it, if he knows.

Q. (BY THE COURT:) You have been there several times?

A. Yes, sir.

Q. Do you know who lives in it?

A. I know who runs it, or uses it for store purposes.

Q. Who does live there?

A. A man named Carpenter.

MR. WILSON: This witness' testimony we propose to supplement by the testimony of several witnesses; we have no more evidence that we can present conveniently to-day for your Honor's consideration. I surrender this witness now for cross-examination.

BY THE COURT:

Q. Did you testify in the Newbury case?

A. Yes, sir.

MR. FOSTER: Now, regarding the postponement; three or four weeks hence Mr. Patterson might be in condition to appear in court.

MR. COOPER: Now is the time when building operations are most active at the seashore, and I think the people of the borough are entitled to know whether they must conform to this line or not.

THE COURT: On October 13th, or the following week, October 19th, you may apply to have a day fixed for the next hearing. I think you will need three days, and possibly four.

10

20

30

40

FOURTH DAY

Continuation of the taking of testimony in the above-entitled causes, before HON. VIVIAN M. LEWIS, at the Chancery Chambers, Jersey City, New Jersey, on the twenty-fifth day of May, 1915, at 10 A. M.

APPEARANCES:

Harry R. Cooper, John E. Foster and H. H. Snedeker, Esqs., for the Complainants;
Patterson & Rhome, Esqs., associated with Hon. Edmund Wilson, for the Defendant.

JAMES H. EMLEN, resumes the witness stand.

DIRECT EXAMINATION (continued) BY MR. WILSON:

Q. You were on the witness stand at the time when the Court arose at the last hearing?

A. Yes, sir.

Q. I am in doubt as to whether you were — you were interrogated as to each of the structures on Tenth Avenue; did you complete your list in each one of them; which ones did you omit?

A. I don't think I have any record of them, no, sir.

Q. I mean this — did you complete your enumeration of the structures which were apparently beyond the restricted lines ——

A. No, sir.

Q. What did you omit?

A. I thought that there were one or two that had porches on, with the porches extending over the line; I thought there were.

Q. You were to look up 301 — is that an open porch or a closed porch?

A. It is open.

Q. The Heyniger bay windows, No. 509 ——

MR. SNEDEKER: That was answered.

Q. Do you think of something that you have omitted calling our attention to? Do you wish to make any corrections in your former testimony?

A. Yes, sir.

Q. What are the corrections?

A. The house which I said was No. 200, should have been No. 206.

Q. Then you mean in your testimony you referred to it as No. 200?

A. Yes, sir.

Q. You want that testimony to relate to No. 206?

A. The number on that house at that time was No. 200, but the correct number should have been No. 206.

Q. Are there other corrections?

A. Yes, sir, the house at the Northwest corner of Tenth and C ——

Q. What is the number of that?

A. 400, I think.

Q. It is not given here with the number; here you gave " corner of C, two houses " — now, one of those houses you want to correct, do you?

A. Yes, sir.

Q. Which one?

A. The Northwest corner, No. 400.

Q. What do you want to say about that?

A. That should have been 4¾ inches over, instead of 4 feet and ¾ inches.

Q. Is that the only correction in respect to that?

A. That is all in that one.

Q. What else is there you wish to correct?

A. No. 304 — the foundation should have been 5⅜ inches, instead of 5 feet and ⅜ of an inch.

Q. Anything else?

A. No. 512.

Q. What about that?

A. The porch should have been 7 feet 9¾ inches, instead of 10 feet.

BY THE COURT:

Q. That is the porch?

A. Yes, sir.

FURTHER DIRECT:

Q. What else, if anything?

A. No. 613 — the main foundation is 1 foot and ⅝ of an inch clear, instead of 3 inches clear.

Q. You had it, the bay window on the first and second floor, 2 feet 5½ inches over; now, do you want to change it?

A. Changing the foundation.

Q. Not the bay window?

A. No, sir.

Q. You mean clear of the building line?

A. Yes, sir.

Q. The bay window stands the same?

A. Yes, sir.

Q. Anything else?

A. That is all that I have any record of here.

Q. Do you know whether there is a flag-station house on Tenth Avenue?

A. Yes, sir.

Q. Maintained on the railroad right of way?

A. Yes, sir.

Q. What is the location of that with reference to the building line on Tenth Avenue?

MR. SNEDEKER: Objected to; the deed to the railroad company clearly shows that it was not subject to any of these restrictions, and it was made prior to this time, and it has nothing whatever to do with this matter.

MR. WILSON: Our insistence is, that whether waived in a deed or not, it is none the less relevant testimony. If you and I and somebody else organize a land scheme, and we promulgate certain rules as to its development, and we give 50 deeds with these rules and regulations in, and then we give 50 more, or any number, with the restrictions out, the fact that we give some with the restrictions in and some with the restrictions out, has some probative force as establishing the proposition as to whether there was an abandonment or not.

THE COURT: Upon that theory, I shall admit the evidence. The deed to the railroad company was given to the railroad company before this restrictive plan. The deed was a long time prior to the restriction plan. Have you looked at the deed, Mr. Wilson?

MR. WILSON: I don't recall having seen it.

THE COURT: May I inquire how you came to offer the deed?

MR. COOPER: It is in Mr. Arrowsmith's testimony.

THE COURT: I will allow the question and note the objection to it, on the objection that you make that the deed was given prior to the restriction being established.

MR. FOSTER: I would like to object to the question on another ground, viz: that it is not the kind of a structure contemplated by the restriction.

Q. (Question read.)

A. The North face of the building is 15 feet 1⅛ inches over the restricted line.

Q. Do you mean the face of the building that is nearest to Tenth Avenue?

A. Yes, sir.

CROSS-EXAMINATION BY MR. SNEDEKER:

Q. You testified that you have been the surveyor of the Borough of Belmar for seven years?

A. Yes, sir.

Q. By whom were you appointed surveyor for the borough?

A. I have never been appointed.

Q. Do you receive a regular salary?

A. No, sir.

Q. Just what do you mean when you testified you were employed by the borough?

A. I do work as ordered and when ordered.

Q. By that, you mean whenever the borough orders any work done, you have done it and were paid for each particular job?

A. Yes, sir.

Q. What work have you done in the last seven years, for the borough?

MR. WILSON: I submit that that is absolutely immaterial.

THE COURT: I think it is material; his authority and his credibility as a witness, I think, is affected by the investment of the power which he had; I think I shall allow it.

Q. (Question read.)

A. I have given and run grades for curbs, walks, state building line for the lots; run the lines for new streets;

that is the territory South of the town that is now being taken in; given lines and grades for sewer system; that is all I can remember just now.

Q. About how many items would that make?

MR. WILSON: That is a matter of arithmetic.

THE COURT: I don't know that it will affect the case one way or the other; I don't think it is at all material.

(Question withdrawn.)

Q. You testified to the municipal building, that is at the corner of Ninth Avenue and E Street?

A. Yes, sir.

Q. The foundation wall of that building is within the building line, is it, of Ninth Avenue?

A. Yes, sir.

Q. You did, however, speak of some pilasters being over 4 inches?

A. Yes, sir.

Q. Are those pilasters put on the building for ornament?

A. Partly, and partly to carry the weight.

Q. How far do they extend up from the ground; I have reference to only those that you say were 4 inches over the line?

A. I have not any record of that, with the exception of the foundation?

Q. You saw the building, didn't you?

A. Yes, sir.

Q. Look at this exhibit, "C 13½," and see if that will refresh your memory; as a matter of fact, it is only between a foot and a half and 2 feet high, isn't it?

A. It is about 2 feet, as I have it here.

Q. And there is nothing on the building that extends over the building line higher than that?

A. Yes, sir, there is a coping up at about the top of the first floor, I think.

Q. You did not speak of that before?

A. I don't know positively that that is so, though.

Q. When you made the measurements for those buildings that you have testified to, you were very careful, I suppose, in making those measurements?

A. Yes, sir.

Q. How did you make them?

A. Took an offset from the line of the monuments, measuring it 7 feet from the line of the monuments, and took my sight down the street for two and three blocks at one stretch, setting my sights opposite the corner of each house and measuring in to the foundation.

Q. What do you refer to as monuments?

A. The corner stones that are put in to mark the lines of the streets.

Q. Do you know who put those corner stones in?

A. I was told; I don't know positively of my own knowledge.

Q. Do you know anything about as to whether they were placed accurately or not?

A. They were placed accurately according to the map, yes, sir.

Q. How did you ascertain that?

A. By measuring from one stone to another.

Q. That was the only way?

A. Yes, sir.

Q. Did you use a tape measure in making these measurements?

A. Yes, sir.

Q. What kind of a tape measure?

A. Steel.

Q. Was it registered tape?

A. Yes, sir.

Q. Did you measure from the inside or the outside of the curb?

A. To get what?

Q. To get these measurements ——

A. I measured from a certain number of feet from the line of the monuments.

Q. Do you know that the distance that is contended for is 40 feet back from the curb, as the building line?

A. Yes, sir.

Q. Did you measure back from the curb?

A. Let me change that; that is wrong; I know that it is 20 feet back from the property line.

Q. But you did not measure 20 feet back from the curb?

A. No, sir.

Q. You established the building line, and from that you measured back, but you did not measure back 40 feet from the curb in any instance?

A. That is right.

Q. Did you find monuments at all the corners of all these streets?

A. No, sir, the monuments are on the opposite corners of each intersecting street.

Q. Did you measure back from the lot line facing Tenth Avenue?

A. From the line of the monuments, yes, sir; the monuments are three feet out from the lot line each way.

Q. Did you measure from the lot line at all, facing Tenth Avenue?

A. The measurements were all made from this offset line.

Q. What do you mean by the " offset line "——

A. (No answer.)

BY THE COURT:

Q. As I understand this proposition, the building line is 40 feet back from the curb line; where did the monuments stand?

A. The monuments are three feet out into the street from the lot line.

A. Three feet beyond the lot line?

A. Yes, sir.

Q. Did you measure from the monument to the curb?

A. No, sir.

Q. You cannot tell us to-day whether the curb line is — —

A. Usually on the corners of the blocks, that is where I measured.

FURTHER CROSS BY MR. SNEDEKER:

Q. So you relied entirely upon these monuments, is that right?

A. Yes, sir.

Q. You did not verify your work by measuring back from the curb line?

A. In several cases I did.

Q. In what cases?

MR. WILSON: The witness has said that he took as his criterion to measure from, the monuments which he described as having been set three feet beyond the lot line; now, I don't understand that he has said that he measured back from that monument 20 feet merely to fix the building line; that was his starting point.

BY THE COURT:

Q. How far did you measure back from the monument?

A. I measured seven feet from the monument to get what we call an offset line.

Q. What is the offset line?

A. It is a measurement that is taken from the line of the monuments to clear any obstructions that might be in

view; it is a line parallel with the line of the monument, and seven feet from it.

Q. From the offset line towards the curb?

A. Yes, sir.

Q. How many feet are there between the offset line and the property line?

A. Three feet between the lot line and the monument line, and seven feet between the monument line and this offset line.

Q. Is this Tenth Avenue a straight street?

A. Yes, sir.

Q. And the lots are about on the same lines?

A. Yes, sir.

Q. All along?

A. Yes, sir.

Q. How far did you go after you struck the offset line which was 10 feet from the lot line; how far did you go back?

A. We measured from the offset line into the house and deducted the 30 feet — the difference between what the measurement was and the 30 feet, to find out whether the houses were over the line or clear of the line.

Q. You deducted 30 feet?

A. Yes, sir, the running line is 10 feet from the lot line; the building line is 20 feet back of the lot line, making 30 feet from the running line.

Q. Now, you call the running line what?

A. The offset line.

Q. How far did you measure back from the offset line to establish violations?

A. 30 feet back.

Q. Then you would be back 40 feet, wouldn't you, from the lot line?

A. Only 30 feet.

Q. The building line is said to be 20 feet back from the lot line?

A. Yes, sir.

Q. I don't understand that.

A. Can I illustrate that to you?

MR. WILSON: The witness is a perfectly candid witness; I think he can make it clear to your Honor. What this witness has done, instead of assuming that the lot line and the curb line would appear to be, according to the confines of the curb and the lot, as it appeals to the eye, he has actually sought, by measuring from monuments, that the city established precisely where the building line was and where the curb line was.

(Witness shows the Court a diagram.)

Q. Now, here is the property; where is the lot line?

A. This solid line is the lot line; this line is the curb line; "L" is the lot line; "C" is the curb line, and "B" is the building line; "O" is the offset line.

Q. Now, just tell in your own way how you made these measurements.

A. The monuments are 3 feet from the property line.

Q. The monument shown by "X" and "Y" are what?

A. Three feet from the lot line; the monuments are three feet from the lot line.

Q. Which way?

A. From the West; three feet in towards the sidewalk.

Q. That makes the monument 23 feet from the house?

A. Yes, sir.

Q. Then what did you do?

A. Measured 7 feet from the monument.

Q. To where?

A. To a point in the middle of the sidewalk, which makes 10 feet from the building line.

Q. What does that make?

A. It makes an offset line.

Q. Then what did you do?

A. I went East two or three blocks and did the same thing, giving me an offset line parallel with the lot line.

Q. How far distant from the lot line?

A. Ten feet.

Q. Then, what did you do?

A. Then, with my instrument over one of those points on the offset line, I took a sight at the other point two or three blocks further East or West, as the case may be, and coming opposite each corner of these houses, I would set a mark on the sidewalk opposite the face of each one of these buildings, and then measure from the mark in the offset line, and measure from that back to the building, whatever it would be. If the building set out over the building line, I would measure that distance in there, and then deduct that from the 30 feet, which is the true building line distance — deduct it — that would give the amount in feet or inches that the building is over the building line.

Q. I understand you to say that you, instead of taking the lot line or the building line or the curb line, you took the monument as the basis of your calculation?

A. Yes, sir.

Q. Now, what kind of a tape is it that you used?

A. A standard steel tape.

Q. Do you remember the name of your tape line?

A. No, sir.

Q. Is it one you have used for many years?

A. Yes, sir.

Q. It was not a new one?

A. No, sir.

Q. Who assisted you in making these measurements — who held the tape with you?

A. William Watson.

Q. Is he in Court?

A. No, sir.

Q. Did anyone else assist you?

A. Mr. Osborne.

Q. Is he a surveyor?

A. No, sir.

Q. Is he in Court now?
A. Yes, sir.
Q. Did anyone else assist you?
A. No, sir.

FURTHER CROSS, BY MR. SNEDEKER:

Q. This other person, what was his name, who assisted you, besides Mr. Osborne?
A. Mr. Watson.
Q. How old is Mr. Watson?
A. 40, I should think.
Q. He is not a surveyor?
A. No, sir.
Q. What did Mr. Watson do, and what did Mr. Osborne do?
A. He helped to measure.
Q. Helped you in what way?
A. With the tape.
Q. Who made the marks on the sidewalk?
A. I could not say, one of the two; I could not tell you which, but I think Mr. Watson made most of them.
Q. It was one or the other?
A. Yes, sir.
Q. And it was from that mark on the sidewalk that you measured back 30 feet?
A. Yes, sir, that is correct.
Q. Where were you with your instrument at the time these marks were being made on the sidewalk?
A. I don't know; I would be opposite one of these monuments.

BY THE COURT:

Q. Who would make the marks?
A. Mr. Watson, I think, made most of them.

FURTHER CROSS, BY MR. SNEDEKER:

Q. And you may, at times, have been as much as two or three blocks away from him when he was making the marks?

A. Possibly two.

Q. Describe the sidewalk; is it a concrete ——

A. In some places it is concrete, and in some, flag ——

Q. The curb line is made of what ——

A. Flagging, or in some cases cement.

Q. Just why didn't you make these measurements from monument to monument, instead of along what you term as the running line?

A. I did that to get away from the trees

Q. Were there trees in front of many of these houses that were 20 feet back from the curb line?

A. There is quite a number, yes, sir.

Q. Where?

A. I cannot say that; that would be a hard question to answer; they are all along the street; I cannot say where they are; there were trees and bushes planted all along the avenue.

Q. Can you state on what properties they were?

A. I cannot just tell you what properties they were on.

Q. State any instance where there was a tree on this line that was 23 feet nearer the street than the house line.

A. I cannot, no, sir — I cannot tell you of any particular point, no, sir.

Q. You have made some corrections in your testimony to-day; have you made any additional surveys since you were here the last time?

A. Yes, sir.

Q. Why did you find that necessary?

A. I was requested to do so by Mr. Levinsohn.

Q. When you made the new surveys, you found you had made errors in your original surveys; that is why you have corrected your testimony to-day; is that right?

A. No, sir.

Q. Then, why did you correct your testimony?

A. I compared the typewritten testimony with the notes that I have here; I found those before I did any work on the field at all.

Q. Now, you testified when you were on the witness stand before that the Northwest corner of Tenth Avenue and C Street — you then testified to the measurement of the porch, and you correct your testimony to-day; what called your attention to that?

A. I don't know; I think Mr. Levinsohn spoke of that; he asked me to look it up, I think.

Q. When did you make these measurements originally?

A. The 15th of January, 1914.

Q. How long were you in making them?

A. I could not say; I think there were three days.

Q. How many houses are there on Tenth Avenue — or buildings ——

A. I don't know.

Q. Have you never counted them?

A. No, sir.

Q. You were a witness in what is termed the Newbury case; you know about the case of Newbury vs. Barcalow, don't you, that was tried before Vice-Chancellor Howell?

A. Yes, sir.

Q. You did count houses on Tenth Avenue at that time, didn't you?

A. I don't know whether I did or not.

Q. You don't know whether you testified to that?

A. I do not.

Q. In that case, you testified to encroachments of porches and bay windows, didn't you?

A. Yes, sir.

Q. And you testified to all of the houses that had any bay windows or porches that encroached over the line at that time?

A. I think I did, yes, sir.

Q. And did you testify that Mr. Newbury's house had a porch that encroached eight feet over the line?

A. I cannot say what my testimony was at that time, no, sir.

Q. Do you remember being asked in that case this question, and that you gave this answer: "Ques. Where is the front of Newbury's building with reference to the 20 foot line? Ans. It is on the line, as near as I remember." Was that question asked and did you make such an answer?

A. I could not say.

Q. Were you asked this question: "Ques. Is there a veranda or piazza extending in front of that? Ans. Yes, sir." Was that question asked you and did you make such an answer?

A. I don't know.

Q. Were you asked this question: "How far does that extend? Ans. About eight feet." Were you asked such a question and did you make such an answer?

A. I could not say what my answers were then, no, sir.

Q. Will you state now whether at the time that case was tried, there was a porch on the Newbury house that extended out over the building line?

A. That is something I cannot answer.

Q. Why not?

A. I don't remember whether there was a porch there or not.

Q. You know where the Newbury house is, don't you?

A. Yes, sir.

Q. You have passed it recently, haven't you?

A. Yes, sir.

Q. You know there is a porch there now?

A. Yes, sir.

Q. But yet you don't know whether it had a porch at that time or not?

A. I could not say, no, sir.

Q. And you have passed that house, have you, how often in the last seven years?

A. I don't know.

Q. Well, at least once a month?

A. I should say at least that much.

Q. You have not seen any porch erected on it since that time?

A. No, sir, I have not.

BY THE COURT:

Q. When you were called in the Newbury case, were you testifying to measurements and lines?

A. Yes, sir.

Q. Do you recall in the testimony you gave then, how you established your measurements, from what point; was it from monuments?

A. Yes, sir, the same as this time.

FURTHER CROSS:

Q. At that time, did you establish a running line in the same way that you did this time?

A. Yes, sir.

Q. Or did you measure from monument to monument?

A. I established a running line.

Q. In the Newbury case did you measure back from any curb lines?

A. No, sir.

BY THE COURT:

Q. You took the same method of establishing the infringements and violations of the building line that you have now testified to?

A. Yes, sir.

New Jersey State Library

BY MR. WILSON:

Q. On which side were you a witness?

A. For Mr. Newbury.

Q. And he was the man who was trying to stop Mr. Barcalow from building?

A. Yes, sir.

Q. And you helped him do it?

A. Yes, sir.

FURTHER CROSS:

Q. Do you know how many houses have been erected on Tenth Avenue since the Newbury case was tried?

A. No, sir.

Q. Can you give the approximate number?

A. No, sir.

MR. WILSON: Objected to as not cross-examination.

Q. At the time the Newbury case was tried, the flag-house on the railroad was there, was it?

A. I don't think it was in the same position that it is now, although I don't know.

Q. What do you know?

A. I don't know positively whether it was or not.

Q. Where was it if it was not in the same position that it is to-day?

A. I think it was further towards the South, further from the curb line.

Q. But you only think that?

A. Yes, sir.

Q. Why did you have any thought in regard to it?

A. They have been doing some work within the last two years, and I think they moved that house, although I am not sure about it.

Q. Describe this flag-house; how large is it?

James Emlen — Cross

A. It is octagonal in shape; six feet six inches in diameter.

Q. How high is it?

A. I don't know.

Q. You did not measure that?

A. No, sir.

Q. Can you tell about what it is?

A. I should say ten feet.

Q. On Tenth Avenue, which side of the street are the odd numbers, house numbers?

A. The South side.

Q. Then the even numbers are on the North side?

A. Yes, sir.

BY THE COURT:

Q. Did you take a measurement of this flag-house?

A. Yes, sir.

FURTHER CROSS:

Q. Now, I understand that there is no No. 1 on the street, that the first number is 100?

A. Yes, sir.

Q. So that the houses between Ocean Avenue and Avenue A are numbers from 1 up to 100; is that correct?

A. No, sir, they start with 100 and go to 200.

Q. And from Avenue A to Avenue B, they run from 200 — from A street to B street they run from 200 to 300?

A. Yes, sir.

Q. And so on right through each block going West there are 100 numbers left for each block; is that correct?

A. Yes, sir.

Q. Where is No. 701, do you know?

A. There is no No. 701, no house at that number.

Q. I will show you "Exhibit C 7½" (showing witness a map); will you tell me what the lot number is on that map, of No. 105 Tenth Avenue?

A. 1902, as I make it.
Q. What is the street number of No. 102?
A. 1801.
Q. What is the lot number of street No. 302?
A. 1820.
Q. Is that 1820 or 1821?
A. 1821.
Q. What is the lot number of street number 304?
A. 1822.
Q. What is the lot number of street number 318?
A. 1829.
Q. What is the lot number of street number 400?
A. 1830.
Q. What is the lot number of street number 511?
A. 1945.
Q. What is the lot number of street number 503?
A. 1941.
Q. What is the lot number of street number 603?

MR. WILSON: What is the object of this testimony?

A. 1954.
Q. What is the lot number of street number 604?
A. 1852.
Q. You have testified to a house on the Southeast corner of Tenth Avenue and River Avenue; that is the Osborne house, isn't it?
A. Yes.
Q. What is the lot number of that?
A. It is not on here.
Q. You think it is not on there?
A. No, sir.
Q. You did testify of a house on Tenth Avenue that was just East of the defendant's property; that, I think, is an hotel, as a matter of fact; what are the lot numbers on that?
A. 1956.

James Emlen — Cross

Q. Now, in the Newbury case, you testified to the measurement of the Osborne house, didn't you?

A. Yes, sir.

Q. And did you testify in that case that the foundation wall was out 9 feet 2 inches?

A. I don't know what my testimony was at that time.

MR. WILSON: What is the number of the Osborne house?

MR. SNEDEKER: It has no number; it was testified to as the Osborne house.

Q. Have you with you the notes that you made, from which you testified in the Newbury case?

A. No, sir.

Q. In the Newbury case were you asked this question, and did you make this answer? "Ques. You refer particularly to a building at the corner of Tenth Avenue and River Street? Ans. Yes, sir." Do you remember testifying to that?

A. No, sir.

Q. Do you remember testifying, "Ques. What is the extent of the projection of that building over the 20 foot line? Ans. The main building is 9 feet 2 inches." Do you remember testifying to that?

A. No, sir, I don't remember any figures at all.

BY MR. WILSON:

Q. What building is that on your line here?

A. The Southeast corner of River and Tenth Avenue.

Q. What is your measurement here?

MR. SNEDEKER: I object to being broken in on at this time.

MR. WILSON: I beg your pardon.

FURTHER CROSS, BY MR. SNEDEKER:

Q. How near this Osborne house is the Newbury house?

A. I don't know, in feet.

Q. It is about half a block away from it, isn't it?

A. I should say about 400 feet.

Q. How long is the block from the railroad to River Avenue?

A. I don't know, they vary.

Q. How far is the block on Tenth Avenue, about, from the railroad to River Avenue, about?

A. I don't know.

Q. Well, the Newbury house is between the railroad and River Avenue, isn't it?

A. No, sir.

Q. It is between the railroad and F Street?

A. Yes, sir.

Q. And there is no street between F Street and River Avenue, West, is there?

A. I think there is.

Q. What?

A. There is Railroad Avenue ——

Q. That is simply a drive in front of the station from Ninth Avenue to Tenth Avenue?

A. No, sir, it is from Tenth Avenue to Eleventh Avenue, it is a narrow street, 33 feet wide.

Q. However, the Newbury house is nearer the Osborne house, than the Levinsohn property?

A. Yes, sir.

Q. In this action you have testified that No. 105, the foundation wall is one inch over; that No. 102, the foundation wall is one inch over; this No. 503, the foundation wall is 1⅛ inch over; and No. 604, the foundation wall is 3 inches over. Now, as a matter of fact, you did not testify in the Newbury case that those foundations were over at all, did you?

A. I don't remember.

James Emlen — Cross

Q. But you did testify in the Newbury case, that you had made measurements of all the houses, and did testify to all those that were over, didn't you?

A. I do not recall what the extent of the testimony was.

Q. Referring to the property that is immediately East of the defendant's property, do you remember that you testified in the Newbury case, that the foundation wall there was one inch over?

A. I do not, no, sir.

Q. Do you remember that you were asked this question and gave this answer: "Ques. Now, what other lots did you find there, above which house are projecting on restricted lots? Ans. The house adjoining to the West is one inch over." "Ques. Is that lot 1956? Ans. 1956, it should be, yes, sir." Do you remember that you were asked and answered those questions in that way?

A. I don't remember it, no, sir.

Q. Do you remember that in the Newbury case, testifying about No. 603, which was lot No. 1951, that you were asked this question and made this answer: "Ques. That is Main house? Ans. Yes, sir, 1951 one inch over. Ques. Is that Main house?" Do you remember that?

A. No, sir, I do not.

Q. Do you remember in the Newbury case testifying about No. 511, that you were asked this question and gave this answer: "Ques. Now, give us the lot number, and then the number of inches or feet that it projected over? Ans. No. 1945, three inches." Do you remember that?

A. No, sir.

Q. Do you remember that in the Newbury case, testifying about No. 302, and that you were asked this question and gave this answer: "Ques. Go on to the next," and then an answer, "No. 1813, two feet. Ques. Main? Ans. Yes, sir, these are all Main;" and then you gave the number of lots, among which was No. 1821, in which you said, "No. 1821, two inches;" do you remember so testifying?

A. No, sir.

Q. And do you remember testifying that No. 1822 was three inches?

A. I do not.

Q. Do you remember testifying that, in answer to No. 1829,—"five inches?"

A. No, sir.

Q. And do you remember testifying as to No. 1830—"Three inches?"

A. No, sir.

Q. Now, if you did so testify in the Newbury case, and your testimony here differs from that there, have you any explanation to make for it?

A. I have not, no, sir.

Q. Do you remember being asked this question and making this answer in the Newbury case: "Ques. Now, I ask you if you measured every house on Tenth Avenue as you went down? Ans. Yes, sir."

A. I do not.

Q. You don't remember so testifying?

A. No, sir.

Q. You had no book when you testified in the Newbury case?

A. I think I did.

Q. Where is it now?

A. I don't know.

Q. Have you tried to find it?

A. I have, yes, sir.

Q. What effort did you make to find it?

A. I looked through all the note books that I had, and all the memoranda.

Q. Why did you make that search?

A. I wanted to find it.

Q. Why?

A. I don't know that I had any particular reason; I simply wanted to compare the two — or at the time that I looked, at the beginning of this case, and I thought that might help out in the case some.

Q. Did you look before or after you made the measurements in this case?

A. It was after I made some of them and before I made these for Mr. Levinsohn.

Q. In testifying to the measurements in this case, you have relied upon your memorandum?

A. Yes, sir.

Q. When did you make the notes in the book that you have testified from?

A. I made them as the measurements were taken.

Q. You mean at that instant of time, or did you do it later in the day?

A. Right at that time.

Q. Have you got that book with you?

A. Yes, sir.

BY MR. FOSTER:

Q. Let me see it.

A. There are some.

FURTHER CROSS, BY MR. SNEDEKER:

Q. Have any of the houses that you have testified to in this case been erected since the Newbury case was tried?

A. I don't know about that.

Q. This is the note book that you put down the entries when you made the measurements?

A. Yes, sir.

Q. Will you look at that and state whether those are two of the pages that you made the entries on?

A. Yes, sir.

Q. I notice there question marks; why did you put question marks opposite some of the houses?

A. That is the building that I was unable to correctly describe at the last hearing, and I did that to call my attention to it.

Q. There is more than one mark there; what do you

say as to the other; what is your explanation for putting those marks on some others?

A. Oh, that is the North point, indicating which side of the street the land lies.

Q. When you were last on the stand, you testified to No. 200 Tenth Avenue; I understood you to say to-day that the house No. 200 Tenth Avenue had a different number on at the time you made the measurement?

A. Yes, sir, that is right.

Q. So that when you made your original measurements you measured No. 200, but you have got it mixed up since?

A. I measured it as No. 200.

Q. You know what 200 Tenth Avenue is?

A. Yes, sir.

Q. Did you, before you were on the witness stand the last time, measure the house at No. 200?

A. There was not any house there on the correct number 200.

Q. But you did testify to the measurements that you made of No. 200?

A. I testified to house No. 200, that is right.

Q. I call your attention to page 80 of your memorandum book; you seem to have indicated here the houses on the street; and also call attention to page 81. (Question withdrawn.) You have testified that you made these measurements from monuments; is there any record showing where those monuments are which have been set, or where they were set?

A. Yes, sir.

Q. Where?

A. The borough clerk has an atlas showing the monuments where they were set.

Q. That simply shows that a monument should be set such a number of feet back from the curb line ——

A. No, sir, it shows where they were set, so many feet from the property line.

Q. When did you see that record?

A. I have seen it a number of times; I don't know when the last time was, possibly within the last six months.

Q. What were these monuments?

A. They are red sandstone.

Q. Do you know how deep in the ground they were placed?

A. I don't know.

Q. Do you know whether frost would be likely to change their position slightly?

A. I don't know how deep down they are; I am not prepared to say.

Q. Are those monuments on every corner?

A. They are at the opposite corners of intersecting streets in the majority of cases.

Q. Also diagonally across?

A. Yes, sir.

Q. So that there would be only one monument at a corner on that side of the street?

A. Yes, sir.

Q. You have no actual knowledge that they were correctly placed?

A. I know that they correspond to the figures given on this atlas.

BY MR. WILSON:

Q. You mean the borough atlas?

A. Yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. About page 80 and 82 of your book; do I understand that you did not measure from the curb line at all?

A. I did not say that; I said, "in several cases," and Mr. Snedeker asked me "what cases," and then he started off on another question before I answered.

Q. Referring to page 82, there appears to be a measurement of 40 25/100 feet between the curb line?

A. Yes, sir.

Q. Indicating that the curb is not properly placed?

A. It indicates that the East and West are as the atlas shows, three inches too wide.

Q. And that same answer then, would apply to the measurement between the curb line and the building line, or curb line and your measuring line on page 88, where you show a measurement of 60 25/100 feet?

A. Yes, sir.

Q. Did you make the diagram in your memoranda at the time that you put down the measurements?

A. Yes, sir.

Q. Some marks were placed on the sidewalk by Mr. Watson, at the time you located this line ten feet from the building line?

A. I don't know.

Q. What was the nature of the mark?

A. It might be a lead pencil mark; in some cases it would be one thing, and in some cases it would be another.

Q. The other gentleman who assisted — Mr. Osborne — was he there on all occasions when the measurements were made?

A. Yes, sir.

Q. Where were you while that was being done?

A. I was making the diagram and keeping the notes.

Q. And you would go in to the inside line to see what the measurement was?

A. Yes, sir.

Q. You would not stand at the starting point?

A. No, sir.

Q. And you personally, then, have no knowledge whether Mr. Watson or Mr. Osborne, as the case may be, had the beginning of the tape line on the mark made by the scratching of a pin or a lead pencil point upon the sidewalk?

A. Not in every case, no, sir.

Q. So that you will have to qualify your testimony to that extent?

A. Yes, sir.

Q. You have to suppose that either Mr. Watson or Mr. Osborne, as the case may be, in every instance put the beginning of the tape upon the exact mark, in order for your measurements to be accurate?

A. Yes, sir.

Q. And you don't know whether they did so or not?

A. That is what I say.

CROSS-EXAMINATION (continued) BY MR. SNEDEKER:

Q. What is the distance of a diagonal line from one of these monuments to another?

A. I don't know it without figuring it; I have never measured it.

Q. You were measuring across from one monument to another, in order to make these lines, were you not?

A. I took the monuments that were on the respective sides.

Q. Now, I understood you to say a moment ago, that at each crossing there were two monuments located on diagonal corners?

A. Yes, sir.

Q. Now, did you measure from one of those monuments to the other?

A. No, sir.

Q. On any of those streets?

A. Not diagonally, no, sir.

Q. Well, did you measure so as to locate where a monument should be placed on the corner directly opposite the monument that you were measuring from on the opposite side of the street?

A. I don't understand that question.

Q. For instance, suppose that there was a monument at the Southwest corner of the street, and the Northeast corner, and you wanted to find where a monument should be at the Northwest corner; you had to do that, didn't you?

A. Yes, sir, but I used the monuments on the side of the street on which I wanted to work.

Q. On the side of the street on which you wanted to work there was only one monument in the block?

A. That is correct.

Q. And so it was necessary for you to fix some point where the monument ought to be, at the other end of the block, wasn't it?

A. I could go to the Easterly side of the corresponding street and find another one, which I did.

Q. But you did not fix any point in that block where a monument should be?

A. No, sir.

Q. Do you know what the distance is from one monument across the street to the location where another monument would be on the opposite corner, if one had been correctly placed there?

A. What street are you referring to now?

Q. I am referring to Tenth Avenue entirely; what is the distance straight across?

A. 74 25/100 feet.

Q. Did you measure across Tenth Avenue at B Street?

A. I don't know whether I did or not.

Q. Do you know that the distance across there is 74 40/100?

A. I don't know.

Q. Or 74 feet and 4 inches, I mean?

A. No, sir.

Q. Did you measure at F Street?

A. I did not measure at any of those places.

Q. Do you know that the distance there is 74 feet 6½ inches?

A. (No answer.)

CROSS-EXAMINATION BY MR. FOSTER:

Q. I was just looking at your diagram of No. 613, to which you referred and corrected this morning; just look

at your memorandum on page 82, relating to No. 613, and just read it, please, from your book.

A. "2325 from the offset line to the porch, 7 8/10 feet from the edge of the porch into the house."

Q. That would make your measurement, then, of the foundation line, how many feet clear of the building line — what distance, I should say, clear of the building line?

A. 1 foot and 5/8 of an inch.

Q. When did you discover —

A. In going over my testimony here, the tyewritten testimony, comparing it with this schedule here, and also the book.

Q. When you testified, you had this book before you, didn't you?

A. Yes, sir.

Q. And you read the measurements from the book, didn't you?

A. Presumably so, yes, sir.

Q. How did the error arise?

A. I don't know.

Q. Take page 85, No. 304, you corrected this morning, there was an error of 5 feet in your testimony; how did that error arise?

A. I don't know; I don't know why that should be.

Q. You testified from your book at that time, didn't you?

A. I don't know about that.

Q. Have you sheets of paper which you call your notes, instead of the notes in the book?

A. I used the book and also these sheets here.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Again directing your attention to No. 613, is any portion of 613 over the restricted building line?

A. Part of the bay window is, yes, sir.

Q. A part of the bay window?

A. Yes, sir.

Q. And to what extent shown here?

A. 2 feet 6 inches.

Q. When you were giving your testimony at our last session, what did you have at that time to aid you in the matter of your memory; what were you testifying from?

A. I think that schedule, in conjunction with the surveyor's book.

Q. And by "schedule," you are referring to the papers that Judge Foster now has in his hands?

A. Yes, sir.

Q. And since then you read over the testimony?

A. Yes, sir.

Q. And these corrections which you volunteered to make, and which you have made this morning, you have volunteered to make on your own responsibility?

A. Yes, sir.

Q. Now, you have been asked about lot 200, or rather, house No. 200; how did you come to refer to it as 200 in your former testimony?

A. That was the number that was on the house at the time.

Q. It was so numbered at the time?

A. Yes, sir.

Q. Has the number been changed since?

A. Yes, sir.

Q. I ask you whether you made any survey with a view to determine whether lot No. 107, whether the structure upon lot 107 did or did not conform with the building line, I mean house number?

A. Yes, sir.

Q. What is the result of your examination?

A. The foundation is 5/8 of an inch over.

Q. What about the second story?

A. 2 feet 5/8 of an inch over.

Q. That is No. 107?

A. Yes, sir.

Q. And what is there in the second story that projects?

A. I haven't anything on this schedule of mine.
Q. Nothing to guide you?
A. No, sir.
Q. Let me give you your book (handing book to witness).
A. Nothing, no, sir, no bay windows.
Q. I did not ask you that; you said the second story projects over the building line?
A. Yes, sir.
Q. What is there in the second story that projects?
A. It is an offset in the house; it is built over.
Q. The front wall of the house?
A. Yes, sir.
Q. Did you make any measurements of the house No. 109?

MR. SNEDEKER: I submit this is hardly regular.

MR. WILSON: It is not re-direct; we began this morning by explaining to your Honor that there were some matters left unfinished.

THE COURT: The objection is overruled.

Q. What did you find in respect to house No. 109?
A. Porches 7 feet 7⅛ of an inch over.
Q. Is the porch open or closed?
A. I have not any record of whether it is open or closed.
Q. What did you find in respect to house No. 111?
A. Porches 4 feet over.
Q. House No. 113?
A. 1 foot 7¾ of an inch over.
Q. What was over?
A. The porch.
Q. Do you know if, in either of these instances,

whether the porch was open — in the last two instances whether the porch was open or closed?

A. I don't know, no, sir.

Q. The house at the corner of A Street, what did you find in respect to that?

MR. SNEDEKER: Objected to; it is indefinite.

THE COURT: Which corner.

Q. On any corner over the line, and if so, what house?

A. No, sir.

Q. Have you looked at your memorandum, as well as your book?

A. Yes, sir, you asked me about the house — do you include the porch in that question?

Q. Yes, in every instance.

A. Well, 201 on the Southwest corner has a porch 5 feet 11¼ of an inch on the Southwest corner of A and Tenth Avenue.

Q. What of house No. 205?

A. The porch is 3 feet 2½ inches over.

Q. Do you know whether that porch is open or closed?

A. I don't know.

Q. Do you know in any of these instances whether the porches are open or closed?

A. No, sir.

Q. That is one of the cases you were going to find out for us when you were on the witness stand before; why didn't you do it?

A. I did not have any notice of it that I was to do it.

Q. What about house No. 207?

A. The porch is 8 feet 9⅞ of an inch over.

Q. What about house No. 211?

A. The bay window on the first floor ——

Q. I am asking you about No. 211?

A. Yes, sir ——

Q. Go on and tell us.

A. The bay window, first floor, is 5⅜ of an inch over; the porch is 9 feet ⅞ of an inch over.
Q. Is there a bay window on the second floor?
A. Yes, sir.
Q. How much is that over?
A. 13 feet 3¾ of an inch.
Q. What about house No. 215?
A. The porch is 4 feet 2¼ inches over.
Q. What about house No. 219?
A. Porch 7 feet 11⅜ of an inch over.
Q. What about house No. 305?
A. Porch 8 feet ¾ of an inch over.
Q. And house No. 307?
A. Porch 6 feet 8½ inches over.
Q. House No. 309?
A. Porch is 8 feet 1¼ inches over.
Q. What about the bay window?
A. The bay window is 4 inches over.
Q. Are there two bay windows?
A. No, sir.
Q. What about No. 311?
A. The porch is 6 feet 8¼ inches over.
Q. What about No. 317?
A. The porch is eight feet over.
Q. What about house No. 407?
A. The porch is 4 feet 2⅜ of an inch over.
Q. Is there a dormer window over the porch?
A. Yes, sir.
Q. How much does that extend?
A. 1 foot 2½ inches.
Q. What are you testifying from now?
A. From my notes in that particular case.
Q. In your book?
A. Yes, sir.
Q. What about No. 411?
A. Porch, 2 feet 6 inches over.
Q. What about No. 415?
A. The porch is 4 feet over.

Q. What about the Grand View?
A. The porch is 4 feet 3⅝ of an inch over.
Q. Is that an hotel?
A. Yes, sir, boarding house.
Q. What about No. 505?
A. The porch is 7 feet 2 inches over.
Q. What about No. 507?
A. The porch is 7 feet 11⅜ of an inch over.

THE COURT — Are these all new — they have not been gone over before?

Q. What about the second floor of this building?
A. It is on the line.
Q. What about No. 513?
A. The porch is 9 feet and ⅜ of an inch over.
Q. What about No. 601?
A. The porch is 7 feet 10⅝ of an inch over.
Q. What about No. 100?
A. The porch is 7 feet 7¼ inches over.
Q. What about a house at the corner of Ocean Avenue with a bay window — indicate which corner it is.
A. The Northwest corner; there is a bay window 3 inches over the restricted line, and the porch is 11⅜ of an inch over the line.
Q. How is the foundation wall?
A. The foundation wall is clear of the line.

BY MR. SNEDEKER:

Q. You are referring to these restrictions being over on the Tenth Avenue side?
A. Yes, sir.

FURTHER RE-DIRECT:

Q. 106 Tenth Avenue?
A. It is entirely clear.

Q. What about 108?

A. The foundation is 1¾ inches over; the porch is 9 feet 9½ inches over.

Q. Corner of A Street — is there any house on either corner, with any part of it over, and if so, what house?

A. Yes, sir, there is, the Northeast corner.

Q. And what portion of the house is over, if any?

A. The porch.

Q. How much?

A. 7 feet 10⅝ of an inch over; there is also an octagonal corner on the Southeast corner, an octagonal porch, in addition to the one I have already given you, which is 11 feet 7 inches over.

Q. No. 206; have you testified to No. 206?

A. Yes, sir.

Q. What about No. 310?

MR. SNEDEKER: Objected to on the ground that it has already been testified to.

MR. WILSON: Not by this witness.

Q. No. 310 on the first and second floor?

A. The house is 7¾ of an inch over.

Q. And what portion of it?

A. The second floor is 7¾ of an inch over.

BY THE COURT:

Q. How is the foundation there?

A. Clear.

FURTHER RE-DIRECT:

Q. What about the buildings at the corner of C Street, which are on the Northwest corner?

MR. COOPER: He has already testified to that, page 255, at the last session.

MR. WILSON: I think he testified as to one house ——

Q. What about the other corner; is there a house with a bay window on that corner?

A. Yes, sir.

Q. Is there a house with a bay window on that corner?

A. Yes, sir.

Q. What is the number of it?

A. No. 400.

Q. And is there any projection there?

A. (No answer.)

MR. SNEDEKER: Well, is not that the Northwest corner?

THE WITNESS: Yes, sir.

MR. SNEDEKER: Then I object to it.

Q. What about the house on the other corner, did you testify to that?

A. On the Northeast corner, yes, sir.

Q. What is the projection of that house, if any?

MR. SNEDEKER: Cannot we have the number of the house?

THE WITNESS: No. 318.

MR. SNEDEKER: I object to it; he has already testified to that.

Q. Are not you mistaken in supposing that No. 318 is at the corner of C Street?

A. No, sir.

Q. It is a corner lot?

A. Yes, sir.

James Emlen — Re-direct

Q. You have already testified as to all the houses at that corner?

A. Yes, sir.

Q. Now, No. 406, what about that?

A. The porch is 5 feet 10¼ inches over.

Q. No. 416, what about that?

A. The foundation is 1⅜ of an inch over.

Q. What about the porch?

A. That is 9 feet 4⅝ of an inch over.

Q. And what about 502?

A. That is 1 inch over — the foundation. The porch is 6 feet 9⅛ of an inch over.

Q. And how about No. 504?

A. I haven't any record of the porch; the foundation is clear.

Q. And what about No. 506?

A. The porch is 6 feet 5 inches over.

Q. Is there any other part of the house that is within the restricted area?

A. No, sir.

Q. What have you to say about No. 508?

A. The porch is 6 feet 5⅜ of an inch over.

Q. And as to No. 510, what have you to say about that — second story?

A. The second story is 3 inches over.

Q. Now, what about No. 516?

A. The foundation is 6 inches over; the porch is 8 feet 6 inches over.

Q. Is the porch in part a circular one?

A. Yes, sir.

Q. Built down to the ground?

A. Yes, sir.

Q. And what portion of that circular porch running down to the ground overlaps, if any, or how much does it overlap?

A. I have not any particular record of that; it is 8 feet 6 inches over; that is the extreme point.

Q. And would that measure into the enclosed part of the circular porch that goes down to the ground?

A. Yes, sir.

Q. What about No. 600?

A. Porch 7 feet 10½ inches over.

Q. What about No. 602?

A. The porch is 8 feet 1¾ of an inch over.

Q. What about the second floor?

A. The second floor is 6⅝ of an inch over.

Q. What about the porch on the second floor?

A. I haven't any record of a porch on the second floor.

Q. Have you any knowledge as to whether that porch goes up to the second floor or not?

A. No, sir.

Q. No. 606?

A. I have no No. 606.

Q. How about No. 608?

A. The foundation is 9 inches over; the porch is 8 feet 4¾ of an inch over.

Q. What about the corner of F Street; is there a house there?

A. Right on the corner is a store.

Q. There is a store on the corner, what corner is that?

A. The Northeast corner in this case.

Q. And how is that; what do you find the condition there?

A. 3⅝ of an inch over — that is the foundation. The porch is 8 feet 4¾ of an inch over.

Q. What about the West side of the store?

A. They are both the same distance over.

MR. SNEDEKER: I object to anything on the West side; that is on F Street.

Q. What portion of this store building is over the line, if any?

James Emlen — Re-direct

A. The foundation on Tenth Avenue is 3⅝ of an inch over.

Q. Is there any projection on the building that reaches further out?

A. At the Easterly end of it is a house; in fact, it is all one building and the porch is 8 feet 4¾ of an inch over.

Q. Now, what about the other corner of F Street?

A. There is a store there; the Northwest corner; the foundation is 5⅜ of an inch over, on the Easterly end, and 3 inches over on the Westerly end.

Q. What about the porch?

A. I have no porch here.

Q. What about the Honce and Dubois house?

MR. COOPER: That is No. 706 Tenth Avenue.

A. The bay window is 3¾ of an inch over on the first floor, and also on the second floor.

Q. How much is the porch over?

A. The porch is 5 feet 9⅝ of an inch over.

Q. Is this a bay window, a solid structure up from the ground?

A. Yes, sir.

Q. What about Cooper's house?

A. The porch is 7 feet 9¾ of an inch over.

Q. Does the porch extend up to the second story?

A. I don't know.

Q. What about No. 802?

A. The foundation is ¼ of an inch over; the porch is 7 feet 9¼ inches over.

Q. What about the Tilton house — the first and second floor?

A. It is clear on the first floor and 6 inches over on the second floor.

Q. You have been interrogated as to the work you have done for the borough; the borough directed you to go and make measurements on this Levinsohn land and fix the building line there, didn't they?

A. Yes, sir.
Q. You were acting for the city in that matter?
A. Yes, sir.

MR. SNEDEKER: Objected to as calling for a conclusion.

BY THE COURT:

Q. Who directed you?
A. Mayor Poole.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. Having established that line, did you call Mr. Levinsohn's attention to it?
A. I called Mr. Wolverton's attention to it, the contractor.
Q. Didn't you call Mr. Levinsohn's attention to it?
A. No, sir, Mr. Wolverton spoke to him about it.
Q. While you were present?
A. I was in the neighborhood.
Q. Did you hear what Mr. Levinsohn said?
A. No, sir.

Q. One thing I don't understand; you have explained the measurements by yourself with Watson and Osborne from the line you established to the foundation; how did you measure the projections on the second story; how did you determine that they were beyond the building line?

A. I would get a point clear of the building and turn a right angle from this working line; then I would put in two marks or pins, as we call them; stretch a line across the two marking pins, and set up my instrument and take a sight from the right angle line, and right angle back again, making a parallel line and my working line.

Q. Did you do the same thing when you were measuring the eaves?

A. Where I could not get at them; when they are on the porch you could get up on the porch railing and measure them direct.

Q. Did you go up and measure the eaves on the roof?

A. No, sir.

Q. Did you measure the second story projections you have spoken about by going on the building itself?

A. Only in No. 413.

Q. What you say about not knowing whether Osborne and Watson started from the beginning point or not, is true in regard to your measurement of projections as well as it was in regard to the foundation?

A. Yes, sir.

Q. And if it were not watched carefully, these measurements of 1/8 of an inch could easily be created by not keeping the beginning of the tape line upon the point?

A. That would make some little difference, but not much.

Q. That schedule to which you have been making reference this morning was the memorandum upon them, copied from your book?

A. Yes, sir.

Q. And by whom was the copy made?

A. By me.

Q. And when was it made?

A. Before the first hearing.

Q. And did you compare after copying upon these sheets from the book; did you make comparison to see that they were correct?

A. Yes, sir.

Q. Then, why did you have to make corrections on the measurements relating to No. 304 Tenth Avenue, as appears upon that sheet?

A. I have a correction here; I compared it over again; after I got the typewritten testimony, I saw there was a difference, and then I compared it over again with this book the second time.

Q. You don't know whether it is an error in copying, or an error in the measurement?

A. That is true.

Q. Is that true in regard to erasions and corrections on No. 613?

A. No, sir.

Q. What have you to say about those?

A. I don't know when that was done.

Q. Now, on your book you have a number of diagrams?

A. Yes, sir.

Q. Representing the different houses that you say you measured?

A. Yes, sir.

Q. And you have projections on those diagrams representing the extension of the bay windows or porches; is that right?

A. Yes, sir.

Q. You have no projection upon the diagram relating to house No. 107 Tenth Avenue, have you?

A. Yes, sir, there is — right here.

Q. You did not show it to me before?

A. This is the foundation.

Q. What is the extent of the projection?

A. 2 feet and 5/8 of an inch.

Q. You say that projects from the second story?

A. Yes, sir.

Q. But it does not go to the ground?

A. No, sir.

Q. What did you mean in reply to Mr. Wilson's question, that the projection of No. 107 extended to the ground?

A. I did not say that.

Q. As a fact, the projection does not go to the ground?

A. No, sir.

Q. How far does your book show the foundation at No. 107 to be over the line, if at all?

A. 2 5/8 of an inch.

Q. How far does your sheet show it to be?

A. The same thing; that is, 2 feet and 1/10 of an inch.

Q. Where is that?

A. It is right in that line there.

Q. Did you ever have Mr. Watson or Mr. Osborne verify your measurements?

A. No, sir.

Q. In no instance at all?

A. No, sir.

Q. Did you have anybody assist you in jotting down your measurements in the note book?

A. No, sir.

Q. You did that yourself?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. SNEDEKER:

Q. At the last hearing you testified to street numbers, No. 103 and 105?

A. Yes, sir.

Q. And to-day, for the first time, you testified to No. 107; why did you omit that from your testimony the last time?

A. I was not asked for it.

Q. But were you not asked at the last hearing to state the houses that did project over the line?

MR. WILSON: Counsel interrogated him house number by house number, and these were not asked.

THE COURT: I don't think it is material one way or the other.

BY THE COURT:

Q. I wish you would describe to me exactly in taking this measurement that you have testified to, the exact oper-

ation, and what passed between you and Watson, and what passed between you and Osborne in calling out to each other when you were on the spots?

A. I would make my sketch first, and Mr. Osborne and Mr. Watson making the measurements and I putting them down and overseeing the measurements — I read most every measurement made and put it down on the sketch at that time.

Q. Did they ever call it out to you?

A. Yes, sir, if I did not happen to be right there.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. But you say you read most of them yourself?

A. Yes, sir, with Mr. Watson.

Q. Who is this man Watson?

A. Well, he is a man that I had helping me at that time; he lives at Belmar; he lives at River Road, Belmar.

Q. Was he selected by you to aid in this particular work?

A. No, sir, he had been working with me at the time.

Q. Was he selected by you to aid you in this work?

A. Yes, sir, he was my employee at that time.

Q. Had he been employed by you for some time in this same business?

A. Yes, sir.

Q. Is Mr. Watson still at Belmar?

A. Yes, sir.

Q. Is he employed by you still?

A. No, sir.

Q. And who is Mr. Osborne?

A. He is present in this room at this time.

MR. WILSON: Stand up, Mr. Osborne.

(A man stands up.)

Q. Is that the gentleman?

A. Yes, sir.

Q. What is his business; is he a surveyor?

A. No, sir, he was a helper at that time; I don't know that he has any business now.

Q. Has he been employed by you for any length of time?

A. Only when I needed a man.

Q. You selected him?

A. Yes, sir.

Q. Now, as I understand your narrative, the way the matter was done — this line, three feet away from the lot line, was established, and then the tape was held at that point in front of the house and run back from that point to the house to make the measurements?

A. Yes, sir, from the working line.

Q. And who fixed the point in the running line from which the measurements should be taken?

A. I gave that with an instrument; I sighted it with the instrument.

Q. And who indicated on the ground the spot in the running line from which the measurement should be taken?

A. Principally Mr. Watson.

Q. Now, did he do that in your presence?

A. Well, I would be at the instrument and he would be, probably, half a block or maybe a block away from me.

Q. Could he do it in such a way as to do it inaccurately or fraudulently, without your knowledge?

MR. SNEDEKER: Objected to as calling for a conclusion.

THE COURT: Objection overruled.

Q. Not making the mark ——

A. No, sir.

Q. Do you mean to say, that when he fixed the point in the running line from which the measurement could be done, that could not be done so as to mislead you?

A. Yes, sir.

Q. And you are satisfied that was done correctly?

A. Yes, sir.

Q. Now, assuming that point in the running line to have been fixed by the method you suggest: the tape was held at the point in the running line and was run down to the house and the measurement made?

A. Yes, sir.

Q. Now, I understand you to say that in most instances you read the tape yourself, and that sometimes the tape was read to you?

A. Yes, sir.

Q. Would it have been possible for these two people, Osborne and Watson, to have deceived you, as to the physical measurement done under such circumstances?

A. Well, I should say it could be possible, yes, sir.

Q. And it could be possible, because, I presume you did not look to see whether he was holding it at the point in the running line or not, or you might not have looked to see whether he ran as far as the house was?

A. I always took notice of that, that he measured in to the house.

Q. And where would you think then that the possibility of deception might have arisen, if it did arise at all?

A. The person who was holding on the running line.

Q. If he did not hold it there, you might have been deceived?

A. Yes, sir.

Q. And either Watson or Osborne were the persons who held it on the running line?

A. Yes, sir.

Q. How far did you stand from them?

A. I would be right close to them ——

Q. Then you would put them in your book?

A. I would put the figures down as they were given to me.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. When you were a block or half a block away, sighting down this running line, did Watson or Osborne have the rod?

A. They had a marking pin.

Q. When they reached the point that you were satisfied with, they would stop?

A. Yes, sir.

Q. Where did they put the mark — between their feet, or how; for instance, you tell me to stop; you say I have reached the point on the running line where you want me to make the mark; now, where did I make it?

A. You would have a marking pin or a rod to put down there, and you would put it on the ground and then move it along the ground until I said, "Stop."

Q. You did not sight the pin?

A. Yes, sir.

Q. How long was the pin?

A. 15 inches or 16 inches.

Q. I would put it down and then move it as you directed me to?

A. Yes, sir.

Q. Then when you said "Stop," it was my business to put it down?

A. No, sir, the pin would be on the ground almost touching it.

Q. Did you ever verify any of these marks upon the sidewalk by a measurement from the curb line?

A. I measured from the line to the curb in several cases, to test the curb.

Q. But not to determine how accurate your running line was?

A. No, sir.

Q. Or the marks in them?

A. No, sir.

BY THE COURT:

Q. In how many cases did you do that in?

A. Possibly a dozen.

Q. Have you a record of them?

A. In one case the distance is 1⅛ of an inch short; another is 1¾ of an inch short.

FURTHER RE-CROSS, BY MR. FOSTER:

Q. What do you mean by that?

A. That the distance from the running line to the face of the curb is that much short, on ten feet — the correct distance.

Q. Was there a curb actually built on both sides of this avenue?

A. Yes, sir.

Q. In front of every property?

A. No, sir, it was not on every property; in another case, I have the curb 3¾ of an inch too far out, pushed out. In another case I have the same thing — 3¾ of an inch pushed out.

BY THE COURT:

Q. Do you mean the curb is that much further than a true ten foot measurement?

A. Yes, sir; in another case, I have 1⅛ of an inch too far out. In another case, I have 2¼ inches pushed out too far.

Q. You mean that the curb from your line, as established by your running line, was 12¾ of an inch out?

A. No, sir, I mean it is 10 feet and some odd inches out.

FURTHER RE-CROSS, BY MR. FOSTER:

Q. Does that indicate that the curb line was right?

A. It indicates the curb had been pushed out or in, as the case might be.

Q. What was your object in making these measurements to the curb?

A. Just for a test; I wanted to see how they agree.

Q. But you knew the curb line was irregular?

A. It would simply give me the information that I wanted; I was wondering whether they measured from the curb into the house, or whether it was surveyed.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. When you made this survey for the purposes of this case, did you measure every house along the street?

A. In what way?

Q. With a view of determining whether the house in its structure corresponded to the building line or not; did you measure every house on the street?

A. Yes, sir.

Q. Every house?

A. Yes, sir.

Q. Did you do that when you testified in the Barcalow case?

A. I think I measured them all in that case.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. How did you make the measurements that you testified to in the Newbury case?

A. I must have measured in the same way that I did this.

Q. When Mr. Watson or Mr. Osborne made a mark on the sidewalk, with what did they make that mark?

A. With a lead pencil, or with one of these steel marking pins.

Q. How does a steel marking pin make a mark in a stone?

A. It makes a scratch.

RECESS TO 2 P. M.

AFTER RECESS

JAMES H. EMLEN resumes the witness stand.

RE-CROSS EXAMINATION BY MR. SNEDEKER:

Q. You stated that in making the measurements Mr. Watson or Mr. Osborne made the mark with a steel point or a pencil. In making the measurements of the houses that you have testified to, which was used?

A. In some cases it would be one, and in other cases the other.

Q. In using the steel pin, the man holding it held it up from the ground?

A. He held it almost touching the ground.

Q. After you told him that he had the correct point, what did he do with the pin?

A. He put it right down on the ground.

Q. How would he make a mark with the pin?

A. Drawing it right towards him.

Q. In a line parallel with the house line?

A. Not necessarily, no, sir.

Q. Did he make more than one line?

A. One line is sufficient.

Q. You don't know whether it was made parallel or not with the house line?

A. No, sir.

Q. If it was not parallel with the house line, what part of the mark that he made would you commence your measurement from?

A. The beginning of the scratch.

Q. Did he also make the scratch in one direction?

A. I don't know about that.

Q. How could you tell when you went up, which end of the line it was that he fixed ——

A. He would naturally draw the pin; the pin would be between him and the instrument, so that the line would naturally be drawn towards him.

Q. How long a line was generally made with this pin?

A. Sometimes it would be two inches, sometimes three inches; sometimes a very short one.

Q. Would it ever be made more than three inches?

A. Well, that was up to the man, we might say, that made the mark ——

Q. When did you measure No. 107?

A. I don't know what date that was made.

Q. Was it since you testified the last time?

A. No, sir.

Q. You think it was before you testified the last time?

A. Yes, sir.

Q. When did you measure No. 108?

A. That was before I measured the last time.

BY THE COURT:

Q. Were any of those measurements that you have testified to this morning, taken after this last hearing?

A. I don't know whether No. 102 was questioned this morning or not.

FURTHER RE-CROSS, BY MR. SNEDEKER:

Q. I call your attention particularly to No. 108; you are positive you saw the number 108 on the house that you surveyed?

A. I don't know whether the number is on the house or not.

Q. How did you fix this house that you did survey, that you call No. 108, how did you fix that number?

A. By being 50 feet West of house No. 106, by being on that lot.

Q. Do you know whether it is or is not a fact, that the house immediately West of that is No. 110?

A. I don't know.

Q. Now, when you measured to the foundation walls,

what portion of the wall did you measure to — the end of the house?

A. Yes, sir, the end.

Q. Which end did you measure to?

A. Sometimes it would be one and sometimes the other, and sometimes both ends.

Q. Why didn't you measure to both ends in all instances?

A. I thought it would take too much time.

Q. But you did testify this morning as to one house being at the Northwest corner of F Street and Tenth Avenue, that one end of it extended, encroached more over the line than the other end did; is that so?

A. Yes, sir.

Q. Might not that have been so as to other houses that you measured?

A. It is possible.

Q. So that where you have said a house encroached one inch or a little more at one end, it might have been clear at the other end?

A. It is possible, yes, sir.

Q. You have testified that No. 200 was erected since you were last on the witness stand; has that house been constructed within the line as to the foundation?

A. I don't know; I did not measure it.

Q. You have not measured it?

A. No, sir.

Q. Notwithstanding a new house has been put up, you have not made any measurement of it?

A. That is right.

Q. Have any of the houses that you have testified to, that a foundation was over the line, been erected since you were a witness in the Newbury case?

A. I cannot answer that — if any houses have been built there, yes ——

BY THE COURT:

Q. Since the Newbury case?
A. I cannot say about that.
Q. You don't know of any?
A. No, sir.
Q. You were familiar with the houses that you measured in the Newbury case, were you not?
A. I could not remember that.
Q. Can you remember any houses that you measured in this case that you did not measure in the Newbury case?
A. I cannot remember any particular house, no, sir.

FURTHER CROSS, BY MR. SNEDEKER:

Q. You testified to the curb being out at points; did you refer to the curb line, or did you refer to the condition of the curb itself, as it was located?
A. I referred to the curb as it is located now — itself.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Emlen, what preparation did you have for your profession?
A. In Princeton.

MR. SNEDEKER: We admit he is qualified.

MR. WILSON: Notwithstanding, I think this is a very proper inquiry.

THE COURT: I will permit the question.

MR. SNEDEKER: Then I want to withdraw that admission.

Q. What preparation did you have for your profession?
A. I am a graduate of Princeton College.
Q. And what degree did you take there?

A. Civil engineering.

Q. When were you graduated?

A. In 1896.

Q. And have you been continuously occupied in your profession since?

A. No, sir.

Q. Where have you resided?

A. Trenton, New Jersey, Atlantic City, Avon.

Q. How long have you been down in this neighborhood?

A. About eight and a half years.

Q. Engaged as a surveyor during that time?

A. Yes, sir.

Q. You were asked this morning what work you have done for the Borough of Belmar; how recently have you done any work for the borough?

A. Last month; I don't know just what day it was.

Q. Since you first gave your testimony in this case?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. Neither Mr. Osborne or Mr. Watson had any experience in surveying?

A. No, sir.

BY THE COURT:

Q. Are either of them surveyors?

A. No, sir.

BY MR. FOSTER:

Q. Did either of them understand the purpose for which you were working?

A. I don't know.

BY MR. WILSON:

Q. Mr. Emlen, I wish you would tabulate your measurements for our convenient use, what you have testified to, both to-day and upon the former occasion; do you understand what I mean?

A. Yes.

Q. Will you do that?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. SNEDEKER:

Q. In the Newbury case, do you remember that you were asked how many houses there were on Tenth Avenue, and you said there were 79?

A. I don't remember any figures.

Q. Do you remember you were asked how many houses there were that extended over the line, either as to porches, bay windows or foundation, and you said 53, although 79 extended over?

A. I don't remember that.

BY MR. WILSON:

Q. Did you ever count the number of houses on Tenth Avenue?

A. No, sir.

FURTHER RE-CROSS:

Q. Were you asked this question in the Newbury case, and did you make this answer: "Ques. If the record will enable you to tell how many buildings there are on Tenth Avenue, look at it. Ans. 79." Were you asked that question and did you make that answer?

A. I don't remember.

Q. Were you asked these questions: "How many buildings are there on Tenth Avenue? Ans. I don't know;

I have a record here, if I may use that." Do you remember being asked that?

A. No, sir.

Q. "Ques. If the record will enable you to tell how many buildings there are on Tenth Avenue, look at it. Ans. 79."

A. I don't remember that.

Q. Were you asked this question, and did you make this answer in the Newbury case: "Ques. How many all told, then, have projections within the twenty feet? Ans. I cannot give you that; I have not got it totalled up. Ques. Can you get it shortly from notes? Ans. 53." Were you asked that question, and did you make that answer?

A. I cannot say.

Q. In this Newbury case, do you say that you were not asked the questions that I have read to you and that you did not make the answers that I have read to you?

A. I say I don't remember.

Q. And the fact that the stenographic minutes of the Newbury case show that these questions were asked and these answers made, does that lead you to believe that they were asked and the answers correctly made?

A. Yes, sir.

Q. In the Newbury case you testified to some bay windows, where the foundations of the bay windows were on the ground?

A. I cannot recall any of that testimony at all.

Q. Did you testify to porches or piazzas, that the foundations were on the ground, that extended over the building line?

A. I don't remember that question being asked.

BY MR. FOSTER:

Q. Do you remember how long you were on the stand as a witness in the Newbury case?

A. I do not, no, sir.

FURTHER CROSS BY MR. SNEDEKER:

Q. Were you asked in the Newbury case this question, and did you make this answer: "Ques. How many porches are there on Tenth Avenue that extend within the line, extend nearer to the street than 20 feet from house line, 40 feet from the curb line — the sidewalk is 20 feet? Ans. I have 50 porches." Do you remember making the answer to that question?

A. I do not, no. sir.

Q. Now, in the Newbury case, when you testified that there was a certain number of bay windows extended over the line, did you testify to the bay windows that you have testified to here to-day, or that you were examined upon before in this trial?

A. It must have been included in it, as far as I know.

Q. And do you know of any case where a bay window, that rests on a solid foundation, has been constructed since the trial of the Newbury case?

A. I do not, no, sir.

BY THE COURT:

Q. Were you asked in the Newbury case to describe the construction of bay windows?

A. No, sir, I don't remember that I was.

MR. WILSON: I think it would be useful to just let me read this paragraph from the opinion. It says: "Of the 36 houses on one side of the street, 9 were over the restricted line from one inch to four and one-half inches; there was also an old house at the extreme Westerly end of the street, which had a closed-in veranda, extending over the line a distance of over nine feet. Of the 43 houses on the other side of the street, 18 were over the line from two inches to a little over two feet. There

was nothing to show that the original owner had consented to the violation.— Held, that the violations were too insignificant in extent and in number to justify the Court in inferring a general abandonment of the building restrictions, even if the original owner could abandon or release a restriction which it had made for the benefit of all its grantees."

Now, it appears that the number of houses is 100, and by his computation very much more in number — the violations — than they appear in that case.

BY MR. SNEDEKER:

Q. Houses that are numbered 200 to 218, are how far removed from this property?

A. (No answer.)

BY THE COURT:

Q. Do you know what the number of the defendant's property is?

A. Yes, sir.

Q. What is it?

MR. WILSON: This witness has testified to 82 encroachments, assuming they are encroachments; that is a question of law for the Court.

THE WITNESS: About 2200 feet from house No. 218.

MR. WILSON: You make out that list for us, Mr. Emlen.

MR. SNEDEKER: And bring the tape that you made the measurement with, either bring it or send it.

Thomas F. Dillon — Direct

THOMAS F. DILLON, sworn.

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you live?
A. Belmar, New Jersey.
Q. What is your business?
A. Agent for the New York and Long Branch Railroad Company.
Q. Station agent?
A. Yes, sir.
Q. Do you live in Belmar?
A. Yes, sir, I have lived in Belmar for 24 years.
Q. Have you ever had any official position there?
A. Yes, sir.
Q. What was it?
A. I was a member of the Belmar Council for seven years, consecutive years.
Q. When did you retire from your responsible and honorable duties?
A. December 31st of last year.
Q. I direct your attention to Tenth Avenue; how does it compare as a business street and for business activities with other streets of the borough?
A. It is the busiest avenue we have in Belmar.

MR. SNEDEKER: I ask to have that struck out as not responsive.

MR. WILSON: He cannot object on the ground that it is not responsive; this is my own witness.

Q. What do you mean by the "busiest avenue?"
A. There are more business places, more stores and travel, and the post office.
Q. How does it compare with F Street?

A. F Street is the busiest street we have; F Street runs North and South; trolley tracks are on F Street.

Q. You say it ranks next to F Street?

A. Yes, sir.

Q. How many business places are there on Tenth Avenue?

MR. FOSTER: I think there was an understanding here at one of the former hearings, that this subject was to be confined East of F Street.

MR. WILSON: I know of no such limitation.

THE COURT: Does the record disclose it?

MR. FOSTER: I shall not press it; that is the way I understood it.

MR. WILSON: As I understand it, and I am proceeding to try the case on the assumption that your Honor has excluded any testimony tending to establish that there has been any abandonment of this building scheme on any street or avenue in Belmar except Tenth Avenue; that is as far as your Honor has gone.

THE COURT: Yes, that is right.

Q. (Question read.)

A. I should judge about 12 or 15.

MR. FOSTER: I move to strike it out, because he does not answer with any certainty.

Q. Name them; perhaps this will resolve the objection. Name the business places.

A. Carpenter's boathouse —

Thomas F. Dillon — Direct

MR. COOPER: I object; that is on River Avenue.

THE COURT: Proceed.

A. Osborne's Restaurant; Adams' Express office; Barcalow's livery stable; Conover and Garrabrant's real estate office; Newbury's milk depot; moving picture house; Honce and Du Bois' real estate; Monmouth Ice Company: Newman and Son; Kasban's drug store; and Tafsinki's optical store; and there may be a few more that I have omitted.

Q. What about a restaurant; is there a restaurant there, too?

A. Yes, sir, there is Leddon's restaurant.

Q. Now, is there a pavilion there, too, Buhler's pavilion?

A. No, sir, that is Carpenter's; I named that. There are 15 all together.

Q. Now, Mr. Dillon, what is the relative profit and business of the two streets — F Street and Tenth Avenue — you say that F Street is the more active street of the two; what is the relative difference in percentage between them, in your opinion?

MR. FOSTER: I object; I do not see the relevancy of this inquiry.

Q. I mean, the business done on the street, in the places on the street?

A. Probably one-half.

Q. What do you mean by that?

A. The business is about equally divided.

Q. On the two streets?

A. That is on F Street and Tenth Avenue.

Q. They both do the same amount of business?

A. Yes, sir.

Q. Now, is the post office on Tenth Avenue?

A. Yes, sir, the corner of Tenth Avenue and F Street.

Q. Did you mention that in your list of business places?

A. No, sir.

Q. You omitted that, did you?

Q. Is Tenth Avenue one of the main avenues of approach to the depot?

A. Yes, sir.

Q. How far is the depot from the foot of Tenth Avenue, approximately how far?

A. About half-way.

Q. Half-way from where?

A. The railroad from F Street, do you mean?

Q. No, I mean the depot from F Street — Tenth Avenue goes East and West?

A. Yes, sir.

Q. It ultimately cuts the railroad track?

A. Yes, sir.

Q. Now, the place where it hits the railroad track is how far away from the depot?

A. I don't understand your question.

Q. Can you go down Tenth Avenue towards the depot and get to the depot by travelling Tenth Avenue?

A. Yes, sir.

Q. How far do you have to travel off Tenth Avenue before you get to the depot?

A. About half a block — the depot is between Ninth and Tenth.

Q. Now, you spoke of the post office a moment ago: now, has the post office, the location of it, been recently changed?

A. Not in six or seven years.

Q. Is it still on Tenth Avenue?

A. Well, it is not directly on Tenth Avenue; it is in the Leroy Building, but it is not facing Tenth Avenue.

Q. Is there an entrance to the post office from Tenth Avenue?

A. No, sir.

Q. Now, of these business places which you have named, how many of them have been added since 1909 — say, in the last six years?

A. The Adams' Express office; Garrabrant and Conover; the moving picture house, I guess, I am not positive about that; and Leddon's Restaurant.

Q. What about this optical parlor?

A. Tafsinki's optical parlor — that is new.

Q. How about the ice company's office?

A. I think that was there longer than that.

Q. What about Newman Brothers mason shop?

A. I think that was there.

Q. Is the drug store new?

A. Yes, sir.

Q. What about Newbury's ice cream depot — the milk depot?

A. That was about the same time as the Barcalow lawsuit.

Q. You think that was there then?

A. Yes, sir.

Q. That was the fellow that had the lawsuit?

A. Yes, sir.

Q. You have named the Adams' Express; Garrabrant and Conover; moving picture; Leddon's Restaurant; the drug store; that is five, and the optical parlor is six. Now, what about Buhler's restaurant and pavilion, has that undergone any change since the Barcalow suit?

A. Carpenter's pavilion; there have been some changes made there, but I don't remember whether it is since that suit or not; Tenth Avenue was arranged leading right into the pavilion; I don't know what year that was, positively.

Q. You don't know when that change took place?

A. Not positively.

MR. WILSON: I wish to inquire, if your Honor please — the record, I think, is in some confusion; we offered to show by a former wit-

ness, that Buhler was permitted to build out to Tenth Avenue, and that he entered into a contract with the borough and paid them by way of compensation for this entrance into this street, the sum of $50.00 annual rent. Now, I had understood that was to be covered by stipulation. If it has not already been covered by stipulation, and you are not willing to cover it by stipulation, we now want to know it.

MR. FOSTER: I think you will have to prove it, Mr. Wilson; we cannot stipulate it.

Q. Were you a member of the Borough Council when this matter came up of Buhler's extension of his building?

A. Yes, sir.

Q. How was it disposed of?

MR. FOSTER: I object to that; he will have to prove it by the record.

(Question withdrawn.)

MR. WILSON: I had supposed we had gotten far enough to cover it by stipulation, but I shall subpoena the production of the minute book, if that discloses the transaction, which I very much fear it does not; and if not, then I shall prove it by secondary evidence.

Q. Do you know whether Mr. Buhler has been paying rent to the borough?

MR. FOSTER: Objected to as immaterial.

MR. WILSON: The materiality of it already appears in this case; your Honor has had

before you already in this case a map, a copy of which has been promised before; your Honor has seen the original of it — a map produced by Mr. McDermott; that map not only showed this place — it was a borough map, and it showed Tenth Avenue running down into the river. Now, this structure contravenes the confines of that Tenth Avenue, as shown upon that public map.

THE COURT: Presuming that is all true, what about the competency of this witness to testify as to rental payments?

MR. WILSON: I am dealing with the objection that this testimony can have no relevancy to the issue in this suit, and I am addressing myself to your Honor's commands that I must show it is material. Now, I say your Honor has enough before you to show it is material, with that map before you, your Honor may conclude that Tenth Avenue extended to high water mark in that river, and, therefore, it is material.

THE COURT: I shall allow it as material.

MR. WILSON: As to the competency, if this man was familiar with the Borough affairs, and he knows of his own knowledge that Mr. Buhler was paying a certain stipend each year to the borough, that is not secondary evidence.

THE COURT: How long has he been a member of the Borough Council?

THE WITNESS: For seven years before last January.

MR. WILSON: Now, we have been so long trying this case, that it is very easy to see that not only counsel, but the Court, may fall into error. I assert, however, that Mr. McDermott was brought here, not as our witness, but as theirs, and he brought with him a number of maps that had been filed in his office; some of these maps show Tenth Avenue; one of these maps, at least, filed authoritatively shows Tenth Avenue extending down to the water; that map I asked Mr. McDermott to leave; I told him I wanted to use it, as ours; and it was agreed that a copy thereof should stand in lieu of the original. Now, that is precisely the record as I understand it. He has not sent the copy, but I shall insist upon his making good his promise, or I will bring the original map back for your Honor's consideration.

THE COURT: Refer back to the record.

MR. FOSTER: (Reads page 26 of the testimony).

THE COURT: The map in evidence does not show that Tenth Avenue continues to the river, and that, therefore, it is immaterial. Of course, that is so if that is the case. I remember that controversy as to whether this Buhler's pavilion was on Tenth Avenue or not, because, if that was Tenth Avenue there was a considerable infringement. I think at present I shall rule that is immaterial, on that record. I will note your objection to it.

MR. WILSON: I am bound to yield to what your Honor says about it, but I have an abid-

ing faith as to what happened, that they had a map here that showed that Tenth Avenue going down to high water mark, and they did not want to use it.

THE COURT: I will rule it out as immaterial, at present. I suppose the complainant here will stipulate that the Buhler pavilion is not on Tenth Avenue.

MR. WILSON: But does occupy a place which would be within the confines of Tenth Avenue if Tenth Avenue were projected across Ocean Avenue; are you willing to stipulate that the owner of that building has been paying money to the borough, and if so, for what purpose?

MR. FOSTER: No, I don't know the purpose.

MR. WILSON: Will you gentlemen, who have entire control over the borough books, will you bring the minute books?

Q. About how long ago do you think it was when there was some arrangement about this building?

A. The last was made with Mr. Carpenter; I think, probably, three or four years ago, Mr. Buhler deceased, and Mr. Carpenter bought the business out.

Q. Don't you remember that some arrangement was made with Mr. Carpenter?

A. Yes, sir.

Q. How many minute books are there?

MR. COOPER: Six or seven.

MR. WILSON: Bring them, covering the last six or seven years.

BY THE COURT:

Q. Do you know whether there was a written instrument in regard to this property; do you know whether there was any lease?

A. I don't think so; it was on the minutes.

CROSS-EXAMINATION BY MR. FOSTER:

Q. The post office is on F Street?

A. Yes, sir.

Q. Not on Tenth Avenue?

A. No, sir, on F Street.

Q. There is a lot between the post office and Tenth Avenue, isn't there?

A. No, sir.

Q. Is not the drug store on the corner lot between the post office and Tenth Avenue?

A. It is all the same building: drug store, barber shop and post office.

Q. There is another door, then, or another business place, between the post office proper, and the side of Tenth Avenue?

A. Yes, sir.

Q. So, as a matter of fact, the post office is on F Street and not on Tenth Avenue?

A. It is in the same building; it is not facing Tenth Avenue.

Q. This optical parlor, that is not a business place. is it; that is a private dwelling?

A. The party lives there.

Q. But it is not a regular store?

A. No, sir.

Q. It is not an office building?

A. No, sir.

Q. It is an old dwelling house, and one of the rooms was converted into a business parlor?

A. The party has lived there for years.

Q. Isn't it a dwelling house?

A. Yes, sir.

Q. Are there any wares and merchandise in the place?

A. Yes, sir.

Q. What are they?

A. Mostly jewelry, I believe.

Q. Do you mean spectacles?

A. No, sir; he peddles jewelry out on the road.

Q. He has converted one of the rooms of his dwelling house into a consulting room?

A. Yes, sir.

Q. Are any of these business places that you have told the Court about, are any of them East of F Street?

A. That is the only one.

Q. This optical place?

A. Yes, sir.

Q. In this private house?

A. That is the only one.

Q. Now, what you state about the business being equally divided between F Street and Tenth Avenue — that had relation to the business that was done on Tenth Avenue West of F Street, is that right?

A. There is business all the way down in the summer time; what I mean is, that it is one of the busiest avenues.

Q. What business is done all the way down on Tenth Avenue, East of F Street?

A. In the summer months that is the main street for the ocean.

Q. What business is done: Do you mean that there is travel, automobiles and people travel through it?

A. Yes, sir.

Q. But they do not stop at the residences along there to do business?

A. There is a real estate office and an express office, and milk depots.

Q. And are they West of F Street?

A. Yes, sir; there is nothing East of F Street?

Q. How many business places, roughly, are there on F Street?

A. Probably 50, from the Shark River beach to Sixteenth Avenue.

Q. And, do you think the twelve stores on Tenth Avenue, West of F Street, do as much business as the 50 stores on F Street do?

A. There are four or five blocks.

Q. Do you think that 12 or 13 stores or business places on Tenth Avenue, West of F Street, do as much business as the 50 places on F Street do?

A. No, sir, I don't know that I do.

Q. Then, you desire to correct your statement that the business was about equally divided between the two streets?

A. Yes, sir.

Q. Now, what would you say was the division of business on Tenth Avenue West of F Street, and on F Street — would you say one-fifth on Tenth Avenue?

A. More than that, I should think.

Q. One-quarter?

A. Easy.

Q. Well, one-third, would that be right?

A. Yes, sir.

Q. And two-thirds on F Street?

A. Yes, sir.

Q. And none of that business that you refer to is East of F Street on Tenth Avenue?

A. Not East, no, sir, it is all West of F Street.

HERBERT HEROY, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you live?

A. In Wall Township, West of Belmar.

Q. What is your business?

A. Merchant.

Q. And where is your place of business?

A. My headquarters are at Trenton, New Jersey.

Q. Have you ever lived in Belmar?

A. Not in the borough.

Q. How far away from the borough do you live?

A. From the limit about 5/8 of a mile.

Q. How long have you lived in the neighborhood of the borough?

A. Since 1881.

Q. Are you familiar with Tenth Avenue?

A. Yes, sir.

Q. How does it compare with other business streets of the borough as a business street?

A. Well, it is a natural business street; it is the main thoroughfare from the depot through the town.

Q. And in the activity of those business places on the street, how does it compare with F Street?

A. In the winter time it does not compare favorably as it would in the summer time; in the summer, all the places that are there are summer business places and very busy.

Q. What do you say as to the volume of business done on Tenth Avenue, as compared with F Street, in the summer time?

A. That I have no way of knowing.

Q. In a general way, what would be your idea?

A. That corner there is a busy corner; on all those four corners they have always been busy corners, especially on account of the post office being there.

Q. The building occupying the post office is on the corner?

A. Yes, sir.

Q. But there is no entrance from the Tenth Avenue side?

A. Only for employees and for the Government wagons.

Q. Now, what is the busiest business street in the borough?

A. If you refer to traffic, I should say in the summer time that there is as much traffic on Tenth Avenue as on F Street, barring the trolley company's service.

Q. Would you regard F Street as a street of equal or more importance than Tenth Avenue?

A. No, sir, F Street is more important as a business street.

Q. And next to that, if there is any difference between them, would come Tenth Avenue?

A. Yes, sir.

Q. Now, how many places of business are there on Tenth Avenue?

A. I have just heard them enumerated as 13, and I believe that is correct.

THE COURT: The witness stated that the volume of business done on Tenth Avenue was only about one-third, as compared with F Street.

Q. What do you say as to that; as to the volume of business done on Tenth Avenue, as compared with F Street?

A. I have no way of judging; five stores on Tenth Avenue, in the summer, might do more business than ten stores on F Street.

Q. Now, of these places on Tenth Avenue, these places of business on Tenth Avenue, how many of them have been opened up since 1909?

A. There is the Ice Company, and Newman, and Leddon, and Kasban's drug store; and the real estate men in Barcalow's property; and Adams' Express, and I think that moving picture plant.

Q. Now, what about Leddon's restaurant?

A. That has been opened since.

Q. What about the optical parlor?

A. That I don't know about.

Q. You don't remember about that?

A. No, sir.

Q. Well, what about this Leddon's restaurant; is that in your building?

A. Yes, sir.

Q. When did you put that building up?

A. Two years ago.

Q. How much of a building is it?

A. It is a building that cost $2,000.

Q. And is there no business in it except Leddon's restaurant?

A. That is all; he had a grocery store there until this year.

Q. And did you build in accordance with this building restriction, or did you violate it?

A. Well, this last building I kept on a line with my first building.

Q. What did you do about your first building?

A. I told the man to build out — when he started to build, out to a monument, and to build out to the line; and I was in Europe, and he built back, and somebody told him there was going to be a lawsuit, and he built back, and when I came back from Europe the building was up.

Q. How far is your store from where Mr. Levinsohn put up his store?

A. The side diagonally across the corner would be Southeast and Northwest.

Q. Has there been any change in Tenth Avenue in the last six years, which would indicate that it was any less of a residence street than it had been before?

MR. SNEDEKER: I object to that, on the ground that it calls for a conclusion.

THE COURT: I think, probably, it does call for a conclusion; he can state the facts.

Q. Has Tenth Avenue been in the last six years exclusively a residential street?

A. No, sir.

Q. Has its character in that regard changed any in the last six years?

A. Yes, sir.

Q. To what extent, slight or great?

A. There has been a tendency to get it into the business section.

Q. In what way?

A. The people have started business there within the last six years, and it is the main thoroughfare of the town: it is the center of the town; Belmar cannot go any further North, and it has got to go South. When I first went to Belmar, Ninth Avenue was the street for travel. I have changed my building there from a partly residential building to a business building, and they put up that moving picture place; Levinsohn put up their place, and they have improved the corner opposite, which is opposite me; and opposite Levinsohn, Mr. Bamford owns that. Newbury has opened a milk depot there, which is where he does business; Osborne has built a residence there, and Carpenter has come out and improved his place.

Q. How has he improved it?

A. He made it twice the size of what it used to be; he has come right South with his building; and those changes were all made within the last six years.

BY THE COURT:

Q. You talk about this street now being the main artery for business connection in Belmar?

A. Yes, sir, I have noticed that particularly ——

Q. You mean for travel of vehicles through it?

A. Yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. The bulk of the travel will turn and go on F Street?

A. Yes, sir.

Q. And all the business places that you have recited to the Court are all West of F Street?

A. Excepting Levinsohn's corner there.

Q. That corner is not so busy as you have been led to believe; there were only two stores there for years until Levinsohn built his?

A. That was occupied by a dead and alive sort of a shop; that lay dormant for years.

Q. Now, you are a pretty busy man?

A. Yes, sir.

Q. You have your interests scattered pretty well about the country?

A. Yes, sir.

Q. You do not have time to watch the local development of Belmar, do you?

A. Yes, sir, I do.

Q. And to keep in touch with local sentiment down there?

A. Yes, sir, especially the taxes.

Q. Do you know any business place within the last years, except Mr. Levinsohn's, that has been built or attempted to be established East of F Street on Tenth Avenue?

A. I don't know of anything, except they changed that place of Bamford's, so that that is a commercial building.

Q. Has Levinsohn's an entrance on Tenth Avenue?

A. Yes, sir.

Q. How many stores has he on the end?

A. I think there are two.

Q. Do you know any property on Tenth Avenue East of F Street?

A. No, sir.

Q. Only West?

A. Right on the corner of Tenth and F Street.

Q. You would like to see this restriction eliminated so that you could extend out and build within the restrictive area?

A. I certainly would.

WILLIAM S. JACKSON, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you reside?

A. Belmar.

Q. What part of Belmar?

A. Ninth Avenue.

Q. Mr. Jackson, how long have you been down there in Belmar?

A. Thirty years to-morrow.

Q. Did you ever occupy any official position there?

A. Yes, sir.

Q. What was it?

A. I was Mayor eight years; I was in the Council six years; District Clerk fifteen years.

Q. And postmaster?

A. I was postmaster for nine years.

Q. You are familiar with Tenth Avenue, and have been all these years, I presume?

A. Yes, sir; there was nothing on it when I first went there.

Q. Has there been any change in Tenth Avenue in the last six years in respect to its use for residential or business purposes?

A. Yes, there has.

Q. Tell us, in your own way, what that change has been.

A. It has changed the buildings that were there as residences to business places; there are two real estate men there, and businesses of some sort or another.

Q. Has that change been slight or pronounced?

A. It has been pronounced.

Q. Comparing Tenth Avenue to-day with the other streets and avenues of the borough, how does it compare in point of business activity?

A. You would have to take F Street — it is the most business thoroughfare there, and I think that Tenth Avenue, in a business line, was about one-third less, in the same proportion on F Street; take the same distance; you could not take the whole of F Street.

Q. Is there any other street or avenue in the borough that compares in importance with Tenth Avenue, except F Street?

A. No, sir; I would say Ninth Avenue would come next.

Q. You mean F Street, Tenth Avenue next, and Ninth Avenue next, in point of business importance?

A. Both Ninth and Tenth Avenues are leaders from the railroad station.

Q. What is there in the location of Tenth Avenue which gives them any special usefulness or importance — I mean to say as to where it goes to and fro?

A. Tenth Avenue is the leader to the ocean.

Q. Where does it lead to on the other end?

A. From the railway station to the ocean.

Q. How many business places are there on Tenth Avenue now?

A. Well, I would say there are twelve or thirteen or fourteen.

Q. You name as many as you can.

A. Well, there is the Carpenter pavilion, known as Buhler's place, and the Osborne place there; the Adams' Express Company; Garrabrant and Conover, real estate men; Barcalow's livery stable; Newbury's milk place; the moving pictures; Honce and Du Bois, real estate men; and

there is the Newman place, contractors; and the Ice Company; and Leddon's, the delicatessen place, and on the corner is the drug store.

Q. What about that optical parlor?

A. A young man named Tafsinki has that.

Q. And you omitted to mention Mr. Levinsohn's place?

A. Yes, sir.

Q. That would make 14?

A. Yes, sir.

Q. How many of these places have been opened, Mr. Jackson, in the last six years?

A. More than half of them.

CROSS-EXAMINATION BY MR. FOSTER:

Q. These places that you say have been started during the last six or seven years; are they just summer business places?

A. No, sir, all the year around.

Q. All the places, with the exception of the optical parlor and Mr. Levinsohn's place, are all West of F Street, are they not?

A. Yes, sir.

Q. And between F Street and the railroad?

A. Well, F Street and the river.

Q. And the travel that you have mentioned is the travel coming from the depot, and also coming from the West?

A. Yes, sir.

Q. And that travel goes through Tenth Avenue to F Street?

A. The greater part of it goes there.

Q. And then turns North or South on F Street?

A. And East on to the ocean.

Q. Do you own any property on Tenth Avenue?

A. No, sir, Ninth Avenue.

Adjourned to May 26, 1915.

FIFTH DAY

Continuation of the taking of testimony in the above-entitled causes, at the Chancery Chambers, Jersey City, New Jersey, on the twenty-sixth day of May, nineteen hundred and fifteen, before HON. VIVIAN M. LEWIS, Vice-Chancellor.

Appearances as heretofore noted.

MR. WILSON: I offer in evidence the minute books of the Borough of Belmar, entitled "Records of No. 7, Borough of Belmar, 1912," and page 60, a portion of it; I will read it in to the record: "A communication from William H. Carpenter, requesting renewal of the lease granted to John A. Buhler on October 1st, 1910, for two years, for the West End of Tenth Avenue, West of River Road to Commissioners' exterior line, at Fifty dollars per year, for at least three years, was read.

"On motion that the request be granted, it was so ordered."

Mr. Cooper, who very graciously volunteered to bring me the book, rather than to oblige me to subpoena its production by the Clerk, evidently misunderstood what I desired. I desired not only the record of this transaction between the borough and Mr. Carpenter, who is the present occupant, but I desired the record showing the original disposition of the matter when Mr. Buhler made application about the year 1900. Mr. Cooper has not produced that minute book, but has graciously promised to do to-morrow; and I presume it will be stipulated and agreed that the lease referred to here is a lease which had relation to that ground which was occupied, in part at least, by the Buhler pavilion; if not, we shall have to offer proof *aliunde*.

MR. FOSTER: We ask to have stricken from the record what has been read from this minute book, on the ground that it is immaterial and irrelevant.

MR. SNEDEKER: Now, here is simply a recital of somebody else's request referring to some original paper, and we are not bound by any such wording that this party making a request, might have put in that request, and I think that for the time being this matter should be stricken from the record, until they prove what the original lease covered.

THE COURT: Well, until I have the maps and everything before me for consideration, I will let it stand, noting your objection. Everything relating to the renting of these premises on the continuation of the avenue so called, whatever it is.

MR. FOSTER: I desire to object on behalf of the other complainants, that it has no binding effect upon them.

MR. WILSON: I think that is a good objection.

MR. FOSTER: I desire to make the further objection, that it has no relevancy to this particular issue, because there is nothing in the extract which was read from the minutes, that authorized the violation of the restrictive line.

THE COURT: There is nothing in that that authorizes a violation of the restrictive line, what you have read from now.

MR. WILSON: Perhaps your Honor misapprehended how it read; I will read it again. In

the first place, it would be incumbent upon the defendant to show that the *locus in quo* of a portion of this Buhler pavilion was projected out; the building was projected out into what ought to be or was, in fact, Tenth Avenue; now, if it made its ingress into Tenth Avenue at all, it was certainly nearer the street line than twenty feet; that must be clear; and we were met yesterday by the suggestion that there was no proof, and there could be no proof, it was suggested, that Tenth Avenue ever, in fact, extended beyond River Street. The presumption was that Tenth Avenue extended into River Street and there terminated. Now, this resolution is offered.

THE COURT: That is the claim of the complainants ——

MR. WILSON: Now, I wish to say this, your Honor, that it is entirely proper, independent of the objections raised, that we should inform the Court as to the theory upon which this offer is made. In the first place, it is competent, not only as against the borough, one of the complainants, but as against all of the complainants, upon this theory: of course, no complainant, except the borough, would be estopped by any act of the borough, that is clear; but your Honor will bear in mind that this now is offered with a two-fold purpose: First, to show that the borough is here in a court of equity, asking a court of equity to enforce in its favor a mutual covenant. Your Honor will bear in mind that the status of the borough in this controversy is not that of a municipality which is conserving public rights. The borough is here like every other suitor, as the owner of the fee of a piece of

property, comprehended in a common land scheme, bound up and controlled by these mutual covenants.

That being true, therefore, the borough stands in this controversy in precisely the same light as any other suitor, and, bearing that in mind now, this resolution is offered with the two-fold purpose: First, to establish that the borough itself, a complainant, has come into a court of equity and asked to have a mutual covenant inferred against the defendant in this case, in the face of the settled law of this Court; that such a complainant in such a posture cannot get relief on such a mutual covenant, if it appears that the complainant has also violated the covenant.

THE COURT: It is not satisfactorily established that there is that appearance on the part of the case that Tenth Avenue extends beyond the point indicated at River Street.

I shall permit your question to stand, owing to the fact that the maps and other things are not before me. It is quite apparent to me, that, if you demonstrate that Tenth Avenue is continued beyond River Street, and that this Buhler or Carpenter pavilion is across the imaginary line and is a violation of the building restriction, therefore, it is absolutely relevant; no question about that.

MR. WILSON: I was only endeavoring to put upon the record the purpose for which this was offered. I want to say, that it is offered, not only with a view of putting the complainant, to wit, the borough, in the attitude of being guilty of conduct that a court of equity will not grant relief, but it is relevant for an entirely different purpose and against all the

defendants. It is some proof tending to establish that on Tenth Avenue there has been an abandonment of the land scheme; therefore, it is competent upon both grounds. Now, we, of course, hold — with the utmost deference to your Honor's view — that this should be received as competent in the absence of maps.

This resolution recites Tenth Avenue as an extension, and these gentlemen are estopped in law and equity from saying that it does not extend. Here is what it says: "A communication from William H. Carpenter" (this is the minute of the Ford first) "requesting a renewal of the lease granted to John A. Buhler on October 1st, 1910, for two years" (now, for what?) "for the West end of Tenth Avenue, West of River Street"——

(There cannot be any Tenth Avenue unless it goes across River Road) "to the Commissioners' exterior line"— that means the Riparian Commissioners' limit for exterior filling; and I promise your Honor, that I will offer in evidence in this case a grant from the Riparian Commissioners to the Borough of the very extension of this street into the river itself —"at Fifty dollars a year." Let us see what the commissioners did. "On motion that the request be granted, it was so ordered."

Can it be suggested that when A goes before the Commissioners and says, "I want to lease that portion of Tenth Avenue that lies West of River Street and pay $50.00 a year for it"——

THE COURT: I suppose they did not exercise any control or authority over this continuation of Tenth Avenue.

MR. WILSON: But suppose they had done so for ten years?

THE COURT: And suppose that there was no record, a map or other record of the continuation of this avenue beyond this point on River Street? Now, the very entry in the book, while it would indicate that the Common Council, or Borough Council, endeavored to exercise authority and control over this part of the land, the *locus in quo* of the Buhler pavilion; nevertheless, it would not bind or affect the complainant's case, that is, the individual property owner, to go into a Court of Equity and exercise his right to have a building line enforced for his protection, for his benefit; his equity is still there, even though the Common Council had improperly entered in their minute book, which is assumed to be an exercise of some authority; and also practically an indication that they considered this continuation of Tenth Avenue a part of the avenue itself.

MR. WILSON: I grant, if your Honor please, that proof of this kind is not conclusive.

THE COURT: I am not going to rule it out.

MR. WILSON: I propose to show, that some years ago, before the original Buhler lease was entered into, upon the same hypothesis, I propose to offer a grant from the Riparian Commissioners to the borough for lands lying at the foot of Tenth Avenue in the river, and as I have already said, I am only anxious to make it clear that that testimony is offered, not only as binding upon the borough, but as binding upon all the defendants to the extent

of establishing that there was an abandonment of the land scheme.

THE COURT: I do not recall, as far as the case has gone, any evidence, although you are both in dispute about this, that indicates from the map records that Tenth Avenue extends beyond River Street.

MR. FOSTER: I think you are right.

MR. WILSON: I purpose to offer in evidence in this case a map filed authoritatively in Mr. McDermott's office, showing Tenth Avenue running to the river, and that is a part of my proof; if I can get my map, I presume your Honor will permit me to offer it; and that was the thing that your Honor had in mind yesterday as being the thing reserved in the examination of Mr. McDermott. They produced one or two maps showing that there was no continuation. Of course, as there was a continuation, as Mr. Cooper would naturally suppose, representing the borough, it would be an abandonment on their part, anyway, of the building scheme.

The effect of this resolution as it seems to us, is, that if no map were ever produced —

THE COURT: The resolution now read to me the second time, appeals to me very strongly.

MR. WILSON: My opinion is, that that would amount to an estoppel in the absence of explanation; it is not conclusive; but it would invoke the principle of estoppel until explained by them.

MR. FOSTER: I wish to note on the record the

offer of the minutes and recital therefrom as incompetent and irrelevant, on the ground that no matter what Mr. Carpenter may have communicated to the Council, and what action the Council may have taken upon his communication, cannot in law make the piece of land referred to any part of Tenth Avenue. The law prescribes how Tenth Avenue and every part of it, becomes a public thoroughfare in the borough, and no action or in-action of the Council can affect the borough's right in that regard.

I wish to make the further objection, that assuming that the land in question — —

THE COURT: You mean the borough's action cannot bind anybody?

MR. FOSTER: Yes. The law prescribes the manner in which a street can be opened by the Borough Council. Assuming they went as far as Mr. Wilson suggested — I object to the admission of this record, because the action of the Mayor and Council was *ultra vires;* they had no land abutting on this end of Tenth Avenue referred to. I don't care if they got $50.00 a year or $50,000 a year for an illegal act from Mr. Buhler or Mr. Carpenter; that is not binding upon the borough as a municipality. Their act was entirely *ultra vires,* if that is a public street, and I do not care for what consideration it was made, and it could not be binding on the borough as such.

MR. WILSON: They have contented themselves with offering the map apparently made on the ninth of May, 1873. Mr. McDermott had a number of maps here, and my distinct recollection is, that he promised to leave copies of

those maps for common use. The only map now that we have before us is this map, made in 1873; here is Tenth Avenue; here is the Atlantic Ocean; Tenth Avenue does not even run into River Street; it has not the formation of a street; it is seven or eight times the width of a street. It may be a part — we don't know what — this is not the map that even suggests the topography of Belmar, and it was the first map filed; it is so vague in its terms, that it throws no light upon the *locus in quo;* and apparently, they offer no other map, and yet there were three others produced by Mr. McDermott. We will bring those maps back.

THE COURT: Are there any other maps?

MR. FOSTER: No, sir, none that we can offer with any authority.

MR. COOPER: I know of no other, except the one that Mr. Wilson refers to.

MR. SNEDEKER: You had that marked for identification, so it must be in your possession.

MR. WILSON: It is only a matter of saving time; We are bound to have those maps here; your Honor has said that whatever throws light on this question, shall be produced. If you have got the map, why don't you let us take it?

MR. SNEDEKER: We have not got it; we supposed that you had it.

THE COURT: There was one map produced here, that indicated Tenth Avenue extending beyond the River Road; where was that map? Is that the map Mr. Wilson had?

MR. WILSON: The matter is all simplified now. I owe these gentlemen an apology. The map that Mr. McDermott had was produced, and this which he declared to be a copy of it, was marked "Exhibit D 1 for identification," and we will offer that map now and direct your Honor's attention to the topography of the place in controversy. Here is the Atlantic Ocean; here is Tenth Avenue; here is the railroad track; here is River Street; and here it is running down into the river. Now, that I offer in evidence.

MR. FOSTER: We object, on the ground, in the first place, that there is nothing to show that it is a map of Belmar; there is nothing to show by what authority it was made as a representation of the conditions prevailing at Belmar. There is nothing to show that it was ever filed prior to the time that the complainants in this cause acquired their property. There is nothing to show by whom it was made; as far as I am informed ——

THE COURT: The map is not proved as yet. Now, is there anything in the evidence to show this map has been proved?

I will exclude the map at present, until it is proved before me as an authoritative map. It may be an advertisement. It is an advertisement.

MR. WILSON: Nevertheless, it was brought here by Mr. McDermott, not by us, as being represented by him as a true copy of the original on file in his office. If these gentlemen are not willing to accede to that, we will bring the original here.

THE COURT: I will exclude the map.

MR. WILSON: Until we bring the original or prove it?

THE COURT: Yes.

JOHN ARNOLD OSBORNE, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you live?
A. Belmar.
Q. How long have you lived there?
A. I have lived there steady 16 or 17 years, I don't know which.
Q. What is your business?
A. I have not any.
Q. Have you done any building on Tenth Avenue?
A. Yes, sir.
Q. When?
A. Well, about 16 or 17 years ago.
Q. What did you build?

MR. FOSTER: Objected to on the ground that it is too remote in regard to time — 16 or 17 years ago.

THE COURT: The objection is overruled. It is material.

Q. What did you build sixteen years ago on Tenth Avenue?
A. A dwelling house.
Q. For what purpose was the dwelling house devoted?
A. For a restaurant ——
Q. And a boarding house?
A. No, sir.

Q. For what purpose is the building devoted to now?

A. Just at the present time, it is used as a boarding house.

Q. How much accommodation has it?

A. It is 36 feet by 46 feet.

Q. How many rooms in it?

A. 21 rooms.

Q. Where was it built with respect to the street line of the lot?

MR. SNEDEKER: I object to that; this witness is incompetent to answer that question, and it has all been gone into by a competent witness; this refers to the Osborne House.

THE COURT: He put up the house.

MR. SNEDEKER: But he cannot tell what the measurements are; he is incompetent to testify to that.

THE COURT: I don't think so, Mr. Snedeker; I am inclined to let him testify. You object to it on the ground that the witness is incompetent to testify where the building is located. I will allow it to stand.

Q. (Question read.)

A. The main house was off of the street line, just back of the street line.

Q. Did you make measurements when you put up the house?

A. I laid it out myself.

Q. And how far back of the street line?

A. That I could not tell; it might have been a foot or two feet, and it might not have been over eight or ten inches.

Q. But it was not a matter of more than two feet?

A. No, sir, it was not.

Q. Now, so much for the main part of the house; what about the rest of the house?

A. Well, there was a one-story shed onto it, the same as that building, a porch, that was enclosed in for an ice cream parlor.

Q. How far away was that from the street; what do you mean by the street line?

A. I mean where they say the building line is now.

Q. Where do you understand the building line is now?

A. 40 feet from the curb.

Q. Now, you say that the main part of the house was how near the lot line on the street; how near was it?

A. I cannot tell; it might have been eight or ten inches, and it might have been two feet.

Q. Any more than that?

A. No, sir.

Q. How near to the lot line was the part that you say was enclosed in glass and used for an ice cream parlor; how near was that to the lot line?

A. Well, that was built out there 12 feet at that time from the building.

Q. Would that make about seven feet over the building line?

A. Seven feet and a half.

Q. About seven feet and a half over the building line?

A. Yes, sir, I could not tell exactly.

Q. Now, was Belmar a borough at the time you built?

MR. COOPER: I object to that.

BY THE COURT:

Q. You knew about the building line when you constructed the building?

A. I did not know where the building line was then; I understood there was no building line on the West of the railroad.

FURTHER DIRECT:

Q. And this building was located on Tenth Avenue, West of the railroad?

A. Yes, sir.

Q. Nobody interfered with your building?

A. No, sir.

Q. And nobody has interfered with you since?

A. No, sir.

Q. Did you help Mr. Emlen make his measurements, showing the distances back from the lot line of the various houses on Tenth Avenue?

A. I did.

Q. And about when was it that you did that, if you remember?

A. I don't remember when it was, whether it was two or three or four years ago; I have forgotten; I don't remember; it was since the suit was going on, I think.

Q. Did you mean " years " when you said " years," or did you mean months?

MR. FOSTER: Objected to as leading.

THE COURT: The witness is rather difficult.

MR. WILSON: Mr. Emlen said it was done sometime in the winter, sometime about January or February, I think he said.

Q. Did you ever help him to do this work except once? It was only one time when you made those measurements of the houses on Tenth Avenue?

A. Only once.

Q. Now, when, according to your best recollection, was it; about how long ago?

A. I forget.

Q. Who helped you do it?

A. Mr. Watson.

Q. With Mr. Emlen?

A. Yes, sir.

Q. Now, what was your part of the work; what did you do?

A. I helped take the measurements.

Q. And what part of the work did you do?

A. I held the line, and Mr. Watson took the other end and took off the measurements of the line.

Q. Who had the end of the line?

A. I had the end.

Q. You had the end?

A. Yes, sir.

Q. And when we speak about the line, I mean the steel tape; now, where did you take the end of it?

A. I took the end of it against the building.

Q. And who held the other end of the tape?

A. Mr. Watson.

Q. And where did he have the other end of the tape?

A. He had the other end of the tape in his hand.

Q. And where would be measure to?

A. He measured to the curb.

Q. Did he measure anywhere else than to the curb?

A. I don't remember; we measured the length of the blocks, all of them.

Q. What part had you to do other than to hold the end of the tape up against the building?

A. That is all.

Q. And did you do that in every case and accurately and honestly?

A. I did, yes, sir.

Q. I notice you have something in your hand there; what is that?

A. That is the tape, the steel tape.

Q. Is this the original tape used for that purpose?

A. Yes, sir.

Q. How did you get it in your possession?

A. It was handed to me this morning.

Q. By whom?

A. By Mr. Barcalow.

Q. You recognize this, anyhow, as the tape you used for the purpose, do you?

A. Yes, sir.

Q. How many business places are there on Tenth Avenue now?

A. Well, I don't know exactly; I think there is a dozen or fifteen.

Q. Has the character of Tenth Avenue, as to being a business street, changed at all in the last six years?

MR. SNEDEKER: I object to that as calling for a conclusion from this witness.

THE COURT: I think the question should be put in a different form.

Q. What are the two principal business streets in Belmar?

A. F Street and Tenth Avenue.

Q. And how do these two streets compare in point of importance, from a business point of view?

MR. SNEDEKER: I object to that as calling for a conclusion; this witness cannot state as to what the importance of one street is ——

THE COURT: I will sustain the objection.

Q. When you come to the amount of business — just consider now the amount of business done on Tenth Avenue and the amount of business done on F Street; on which of these two streets do you think the most business is done?

A. On F Street.

Q. And how much more business on F Street than on Tenth Avenue, in the summer time?

A. Well, twice as much done on F Street, I should think so.

Q. Has the amount of business and the number of business places on Tenth Avenue increased any in the last six years?

A. It has, yes, sir.

Q. And how many new business places have been opened on Tenth Avenue in the last six years?

A. I could not tell you.

Q. Could not you give us some idea?

A. Five or six, or seven or eight, something like that.

Q. How old are you, Mr. Osborne?

A. Seventy-four.

Q. You have no interest in this controversy in any way?

A. No, sir, not any.

Q. Did you ever help Mr. Emlen with his measurements before that time?

A. Yes, sir.

Q. Were you in the habit of helping him, from time to time?

A. I was, yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Do you still own the Osborne House?

A. I do, as long as I live.

Q. You have owned it all these years?

A. It belonged to my wife.

Q. Then, you are interested in her behalf?

A. Yes, sir.

Q. This house was built 16 or 17 years ago, the main part; did you superintend its construction, or help Mrs. Osborne do it?

A. Yes, sir.

Q. Did you help determine its location on the lot?

A. I laid it out.

Q. You knew of the building restrictions on Tenth Avenue?

A. No, sir.

Q. So that when you built the main part of the house, you did not build with any intention of violating a building line restriction?

A. I did not know there was any.

Q. Now, how long after the main part was built, was this ice cream parlor, the enclosed porch, built to it?

A. That was enclosed at the same time.

Q. And had there been any extensions made to your house in the 16 or 17 years?

A. Yes, sir.

Q. Out into the street or over the building line?

A. That ice cream parlor was built of two stories above and one underneath; the building is a four-story one on Tenth Avenue.

Q. Now, at the time you made these additions, or Mrs. Osborne made them, I suppose you assisted her?

A. Yes, sir.

Q. Had you then learned of the existence of this building line?

A. Yes, sir.

Q. Did you then make the additions with the intent to violate the building line?

A. No, sir; I went to the Council and asked them, and they said, "Put it where you like, so that you don't get on the sidewalk; you can go clean out to the sidewalk line, if you like;" two or three of the Council that we asked ——

MR. COOPER: That was not responsive; I ask to have that stricken out.

MR. FOSTER: I don't see any reason for striking it out.

Q. This tape, you say, is the one you measured with?

A. As near as I can tell.

Q. This is the one you produced this morning?

A. Yes, sir.

Q. And on how many occasions before this particular

one, had you attended Mr. Emlen in making measurements?

A. I could not tell, several of them.

Q. Now, let me understand; did you hold the end of the tape up against the building,— the part where the little ring is here?

A. I held the ring right against the building.

Q. And did Mr. Watson hold the other end?

A. Yes, sir.

Q. In his hand?

A. Yes, sir.

Q. And did he call off the measurements?

A. Yes, sir.

Q. And where was Mr. Emlen at the time?

A. He was right there to put down the measurements.

Q. Where was he — was he with you or with Mr. Watson?

A. So that we could both talk to him right by.

Q. Was he nearer you or Mr. Watson?

A. Sometimes near one and sometimes near the other.

BY THE COURT:

Q. Tell me where Mr. Watson would stand?

A. Mr. Watson would take the line and run out to the curb, and then he would give him the measurement; I would have the end against the building.

FURTHER CROSS:

Q. You would not hold it like that, would you?

A. No, sir.

Q. Let me ask you this question: Won't you take the end of that where the ring is and hold it on this side, so that the Court can see it, and just show how you held it?

A. (Witness illustrated it.)

Q. Is your finger the building; which do you call the end of the building?

A. Where my finger is.

Q. You held the end of the ring against the building?

A. Yes, sir.

Q. How did you get under these porches?

A. I went on top of the porches and plumbed down with a plumb bar, and Mr. Watson had a plumb bar and plumbed them, and he was very particular about it.

Q. That is, you went on the floor of the porch?

A. Yes, sir.

Q. And stood there with this up against the building as you have described?

A. Yes, sir.

Q. And then Mr. Watson would stand in here and take his plumb line and plumb?

A. Yes, sir.

Q. And he would let it drop right on the edge of the curb?

A. Yes, sir.

MR. WILSON: Does your Honor observe that in that tape line, that in order to get the proper measurement, it was the proper thing to do to hold the end of the ring against the building — in other words, the tape line does not begin there; from the end of the ring to here (illustrating) is one inch, so that the first inch includes the ring.

Q. Do you recall the Newbury case against Barcalow?

A. Yes, sir.

Q. That suit in Chancery?

A. Yes, sir.

Q. And your building, or Mrs. Osborne's building, was in the same condition at the time of that suit as it is to-day?

A. No, sir.

Q. Have you changed it?

A. No, sir.

John Arnold Osborne — Cross

Q. Have you changed your building since the Newbury suit?

A. Well, it was built then — the foundation was built.

Q. You don't recall the number of years ago that the Newbury suit took place; do you remember how long ago it was that the Newbury case was on?

A. Six or seven years ago.

BY THE COURT:

Q. Your building was up then, wasn't it?

A. No, sir.

Q. If I should tell you the case was tried six or seven years ago — the Newbury case, what would you say about your building being up at that time?

A. That addition was not up; the ice cream parlor was there, and they were at work on the addition above it, and Newbury came along and said he would make me put it down.

Q. Did you stop work?

A. No, sir.

Q. You went right ahead?

A. Yes, sir; we had authority from the borough, and the carpenter that I had, Charles Camp, he would not put it there until he went and saw the Council, and the Mayor, himself, and they told him to go ahead with it and built it anyway.

MR. FOSTER: I move to strike that out; it is not at all responsive.

MR. WILSON: The purpose of the inquiry was to discredit him in a very courteous way: now he has asked why he did not do or did do a certain thing.

MR. FOSTER: My question is, did he take down the structure, and he said "No," and then he went on and told me why he did not.

MR. WILSON: You asked him why, and that being so, the door is open for the witness to give his explanation, because it is on cross-examination.

THE COURT: I did not assume that there was any attempt to discredit the witness at all.

MR. WILSON: It is an attempt to search him on cross-examination.

THE COURT: I think the answer, as far as his explanation is concerned, is not responsive; I will strike it out on that ground.

Q. Is Mr. Charles Camp here?

A. No, sir.

Q. Is he alive?

A. Yes, sir.

Q. Where does he live?

A. He lives somewhere near Belmar; I don't know

Q. How far is your house from the Heyniger property?

A. My house is right down by the river, and the Heyniger property is up East of F Street; it is three blocks away from my place.

Q. And how far is your place from the Newbury property?

A. About a block, a little over.

Q. How far is your place from the Borough Hall?

A. Well, it is three blocks East, the Borough Hall is, and that is on Ninth Avenue and one block North.

Q. How far is that from the Jacob Newman property — from your house?

A. I think it is over three and a half blocks.

Q. And how far from Charlotte Wildman's property?

A. Three blocks.

John Arnold Osborne — Cross

Q. Is your property further away from Mr. Levinsohn's property than it is from the property of all the complainants in these cases — Mrs. Wildman, Mr. Heyniger, the Borough Hall and Newman?

A. Mr. Levinsohn's is the closest.

MR. FOSTER: Please strike that question and answer out.

THE COURT: Strike it out.

BY MR. SNEDEKER:

Q. Your property is further removed from Mr. Levinsohn's property, Mr. Heyniger's, Charlotte Wildman's property, Jacob Newman's and the Borough Hall, than the Newbury property is; that is, yours is further from those properties than what Mr. Newbury's property is away from them?

A. Yes, sir.

BY THE COURT:

Q. Is the Newbury property East or West of you?

A. It is East of the railroad.

Q. I asked you if the Newbury property was East or West of you on Tenth Avenue?

A. It is East.

Q. And are all these other properties West of you?

A. No, sir, they are East of me.

Q. Is the Newbury property East of you or West of you on Tenth Avenue?

A. It is East.

Q. And are all these properties that they have mentioned, East of the Newbury property?

A. Yes, sir.

FURTHER CROSS:

Q. Are all the properties that I mentioned to you, East of F Street?

A. No, sir.

Q. All except the Newbury property are East of F Street?

A. Yes, sir.

Q. And you are the foot of F Street, that is, the extreme West of it, is that right — of Tenth Avenue, I mean?

A. I am at the foot of Tenth Avenue.

Q. That is the West end of Tenth Avenue?

A. Yes, sir.

Q. And the Newbury property is between your property and F Street; is that correct?

A. Yes, sir.

Q. Now, your property is West of the railroad track, isn't it?

A. Yes, sir.

Q. And there is a decline there in the grade; you remember that your property is much lower than what F Street is?

A. I think so.

Q. You don't know about how much?

A. I think it is lower there than at F Street?

Q. Going West on Tenth Avenue from F Street to the railroad, there is a slight decline, isn't there, or is that about level; what do you think; going West on Tenth Avenue from F Street to the railroad, how is the land there, about level?

THE COURT: What is the object of this.

A. There is a decline from the railroad to River Avenue at Tenth Avenue.

Q. How much does it decline from the railroad to River Avenue, if you know?

A. I don't know; I did know.

Q. Is it quite a decline?
A. Yes, sir.

BY MR. FOSTER:

Q. You have stated, Mr. Osborne, that there are about a dozen business places on Tenth Avenue?
A. I think so.
Q. And there are five, six, seven or eight new places that have been started since the Newbury case, or during the last six or seven years?
A. I think so.
Q. Are they all West of F Street?
A. No, sir.
Q. How many of them are East of F Street?
A. I could not tell you.
Q. Is there any other place except Mr. Levinsohn's?
A. Yes, sir.
Q. On Tenth Avenue?
A. Yes, sir.
Q. What?
A. Wildman has got a place there.
Q. East of F Street?
A. East of F Street, yes, sir; Levinsohn is East of F Street.

BY THE COURT:

Q. What sort of a business has Wildman?
A. He builds automobile bodies; he fixes automobiles.

FURTHER CROSS:

Q. Does he run them in and out and do business there?
A. Yes, sir.
Q. Is not his place for the work on another street?

A. He lives on Tenth Avenue; he has the workshop back of his house.

Q. Has he a driveway in from Tenth Avenue to the workshop?

A. Yes, sir.

Q. Has he a driveway in the rear, too?

A. No, sir.

Q. Just can enter it from Tenth Avenue?

A. Yes, sir.

Q. As I understand it, that is a workshop, isn't it?

A. Yes, sir.

Q. There are no signs out there, are there?

A. I think so.

Q. Are you sure of it?

A. I am not sure, but I think there are; he fixes keys and locks.

Q. In this same workshop?

A. It goes out, and he fixes lawn mowers.

Q. Now, what other business place is there on Tenth Avenue East of F Street?

A. There is one there; I don't know the man's name.

Q. That is quite an attractive street East of F Street, isn't it; Tenth Avenue is quite an attractive street the East of F Street?

A. Yes, sir.

Q. And it is one of the principal driveways to the ocean?

A. Yes, sir.

Q. And is not the reason for that the fact that the street is wide — nearly 120 feet in width between the house line?

A. No wider than any other street that I know of — that is, any other avenue that I know of — I think it is the same width.

MR. FOSTER: I understand you offer this tape and measure?

MR. WILSON: I am perfectly willing to offer it.

THE COURT: I will receive it in evidence.

Marked "Tape 1."

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Osborne, is there a riding establishment where riding horses are entered and hired on Tenth Avenue, East of F Street, too?

A. Yes, sir, I have forgotten that.

THE COURT: I never heard of it before.

MR. WILSON: No, sir.

Q. That is on Tenth Avenue, East of F Street?

A. Yes, sir.

Q. Now, one other question: the front of your hotel is partly enclosed in glass, and is partly a solid wood construction, isn't it?

A. Yes, sir.

Q. And how much of the front is enclosed in glass, and how much is the solid wood construction that was put up when you originally erected your house? (Question withdrawn.) How much frontage is there to your entire house, about how much? About how many feet?

A. About 40 feet.

Q. About how much of that 40 feet is the solid wooden construction — is it one-half, one-quarter, one-third, or whatever it may be?

A. About one-half.

Q. And does that extend up from the ground all the way up to the top of the house?

A. It does, yes.

Q. And is this part that is solidly built up, of wood or brick?

A. Wood.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. Is that part that you refer to towards the river, is it the Westerly end or the Easterly end of your house?

A. It is on the North side.

Q. There is a back entrance on the street on Tenth Avenue?

A. Yes, sir.

BY THE COURT:

Q. It does not face on Tenth Avenue, does it?

A. No, sir.

Q. And the parts of the house that you say are over the building line are the South side of the house?

A. The North side.

THE COURT: Then they are not over the building line.

WILLIAM WATSON, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you live?

A. The corner of River Avenue and Belmar.

Q. How long have you lived there?

A. Four years.

Q. Did you help Mr. Emlen make measurements on Tenth Avenue, with a view of determining how far back certain houses were located from the street?

A. Yes, sir.

Q. When was this work done?

A. I think it was either the latter part of February, or the first of March, 1914.

Q. And who helped you do it?

A. John Osborne.

Q. Is that the old gentleman who was just on the witness stand?

A. Yes, sir.

Q. And Mr. Emlen was there with you?

A. He was.

Q. What part of the work did you do?

A. Well, I called off the measurements; determined and called off the measurements at the measuring end of the tape.

Q. Who had the extreme end of the tape?

A. John Osborne.

Q. And where would he hold that extreme end of the tape?

A. Against the building.

Q. You were measuring from the building to the point, to the curb line?

A. Yes, sir.

Q. What points in the street would you measure to; how did you do the measurement, and what places did you measure to?

A. Well, the curb is not supposed to be a true line, or it might vary, and these measurements were taken from the corner stone or monuments at the intersection of the streets, and a line was taken from the center of those monuments, and opposite the properties, a mark was set in range with these monument lines.

Q. And who would make that mark in the sidewalk?

A. I made the mark.

Q. And what would you make it with?

A. Well, to determine the point where the mark should be, we used a pin, a surveyor's pin, and that was indicated where it should be placed by the instrument — Mr. Emlen and his instrument.

Q. Who operated the instrument?

A. Mr. Emlen.

Q. What kind of an instrument was it?

A. A regular surveyor's instrument, a theodolite, I think it is called, or a transit.

Q. Well, whatever it was, it was an instrument by which he took a line between these two monuments?

A. Yes, sir.

Q. And how would you know where to put down the pin on the sidewalk?

A. He would indicate if I was too far one way or the other, until I got the pin in the exact line.

Q. Then what would you do when you got it in the exact line?

A. I would make a point.

Q. What do you mean by a point; state to the Court what you did.

A. If it came between the joints of a flagstone so much that I could make a point with a pin, that would be enough; and if not, then I would make a scratch with a pin.

Q. Show the Court what kind of a scratch you would make.

A. Say, there we were fighting for the point (illustrating with a lead pencil), I would make a mark like that (indicating).

Q. A triangular mark?

A. Yes, sir.

Q. How big a pin is this surveyor's pin?

A. It is about 16 inches long, with a loop at the top, and it is sharp at the point.

Q. Now, suppose the place were located where the sidewalk was dirt; what would you do?

A. I would have to stick the pin in.

Q. Now, did you in every instance either make the mark on the sidewalk, the triangular mark, or stick the pin in at the place indicated by Mr. Emlen?

A. Yes, sir.

Q. Did you do that honestly and accurately?

A. I did.

Q. Then, my understanding is, that Mr. Osborne held

the end of the tape at the building; and who did the reading?

A. I did.

Q. Did you in every instance read the tape honestly and correctly?

A. I did.

Q. Where was Mr. Emlen while the measurements were being made?

A. Immediately alongside — two feet away — not more than that.

Q. Was he near enough to Mr. Osborne to observe what Mr. Osborne was doing?

A. Yes, sir.

Q. Did he himself ever read the tape?

A. Occasionally — he verified the measurements; not in all cases, but we would take both sides of the building in some cases.

Q. Now, you measured out then, you say, from the building to this running line in the sidewalk; did you ever measure out to the curb?

A. We did.

Q. How frequently was that done?

A. Well, quite frequently.

Q. Do you recall whether those measurements showed any variation in the curb line?

A. They did.

Q. You have no interest in this controversy?

A. None whatever.

Q. Was this the first job you ever did for Mr. Emlen?

A. No, sir, I worked for him off and on for four years, quite often.

MR. WILSON: I do not suppose there is any question but that that is the case; that is not challenged, is it?

MR. FOSTER: No.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Did you measure to the curb or to the curb line?

A. To the line on the sidewalk; there are terraces and other obstructions like fences that would be in the way of this monument line; now, the line we measured by was offset from the monument to bring it out right in the sidewalk, for convenience.

Q. You have stated to Mr. Wilson that you made some measurements to the curb line?

A. That would have to be done by measuring from this line out to the curb.

Q. I ask you if you did measure either to the curb or to the curb line?

A. Measured from the starting line to the curb occasionally.

Q. From this running line?

A. Yes, sir.

Q. To the curb?

A. Yes, sir.

Q. Did you ever, in any instance, measure from the building to the curb?

A. I don't recall that we did.

Q. You won't say that you did not?

A. No, sir.

Q. Mr. Osborne has stated that you did in some cases; if you stood on the curb, did you ever measure from the building line to the curb?

A. I don't recall that we measured from the building to the curb.

Q. You said that you did at times measure from the running line to the curb?

A. Yes, sir.

Q. Who stood on the running line?

A. Mr. Osborne.

Q. And you stood on the curb?

A. Yes, sir.

Q. What was the object in doing that?

A. To determine how much the curb line varied in some cases, where it was apparent that the curb line was not straight.

Q. This monument, is it flush with the sidewalk?

A. In some cases it is below the sidewalk.

Q. When Mr. Emlen sighted to get the running line, you were between him and the monument, were you not?

A. Well, yes, sir, I was between him and the monument.

Q. What was there about the monument; was there a rod or anything else on the monument?

A. There was a surveyor's flag or rod.

Q. Who placed the flag there?

A. I did.

Q. Mr. Emlen has not mentioned that; do you know why?

A. I don't know.

Q. You say you measured in some instances both ends of the building; do you mean the foundation on both ends?

A. Yes, sir.

Q. Why did you do that in some instances and not in all?

A. I think it was done in approximately all instances.

Q. What do you mean by "approximately?"

A. If a building was 30 or 40 feet back from the street, or 50 feet back from the street, we merely determined that it was. One end was sufficient.

Q. One end in such a case was sufficient?

A. Yes, sir.

Q. In all other cases, two measurements?

A. In all other cases, we made two measurements.

Q. Unless it was so far back from the street there could be no question to you about it?

A. Either so far back or so narrow that the variation did not amount to anything.

Q. Did you find a number of instances by the double measurement, where one end of the foundation was within

the building line, and the other projected a few inches, or a fractional part of a foot over?

A. I could not say whether any of them were in the building line, as I did nothing but call off the measurements; I made no note.

Q. What was your process of measurement when you measured the eaves of the house, or any projection above the first floor?

A. It was measured by the surveyor's instrument; Mr. Emlen would turn an angle and offset and take the eaves into consideration with the machine. In case it was only one story high, I would put a plumb line on a pole, and hold it to the eaves and plumb it down.

Q. Was that an accurate way of ascertaining the distance?

A. As near as I could judge — it is plumb from the street side to the ground — measured from the plumb line out.

Q. Mr. Osborne, when he was holding the end of the tape, was always about 30 feet or more from you?

A. About that.

Q. Where was Mr. Emlen — near him or near you?

A. Sometimes between us two.

Q. Did he verify your measurements in every instance?

A. Not in every instance.

Q. You would call them off and he would mark them down?

A. Yes, sir.

Q. Did Mr. Osborne kneel down or bend, or what did he do when he put the end of the tape up against the house?

A. It would be necessary for him to kneel down.

Q. What did he do?

A. He did kneel.

Q. He had the hard end of the job, didn't he?

A. Yes, sir.

Q. Why didn't you take the end of the tape sometimes?

A. I don't know.

Q. Didn't you think it wise to relieve the old gentleman from that hard labor?

A. I always read the measurements when I was working with Mr. Emlen.

Q. Didn't the old gentleman sometimes lay the tape upon the porch and rest his bones?

A. No, sir.

Q. Mr. Osborne never went under the porch, through the lattice to get a measurement?

A. It was not necessary.

Q. Now, you said a little while ago, that there were some terraces and fences on this street at the time of your measurement and some hedges there?

A. Yes, sir.

Q. How high, on an average, were the terraces?

A. About 18 inches or 2 feet.

Q. And did you plumb for the purpose of getting the measurements, from the height of the terraces to the mark on the sidewalk?

A. Yes, sir.

Q. In every case?

A. We would hold the tape on the level, and whatever was necessary, we would have to plumb down.

Q. In every instance where you had a terrace, you plumbed?

A. Yes, sir.

BY MR. SNEDEKER:

Q. Mr. Osborne is an aged man, isn't he?

A. Yes, sir.

Q. And he is a man who is quite feeble?

A. Yes, sir.

Q. Now, when it was necessary to hold this line on a level and use the plumb, it was necessary for Mr. Osborne to hold the end of the tape tight against the house, wasn't it?

A. Yes, sir.

Q. And if, through feebleness or any other cause, he should allow that end of the tape to move any distance from the house, it would change the measurements, wouldn't it?

THE COURT: That is all a matter for the consideration of the Court.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. One other question — was Mr. Osborne, at the time you were doing this work, you know, apparently vigorous enough — to have strength enough, to hold the end of this tape against a building ——

A. I think he was.

MR. SNEDEKER: I object to that.

THE COURT: He did hold it against it — he says he held it.

RE-CROSS EXAMINATION BY MR. SNEDEKER:

Q. Was the man in about the same physical condition at the time that he made these measurements that he is to-day; I am referring to Mr. Osborne; did you observe whether he was in about the same physical condition at the time he made these measurements that he is to-day?

A. I think he is just about the same, yes, sir.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Now, Mr. Watson, as you observed his work, when this was being done, did he seem to be able to physically hold — did he seem to you to be physically able to hold the end of this tape steadily against the side of the building, or whatever he was measuring from?

A. I think he was.

RE-CROSS EXAMINATION BY MR. SNEDEKER:

Q. When you made a measurement where it was necessary to use the plumb and hold the tape line taut, about how many pounds do you suppose it was necessary to pull on that tape line in order to bring it taut?

A. I would not think more than one pound.

Q. Do you know what the tape line weighs?

A. I do not.

Q. And if you were measuring over the top of a hedge, do you think that one pound of pulling would pull the tape line straight on the level?

A. Within a distance of 30 feet or 35 feet or 40 feet, something like that.

JOB BARCALOW, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Are you the Barcalow who is mentioned as one of the parties in the suit of Newbury vs. Barcalow?

A. Yes, sir.

Q. And where do you live?

A. At New Bedford at present, that is just a little outside of Belmar, but Belmar, I claim as my home.

Q. How long have you lived in Belmar?

A. 25 years.

Q. Have you been familiar with Tenth Avenue, its growth and condition, for a good many years?

A. Yes, sir.

Q. Do you own property on Tenth Avenue?

A. Yes, sir.

Q. For how many years?

A. In the neighborhood of about 15 years, somewhere along there.

Q. And you owned property on Tenth Avenue at the time of the Newbury lawsuit?

A. Yes, sir.

Q. What business have you conducted on Tenth Avenue?

A. The livery business.

Q. For how many years have you been engaged in that business?

A. About 26 years, I think.

Q. Now, has there been any change in the business activities of Tenth Avenue since your lawsuit was decided?

MR. SNEDEKER: Objected to; that is calling for a conclusion; if he will only give us the facts.

MR. WILSON: Your Honor will observe that the question is: "Has there been any change in the business activities on Tenth Avenue since your lawsuit was decided?" Now that is not leading, and I do not see that it is objectionable.

THE COURT: I am inclined to favor the taking of the testimony.

BY THE COURT:

Q. Has there been a change in the business activity in Tenth Avenue?

A. Yes, sir.

Q. What is that change?

A. There is a great deal more travel increasing there every year.

Q. You mean traffic along Tenth Avenue?

A. Yes, sir.

Q. Any other change?

A. There has been a number of business places built there since, quite a few of them.

FURTHER DIRECT:

Q. What about the volume of business done on Tenth Avenue now, as compared with the time when your lawsuit was decided; what about the amount of business; is it more or less?

A. Well, it has increased, I think, considerable.

Q. To what extent has it increased — in percentage?

A. Well, I could not exactly get it as close as that to the percentage basis, but I should say it is within one-third of what they do on F Street — one particular block, which is the main business part of the town; I would consider it the main business part, outside of that one block there on F Street.

Q. That is, you regard Tenth Avenue as the main business place outside of one block on F Street?

A. Yes, sir, it is the outlet from the depot ——

Q. How much more business do you think is done on Tenth Avenue now than was done there when your lawsuit was decided; how much more business is done on Tenth Avenue?

A. I should say as much again.

Q. How many business places are there on Tenth Avenue?

A. I will say there are 19, as near as I can figure them out.

Q. Suppose you give them to us?

A. There is Osborne's restaurant — Adams Express — Garrabrant and Conover real estate — Barcalow's stables ——

Q. That is you?

A. Yes, sir.

Q. All right, proceed.

A. Newbury's milk depot.

Q. All right.

A. Moving picture place.

Q. All right.

A. Levinsohn's dry goods store.

Q. The building now in dispute?

A. Yes, sir.

Q. All right.

A. Then next to that is a tailor shop; I don't know who runs that.

Q. All right.

A. Next to that is an automobile supply place, tires etc.

Q. All right.

A. Next comes the American House.

Q. What is that — an hotel?

A. Yes, sir.

Q. What else?

A. Then it starts down with Alfred Wildman's automobile establishment.

Q. What else?

A. Then comes Corliss' stable and boarding house, riding academy — they have saddle horses there.

Q. All right.

A. Then comes Tafsinki's optical parlor.

Q. All right.

A. Bamford's store; it is vacant there now, on the corner; it is not occupied, but it was occupied for a dry goods store.

Q. How recently?

A. There has not been anyone in there for over a year.

Q. Is not that on F Street?

A. Yes, sir, corner of F Street and Tenth Avenue.

Q. I don't suppose we ought to include that; are you quite sure there is no entrance to it from Tenth Avenue?

A. I don't think there is.

Q. All right.

A. And there is Kasban's drug store.

Q. All right.

A. Then there is Leddon's restaurant.

Q. All right.

A. Newman's mason shop.

Q. All right.

A. Honce and Du Bois real estate.

Q. All right.

A. And Carpenter's pavilion.

Q. What about the ice company?

A. The ice company is also on Tenth Avenue; they have an office.

Q. Now, one of these that you gave us, you say has no entrance on Tenth Avenue, you think; that is Bamford's store; have all the rest of these places entrances on Tenth Avenue?

A. Yes, sir.

Q. Now, how many of these business places are East of F Street; how many of these business places are on Tenth Avenue, East of F Street?

A. I should say eight.

Q. How many of these business places to which you have referred, have been opened for business purposes since your lawsuit?

A. I am quite positive Osborne's restaurant was opened for a restaurant business; and the moving picture business has opened since.

Q. What about the Adams Express?

A. That is since.

Q. What about Garrabrant and Conover?

A. That is since, also.

Q. And Barcalow's; you were there before?

A. Yes, sir.

Q. Have you enlarged your place any since that lawsuit?

A. I did not open the stable until after that lawsuit was ended, and I have put in this real estate office where Garrabrant and Conover is, and the building where the Adams Express office is; I put them in myself.

Q. Didn't you have a livery stable at the time of your lawsuit?

A. Yes, sir, that was down near the beach.

Q. But not on Tenth Avenue?

A. No, sir.

Q. Did you open a livery stable on Tenth Avenue since your lawsuit?

A. Yes, sir, I opened it after the suit.

Q. Then, what about Newbury's milk depot?

A. That had just about been completed at the conclusion of that suit.

Q. What about the moving picture place?

A. That is since.

Q. And the tailor's shop; what about that?

A. That is since.

Q. Is that tailor shop in the Levinsohn building?

A. Yes, sir.

Q. I suppose we ought to cast that out; what about the automobile supplies?

A. That has been opened since.

Q. Is that in the Levinsohn building?

A. Yes, sir.

Q. What about the American House; that was there before your suit, wasn't it?

A. Yes, sir.

Q. Wildman's automobile place; was that before or after your suit?

A. He has opened up the business as he has it there now, since my suit.

Q. What about Corliss' stable and boarding house?

A. That has been opened up for a riding academy since my suit.

Q. This optical parlor, that is since your suit?

A. I won't say about that.

Q. That you are in doubt about?

A. Yes, sir.

Q. What about Bamford's store; is that before or since your suit?

A. The building has been there a long time, but they have made some improvements.

Q. And Kasban's drug store?

A. He has opened that up for a drug store since my suit.

Q. What about the mason shop?

A. I think that that was occupied since for that purpose; I am not going to be positive.

Q. What about Honce and Du Bois?

A. They were there.

Q. What about the Carpenter pavilion?

A. That was there before.

Q. What about the ice company; was that before or since your lawsuit?

A. I think they have occupied it there since; I cannot be real sure.

Q. Has the Carpenter pavilion been remodeled since your lawsuit, and enlarged?

A. Yes, sir.

Q. Directing your attention to Tenth Avenue, the block East, or rather North, and the block South, for a distance of a block East and a block West of F Street, what would you say as to these two blocks, whether they are now residential in character or business in character?

MR. SNEDEKER: Objected to; I object to the form of the question; that is another conclusion.

MR. FOSTER: I think his attention should be first directed to this block East and then the block West, otherwise, it would force an objection again.

Q. Now, in that block East of F Street, can you tell me whether it is being used more for business purposes than for residential purposes, or the other way around, which is it?

A. It is about equally divided; you are speaking about the block East of F Street?

Q. Yes. Now, direct your attention to the block West of F Street.

A. That is for business purposes exclusively; it is needed for business.

Q. Do you recall that there is a single building devoted exclusively to residential purposes in that block West of F Street on Tenth Avenue?

A. I don't think there are any; there is the Newbury establishment, and that is combined with the milk depot.

Q. Is that the nearest place for residential purposes that you have in mind?

A. That is the only one there, except Honce and Du Bois live in the rear of his business place.

MR. WILSON: I would hesitate to suggest that the Court of Chancery take a view that juries are permitted to take in courts of law, but it would seem to me that nothing would be lost by it.

THE COURT: I intend to go down and see it.

Q. Now, Mr. Barcalow, are you familiar with the buildings on Tenth Avenue since you had your lawsuit?

A. Yes, sir.

Q. Do you recall the building now standing upon No. 613 Tenth Avenue; do you know those properties by lot numbers?

A. Yes, sir.

Q. What about No. 613; has there been anything built on that since your lawsuit?

[redacted]

MR. FOSTER: I object to his using that memorandum.

Q. You took a paper out of your pocket?

A. Yes, sir.

Q. Do you need that paper to refresh your memory as to the facts called for in my question; do you need the paper? If you do, say so.

A. No, sir.

Q. Have you a paper in your pocket by which you can identify to yourself No. 613 Tenth Avenue?

A. Yes, sir.

Q. Do you wish to use that paper in aiding your memory and giving your testimony?

A. Yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Could not you testify without reference to that paper?

A. I think I could, if you gave me a minute or two to size up whose property it is.

Q. When did you make the paper?

A. A day or two ago.

Q. Why did you make it; who suggested it to you?

A. I think it is my own idea.

Q. Well, if you refer to the paper, will that recall to your mind whether it is your own idea; do you know whether you made it up at your own instance?

A. I am not quite sure about that — more than myself may have had a hand in it — besides myself.

Q. Is your memory weak?

A. It is no better than it ought to be.

Q. You say you made this paper up a day or so ago?

A. Yes, sir.

Q. Is your memory so weak that you cannot recall whether you made up this paper at your own instance or at the suggestion of someone?

A. No, sir, it is not so weak as that.

Q. Did you make it up at your own instance or at the suggestion of somebody?

A. I think I made it up at my own instance, but somebody else may have had a hand in it.

Q. At whose suggestion did you make it up?

A. I think it is my own idea.

Q. You have no distinct recollection about it?

A. I have a distinct recollection about it.

Q. Who assisted you with the suggestion that you make up this paper?

A. I could not say that.

Q. Why cannot you say; just tell us who did it; who helped you to make up this list; just answer the question.

A. I made a list of all those myself; I went down the street and made a list.

Q. Answer my question.

BY THE COURT:

Q. Don't fence with counsel; tell him who suggested your making up this list.

A. I don't know particularly that it was suggested by anyone; I think it was one of my own ideas.

FURTHER CROSS:

Q. Will you say that nobody suggested it?

A. No, sir, I won't say that.

Q. Why don't you remember?

A. There are several matters in the transaction of the lot line question that we were looking up.

Q. Who do you mean?

A. Different ones of us.

Q. Who were they?

A. Mr. Levinsohn and I went down over the line question; he was with me.

Q. Who else?

A. I don't know that there was anyone else.

Q. Don't you remember, or don't you know?

A. I will say there was not anyone else with us at the time.

Q. Why did you and Mr. Levinsohn go down there in the last two days and make up this little memorandum?

THE COURT: It was done for the purpose, I suppose, of testifying.

Q. Why are you trying to conceal the fact that you and Mr. Levinsohn fixed up this memorandum?

A. I went down with my machine, and as I walked along, I marked these down; that is all there was in it; and Mr. Levinsohn was in company with me.

Q. Why were you dodging my questions?

A. There was no one dodging you.

Q. Why don't you answer the questions when they are put to you?

A. I want to try to do so.

Q. What interest had you in this matter in going down to make up this memorandum?

A. Only, I think, it is for the interest of everybody who owns property in that territory to be in shape where they can build and get some revenue out of their property.

Q. How much did Mr. Levinsohn pay you for going down?

A. Nothing.

Q. How much has he promised to pay you?

A. Not a cent.

Q. Do you expect to get anything from him?

A. No, sir, I think it is for the good of everybody that I am doing it, that is interested in that location.

BY THE COURT:

Q. You were not paid for your time?

A. No, sir.

Q. Are you paid to come here to-day?

A. No, sir, excepting my subpoena.

DIRECT EXAMINATION (continued) BY MR. WILSON:

Q. Now, I want to find out how many houses have been built there on that street since your lawsuit; do you know how many houses have been built there on that street since your lawsuit?

THE COURT: He has not answered your prior question in regard to No. 613.

Q. Do you remember about No. 613 Tenth Avenue, whether it was built before or after your lawsuit?

A. That has come to me; I think it was built since.

Q. Does this list that is in your pocket indicate or identify these various street numbers of the properties?

A. The house numbers.

Q. And that is the purpose for which you wish to use this list?

A. Yes, sir.

Q. I understand you made that some days ago when you went down with Mr. Levinsohn with a view of giving testimony in this case?

A. Yes, sir.

Q. Do you want to use that list to identify these separate numbers?

A. Yes, sir, that was my idea.

Q. Now, look at your list and tell us, if you can, who is the owner of No. 613, or the occupant of it?

A. As I remember it now, it is the Heyniger property.

Q. Look at your list.

A. I have not got the names down.

Q. Well, look at the location of No. 613 Tenth Avenue, and tell us whether that was built before or after your lawsuit?

A. That has been built since my lawsuit.

Q. Do you know whether that building is within or without the building restriction?

A. I don't know.
Q. You did not measure it?
A. No, sir.
Q. Now, what about No. 603?

MR. FOSTER: According to the record, it appears from the testimony of this witness, that as recently as two days ago, he made an examination of this territory for the purpose of coming here and testifying and putting the result of his inspection upon paper in order to refresh his memory, and is now unable to testify without reference to that paper. I submit that nothing can be accomplished by having this witness go over a period of seven or eight years to tell the Court whether the buildings have or have not been built during that entire period, if he cannot recall what he did two days ago with reference to a written document.

THE COURT: The objection is overruled.

Q. Have you any way of telling us whether the structure numbered 603, was built before or after your lawsuit?
A. It was built after my lawsuit.
Q. Why do you say so?
A. Well, if it is the house that I am most sure it is — it is the Heyniger house.

BY THE COURT:

Q. Have you changed your residence at all; have you lived there continuously since your lawsuit?
A. Yes, sir.
Q. On Tenth Avenue?
A. No, sir, Ninth Avenue.
Q. How many times since the Newbury suit have you traversed that street?

A. Sometimes every day; I was there almost every day.

Q. Now, Mr. Barcalow, I understood you to say that you went over this street within a few days, with a view of determining what houses were built before or after your lawsuit?

A. Yes, sir.

Q. Did you at that time make a memorandum of the house numbers of such houses as were built after your lawsuit; did you make a memorandum?

A. Yes, sir.

Q. Have you got that memorandum with you?

A. Yes, sir.

Q. With that memorandum, can you tell us the house numbers of the houses that were built after your lawsuit?

A. Yes, sir.

Q. Can you give us the house numbers without the use of that paper?

A. No. sir, I cannot.

Q. Now, with that memorandum in your hand, tell us what houses have been constructed on Tenth Avenue since your lawsuit.

A. Well, this is as near as I can tell; some of them I might be a little mistaken in them — 613 — 603.

Q. Now, as to 603, is there a porch on that house, or don't you recall?

A. Yes, sir, there is a porch on all of them; I am quite positive of that.

Q. Proceed.

A. 514.

Q. Yes.

A. No. 512.

Q. Yes.

A. No. 504.

Q. Yes.

A. Noo. 418.

Q. Yes.

A. No. 416.
Q. Yes.
A. And No. 412.
Q. Yes.
A. And 410.
Q. Yes.
A. And 408.
Q. All right.
A. No. 308.
Q. Yes.
A. No. 306.
Q. Go on.
A. No. 116.
Q. Go on.
A. No. 110.
Q. Go on.
A. No. 102.
Q. Proceed.
A. 107.
Q. All right.
A. 307.
Q. Go on.
A. No. 407.
Q. All right.
A. No. 409.
Q. All right.
A. No. 411.
Q. All right.
A. No. 413.
Q. Yes.
A. No. 503.
Q. All right.
A. No. 505.
Q. All right.
A. No. 509 — 511 — 513 — 601; that is to my best judgment, as near as I can remember.
Q. Now, I understand you made that examination at the request of Mr. Levinsohn?

A. Yes, sir.

Q. To help him as a witness in this case?

A. Yes, sir.

CROSS-EXAMINATION BY MR. COOPER:

Q. Now, directing your attention to No. 408 Tenth Avenue, when was that house built?

A. I don't think it has been built over about five years.

Q. You are positive of that?

A. No, sir, I am not positive of it, because I have not thoroughly looked it up.

Q. Are you positive of any of these houses?

A. That is the best of my knowledge.

Q. Which ones are you positive about?

A. I won't say that I am real positive of any; that is only my idea of it.

Q. Your best answer then is, that you are not positive whether any of these houses have been built within the last five years.

A. My answer would be, that in my best judgment they have all been built since, that I have mentioned.

Q. But you don't know whether or not any or all of these houses have been built since the Newbury case was decided, on your own knowledge?

A. That is my best judgment that they have been built since.

Q. Will you state to the Court on what basis you make this assertion?

A. Sometimes I go up and down Tenth Avenue maybe half a dozen times a day, and sometimes twenty times a day during the summer season.

Q. What you said, I believe, was this: that on the block East of F Street on Tenth Avenue, it was about equally divided between business and residences?

A. Yes, sir.

Q. Now, 601 Tenth Avenue, is that a business place or a residential place?

A. That is a dwelling house, I think.

Q. What is 603?

A. Well, they were pretty equally divided, I guess.

Q. I am asking you about No. 603, is that a business place or a dwelling?

A. That is a dwelling, I guess.

Q. What about No. 605?

A. I think that is a dwelling.

Q. And about No. 607?

A. I shall have to refer to this list; there are some of them that I have no memorandum of what you are asking me, and I cannot exactly tell.

BY THE COURT:

Q. You have stated that the houses to the East of F Street on Tenth Avenue were half and half — half dwelling and half business; what he is trying to get at is ——

A. On one side of the street there are four business places and there are about four residences.

FURTHER CROSS:

Q. I am asking you about No. 605; is that a business place or a residence?

A. Whose property is it; I won't say unless you tell me who owns the property; if I knew the owner of the property, I could tell, or what number it was.

Q. No. 605, Mr. Barcalow, for your information, is one of Mr. Levinsohn's houses; it is a small house.

A. That is a dwelling house.

Q. And what about No. 607?

A. That is a dwelling house.

Q. And what about No. 609?

A. That is a dwelling house.

Q. What about No. 611?

A. Who is the owner of that property?

Q. Is that a vacant lot or not?

A. I don't know.

Q. Is it a vacant lot or not?

A. Tell me the location.

Q. Isn't it a fact, that on the back of that lot there is a small house between No. 609 and No. 613?

A. I don't know.

Q. You examined this block very carefully, didn't you?

A. Only the front parts of them; I did not go in the rear to examine them.

Q. Then, did you think from your examination, that this lot was a vacant lot?

A. I would not say one way or the other.

Q. Is there any business place on that particular lot?

A. I don't know that there is; I would not say whether there is or not.

Q. Now, what about No. 613; is that business or dwelling house?

MR. WILSON: He has already said it was a residence.

Q. (Question read.)

A. That is a dwelling, if I remember rightly.

Q. Don't you remember whether it is a business or dwelling, having seen it two days ago?

A. It is a dwelling; I am quite sure it is a dwelling.

Q. What is the house next West of that, do you know; is that the American House?

A. This No. 613 is the Levinsohn new residence, isn't it?

Q. What is the American House?

A. That is a business house, of course.

Q. Business in what way?

A. It is a boarding house, hotel.

Q. Is that next to this No. 613 on the West; don't you know where the American House is?

A. Yes, sir.

Q. Where is it?

A. It is on Tenth Avenue; I never particularly followed up the numbers; I know the property more by the owners.

Q. Then, next West of the American House — what is the next property on that block?

A. Mr. Levinsohn's new store.

Q. That is the property in this suit?

A. I suppose it is.

Q. Now, commencing on the other side of the street, commencing on the North side of the street at No. 600 Tenth Avenue, what is that?

A. That is the Heyniger dwelling house.

Q. Is that a business house?

A. He carries on his mason business in the rear.

Q. Then, you don't know that there is a mason office in that house, do you?

A. That is his headquarters for his mason business.

Q. Have you ever seen an office in that particular house?

A. No, sir, I never saw an office in the house.

Q. Have you ever seen any business place in that particular house?

A I know when you have any mason business to do with him, you always go there to find him.

Q. Who lives there?

A. William Heyniger.

Q. He lives there, does he?

A. I suppose he does; he did.

Q. What prompted you, Mr. Barcalow, to mention an office in connection with this house?

A. Nothing particular; I said that was the headquarters.

Q. Why did you mention his having an office there, if you had no knowledge of it?

A. I could not say exactly why I did mention it, but I suppose that is his headquarters.

Q. How about these other things; have you been

supposing about those, or do you know those things of your own knowledge?

A. I have told you, to the best of my knowledge.

Q. How about the next lot West of Heyniger's, on the North side of the street; what is on that property?

A. A house, I think.

Q. Is that used as a business or as a residence?

A. As a residence, I think.

Q. What about the next one West of that?

A. That is used as a residence and a sort of a boat yard, I think.

Q. What do you mean by that?

A. The building of boats is going on in there.

Q. Who owns that house?

A. I think the Heynigers own it.

Q. Are the Heynigers in the boat business?

A. The old gentleman built one boat in there.

Q. How many boats, to your knowledge, have been built in the yard?

A. I have seen one in there.

Q. From the fact that you have seen one boat in there, leads you to say that?

A. Yes, sir.

Q. What about the house next to that property on the West?

A. That is used for a boarding-house — the house next to it, but there is a vacant lot between them.

Q. In your opinion, is that for business or residential?

A. There is a boarding house on the front and a riding stable in the rear.

Q. How far in the rear is that riding stable?

A. I think it is on the rear end of the lot.

Q. How far, approximately?

A. I suppose 100 feet.

Q. How long has that been there?

A. A good many years.

Q. How many years?

A. I could not say.

Q. Five, or six, or eight, or ten?
A. I could not say.
Q. Was that there when your suit was commenced?
A. I think it was; I think part of it was.
Q. What about the house next West of that?
A. The house next to it is a jewelry shop, I think.
Q. Now, who lives in the house, if you know?
A. Tafsinki.
Q. Are there any show windows to that house, or goods, wares and merchandise in the windows in the house; do you know?
A. I don't know whether there are or not.
Q. Is there any business front to that house?
A. I could not say.
Q. Is that the best answer you can make?
A. Yes, sir, he advertises his business there.

MR. COOPER: I ask to have that struck out.

BY THE COURT:

Q. In what way does he advertise his business there?
A. The old gentleman has the dry goods end of it and his son the optical place there.
Q. You say he has a dry goods place there?
A. Yes, sir.
Q. How much of a stock does he carry?
A. I could not say.
Q. Have you ever been in that?
A. No, sir.
Q. Have you seen any goods in the window there?
A. I have not noticed them particularly.
Q. Have you ever noticed them?
A. I don't know that I have.

FURTHER CROSS:

Q. Have you seen dry goods delivered there from the wagons?

A. He goes in and out there with his wagon; I never made any particular observations.

Q. Is he a peddler?

A. I am quite sure that people go in and out there to buy goods. I would not say that positively.

Q. Did you ever buy any?

A. No, sir.

Q. Did you ever see anyone else go in there and buy goods?

A. No, sir, but I have bought goods from him out of the wagon, but never out of his house.

Q. How about the house next door on the West?

A. That is Bamford's store.

Q. Is it a store?

A. There are three or four stores into it, as near as I remember.

Q. Describe that store, that property on the West, to the Court?

A. The one on the West — three stores join on F Street; three stores face F Street, and one of them is right on the corner of F Street and Tenth Avenue.

Q. Does that store face on Tenth Avenue?

A. One of the stores does, and the other faces just as much on Tenth Avenue as it does on F Street.

Q. Has it an entrance on Tenth Avenue?

A. No, sir, I don't think so.

Q. That is one of the 19 business places that you spoke of on Tenth Avenue?

A. Yes, sir; I would consider that on Tenth Avenue.

Q. Have you enumerated, Mr. Barcalow, all the houses on the block on Tenth Avenue, immediately East of F Street?

A. No, sir, I don't know that I have.

Q. Enumerate any that you have left out; tell the Court any buildings you have left out.

A. My observation was of the buildings, that to the best of my recollection had been erected there since my case.

Q. I asked you if you had enumerated all the buildings on that block?

A. No, sir, I have not.

Q. Enumerate those that you have omitted.

A. I don't think I have skipped any.

Q. (Question read.)

A. I think we went over them.

Q. Don't you know?

A. To the best of my recollection, we went over all of them that I can remember.

Q. Now, Mr. Barcalow, you have a stable on Tenth Avenue, you testified; have you made any alterations to that stable recently?

A. No, sir, that is right similar; it is about the same as it was; some little minor alterations may have been made.

Q. Now, should this building line restriction be removed, would you enlarge your stable by projecting it out beyond the line?

A. No, sir, I would build two stores on my property.

Q. How far from the curb would you erect stores, if you erected them?

A. That would all depend what the situation was when I was ready to do that.

Q. Do you know Mayor Poole?

A. Yes, sir.

Q. Are you friendly with him?

A. We get along all right except on election day.

Q. You know me?

A. Yes, sir.

Q. We get along all right?

A. (No answer.)

Q. Now, Mr. Barcalow, about two years ago did you have any trouble with the borough administration in regard to paying water rents?

THE COURT: I am perfectly satisfied that this man is convinced that it is beneficial to him to

have the restriction removed, and he wants to put up stores on the property.

Q. Now, did you or didn't you, about two years ago, have any trouble with the present borough administration in regard to the payment of water rent on some of your properties?

A. We had a little tilt, yes.

Q. Your water was cut off because you did not pay your rent?

A. Yes, sir.

MR. WILSON: Now, does that show interest in the borough ——

THE WITNESS: I would like to explain the reason.

BY MR. WILSON:

Q. They cut your water off?

A. Yes, sir, and they put it on again, too.

FURTHER CROSS:

Q. Was that water put on before or after you paid your water rent?

A. I think some of it was put on before.

Q. But most of it was put on after, wasn't it?

A. If they had paid me the 100 they owed me they would have been all right; you want to explain both sides of it, as long as you are trying to discredit me in this matter.

Q. Now, isn't it a fact that as a result of that controversy and the fact that your water was shut off, that you have not had a friendly feeling towards the borough officials?

A. No, sir; I am just as much in favor of improvements in Belmar as anyone there.

Q. They had an election for Mayor about two years ago. didn't they?

A. They have had a good many of them.

Q. (Question read.)

A. Yes, sir.

Q. And did you have any part in that election?

A. Well, I may have been interested.

Q. You were considerably interested, were you not?

A. I may have been; I cannot keep quiet election day.

Q. Do you want to state to the Court what you did that day, or not?

A. I don't know what you are referring to.

Q. Is it or not a fact, that at that time you attempted to defeat Mayor Poole for re-election?

A. Not any more than that I wanted to see him beaten; that does not have a particle of difference in this case to me.

RECESS TO 2 P. M.

AFTER RECESS

JOB BARCALOW resumes the witness stand.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Barcalow, do you know in Belmar the location of E. T. Tilton's vegetable and fruit market?

MR. COOPER: Objected to as irrelevant and immaterial.

THE COURT: The objection is overruled.

Q. Do you know the location of E. T. Tilton's vegetable and fruit market?

A. Yes, sir.

Q. Where is it?

A. Between the railroad and the river, on Tenth Avenue.

Q. Do you know the location of the public library at Belmar?

A. Yes, sir.

Q. Where is it?

A. At the corner of Second Street and Tenth Avenue.

Q. Has it an entrance on Tenth Avenue?

A. Yes, sir.

Q. Do you know the location of the office of the Belmar Water Works?

A. Yes, sir.

Q. Where is that located?

A. It is on Tenth Avenue, near the railroad.

Q. Do you know the location of the Sanborn pavilion?

A. Yes, sir.

Q. Where is that?

A. At the foot of Tenth Avenue, just at the East end of Tenth Avenue.

Q. I understand you to say that it is at the foot of Tenth Avenue?

A. Yes, sir.

Q. On the ocean?

A. Yes, sir.

Q. Do you know the residence of George Heyniger, a mason, where he lives?

A. Yes, sir.

Q. Now, what is his business?

A. Mason.

Q. And has he a shop and garage in connection with his house?

A. I don't know; I never noticed that particularly.

Q. Do you know the location of the Brocksted boarding house?

A. Yes, sir, that is at the corner of C Street and Tenth Avenue.

Job Barcalow — Re-direct

Q. Do you know the location of the Belmont — an hotel or boarding house?

A. Yes, sir.

Q. Where is that located?

A. No, sir, the other one is the corner of D and C.

Q. Where is the Belmont?

A. That is at the corner of C Street.

Q. And on Tenth Avenue?

A. Yes, sir.

Q. Both of them?

A. Yes, sir.

BY THE COURT:

Q. What is the Belmont?

A. A medium sized boarding house — 25 or 30 rooms.

FURTHER RE-DIRECT:

Q. Do you know anything about the relative size of the Brocksted — is that bigger or smaller than the Belmont?

A. It is larger than the Belmont.

Q. Do you know the location of Dr. Thompson's office?

A. Yes, sir.

Q. Where is that located?

A. At the corner of D Street and Tenth Avenue.

Q. Is it in a residence?

A. His office is on the side of his residence.

Q. And his residence is on Tenth Avenue?

A. Yes, sir.

Q. Do you know the location of the New England boarding house?

A. Yes, sir.

Q. Where is that?

A. At the corner of B Street and Tenth Avenue.

Q. How big a place is that?

A. I should judge that is about a 14-room house — 12 or 14 rooms.

MR. WILSON: Our theory is, and our proof will be, I think, that these boarding houses were not in operation as boarding houses at that time.

Q. Do you know the location of the Pinehurst?

A. Yes, sir.

Q. Where is that located?

A. That is at the corner of B Street, on the opposite corner.

Q. I mean, the Hyman property?

A. Yes, sir.

Q. Is that a boarding house, too?

A. Yes, sir.

Q. Now, to go back a moment — was the Tilton vegetable and fruit place open and in operation at the time of the decision in your case?

A. No, sir.

Q. Was the Belmar Public Library located on Tenth Avenue at that time?

A. No, sir.

Q. Was the office of the Belmar Water Company opened up on Tenth Avenue at that time?

A. I most think it was; I cannot be positive on that.

Q. Was the Brocksted boarding house operated as a boarding house at the time of the decision in your suit?

A. Yes, sir, it has always been.

Q. And what as to the Belmont?

A. That has also always been a boarding house.

Q. And what as to the New England?

A. That has turned into a boarding house since.

Q. And what as to Dr. Thompson's office; has that been opened up since?

A. No, sir.

Q. What about the Pinehurst, the Myman property?

A. That has been rebuilt and used for a boarding house since my case.

RE-CROSS EXAMINATION BY MR. COOPER:

Q. This Tilton vegetable market that you have testified about, does that front on Tenth Avenue?

A. The house, yes, sir.

Q. Is there any market on Tenth Avenue?

A. Not any regular market; he does his business there.

Q. People pass that house up and down Tenth Avenue; could they see from the avenue that there was a market there; could people passing that house up and down that avenue, see any market there from Tenth Avenue?

A. No, sir, there is no regular market there.

Q. Now, this public library of which you speak; do you know how far back to the curb that is, approximately?

MR. WILSON: Objected to as not proper cross-examination.

Q. Do you know how far back from the curb that building is, approximately?

A. You are speaking from the curb line ——

Q. Yes.

A. I should say in the neighborhood of 85 or 90 feet; I have never measured it.

Q. Now, this Belmar Water Tax office, of which you speak, does that face on Tenth Avenue?

A. I should say partly so, and partly faces to the railroad.

Q. Is there any entrance to that office on Tenth Avenue?

A. I think there is a door there leads right in the office; there is a door there, but whether it goes in the office, I don't know.

Q. Do you know who the water superintendent of Belmar is?

A. Yes, sir, William H. Cooper.

Q. Where does he live?

A. Right in that same house.

Q. What street?

A. River and Railroad on Tenth Avenue.

Q. Now, the office of which you speak is in that house, isn't it?

A. Yes, sir.

Q. There is no separate office, is there?

A. He always used the front part there as an office.

Q. It is located in his dwelling house?

A. Yes, sir.

Q. Now, Mr. Thompson's office you have testified, was there before the Newbury case; is that on C Street or Tenth Avenue?

A. Well, the offices faces on D Street.

Q. And is that a separate office building or a doctor's office in his residence?

A. It is all together.

Q. Now, this Hyman boarding house, when was that built, if you know?

A. A portion of it has been built, I should judge, 14 or 15 years, I think, and the large part, the extension on the main part, and also an extension in the rear, I think in the neighborhood of 35 rooms, were built within the last four years.

Q. Now, this extension of which you speak consists of what?

A. Rooms for guests, a three-story building, bedrooms, etc.

Q. Now, Mr. Barcalow, these boarding houses that you speak of, are really large cottages, are they not, which have been converted into boarding houses?

A. No, sir; the Belmont has always been operated as a boarding house.

Q. Directing your attention to these houses which you say are now operated as boarding houses, but were not before, they are simply private houses which have been converted into boarding houses?

A. Two of them — the Pinehurst, the front part of it was a private residence, then, after it changed hands, Hyman built it up with the boarding business; that is on B Street and Tenth Avenue.

Q. How far is that from F Street?

A. About four blocks.

Q. How far from Mr. Jacob Newman's property?

A. Two and a half blocks.

Q. What is the number of that Hyman house?

A. I think that would be 302 or 304; there is a lot on the corner, a vacant lot on the corner.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Your attention has been directed to this Tilton vegetable and fruit market; haven't you seen vegetables and fruit displayed upon his piazza?

A. Yes, sir.

Q. Hasn't he got a fruit stand out in the front in the summer time?

A. I don't recollect; I don't think I ever saw it.

LOUIS TAFSINKI, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. You live in Belmar?

A. Yes, sir.

Q. You have lived there how long?

A. I have lived there about 25 or 26 years.

Q. What is your business?

A. I am in the optical line.

Q. Where is your place of business?

A. 612 Tenth Avenue.

Q. What have you got there by way of a business place?

A. I have an office fixed up to start with, and then I have got lenses there; that is, merchandise to sell, connected with that line.

Q. You sell glasses and things of that sort?

A. That is just the idea.

Q. Do you sell anything else besides them?

A. Every now and then I handle a piece of jewelry, such as a diamond.

Q. Do you display them there also?

A. Not very often.

Q. Where do you live?

A. In the rear end of it.

Q. Haven't you had the front fitted up for business purposes?

A. Yes, sir.

Q. Have you got show counters?

A. No, sir, I have a desk.

Q. What kind of a desk is it?

A. I have a roll-top desk, but it is always open.

Q. Have you a sign displaying your business?

A. Yes, sir.

Q. Where is that exposed?

A. Right in front of the building.

Q. Do you know where Osborne's restaurant is?

A. Yes, sir, right on the corner of River Road and Tenth Avenue.

Q. Do you know where Adams Express is?

A. It is between Railroad Avenue and F Street.

Q. And Barcalow's livery stable?

A. That is in the same location.

Q. And Newbury's, where is that?

A. The same.

Q. And the moving picture place?

A. Next to that.

Q. And the tailor shop?

A. That is in the Levinsohn Building.

Q. And the American House?

A. Right next — F and E Street.

Q. Wildman's automobile place?

A. That is on the corner of E and Tenth Avenue.

Q. Corliss' riding academy and stable?

A. That is 608 Tenth Avenue.

Q. Has that come there within the last six years?

A. Yes, sir.

MR. FOSTER: Objected to.

Q. The Wildman automobile place; has that been opened up within the last six years?

A. Within the last three or four years, I think.

Q. The moving picture show, has that been opened up within the last six years?

A. I cannot say exactly; I don't think it has been there over five years, but I am not sure.

Q. Newbury's milk depot?

A. That has just come there recently, within the last three years, I think.

Q. Garrabrant and Conover's?

A. They have not been there very long; they have not been there six years.

Q. Adams Express?

A. Just come recently.

Q. Osborne's restaurant?

A. I don't think they have been there six years, but I cannot say for sure.

Q. How long has your own place been there?

A. That is within the last three years.

Q. Bamford's store, do you know where that is located?

A. On the corner of Tenth and F Street.

Q. Is there a show window exposed at the store on Tenth Avenue?

A. Right on Tenth Avenue.

Q. How long has that place been there?

A. They had no window there, not until this spring,

and now they have put a window in — up to last year, I mean.

Q. How long has the store been there?

A. As long as I can remember.

Q. That is 25 or 30 years?

A. About 25 years.

Q. How about Kasban's drug store; has that come within the last six years?

A. Yes, sir; that is on the corner of Tenth Avenue and F Street.

Q. Where is Leddon's restaurant?

A. On Tenth Avenue.

Q. How long has that been open?

A. Just recently.

Q. How long has the grocery store been there?

A. About two years.

Q. And then that was changed into a restaurant?

A. Yes, sir.

Q. What about the mason shop?

A. That has come there recently, within the last three or four years, no more.

Q. Honce and Du Bois?

A. They have been there sometime.

Q. And that is on Tenth Avenue?

A. Yes, sir.

Q. The Carpenter pavilion; that is on Tenth Avenue?

A. Yes, sir.

Q. The ice company's office?

A. That is on Tenth Avenue; they have only been there four years.

Q. Do you know where Tilton's vegetable and fruit market is?

A. Yes, sir.

Q. Where is that?

A. Between Railroad and F Street, on Tenth Avenue.

Q. How long has that been open?

A. I noticed it last summer for the first time.

Q. Did you notice any vegetables or wares displayed, so that you could see them from the street?

A. That is how I noticed they had some fruit lying there.

Q. Lying where?

A. On a porch.

Q. Exposed on the porch?

A. Yes, sir.

Q. Do you know whether he had a fruit stand there?

A. That I did not notice.

Q. Where is the Belmar Public Library?

A. On Tenth Avenue.

Q. How long has that been there?

A. Just been recently opened; I don't think it has been there over a year.

Q. What about the office of the Belmar Water Company; where is that located?

A. At the corner of Tenth Avenue and Railroad Avenue.

Q. Is there an entrance to it from Tenth Avenue?

A. I guess there is; I think there is, and I think there is a door on the side of Tenth Avenue.

Q. How long has that been there?

A. It is within the last four years.

Q. Where is Sanborn's pavilion located?

A. Tenth Avenue and Ocean.

Q. Where is the Brocksted boarding house?

A. At the corner of Tenth Avenue and D Street.

Q. And the Belmont boarding house?

A. That is the block further down.

Q. Have these two houses been there for some time?

A. Yes, sir.

Q. How large are they?

A. Brocksted is a house that will accommodate about 75.

Q. What about the Belmont?

A. That is not as large.

Q. Dr. Thompson's office, where is that located?

A. The corner of Tenth Avenue and C Street.

Q. What about the New England boarding house?

A. That has been there about four years.

Q. How big is it?

A. It is a small house.

Q. Do you know how big it is?

A. I should judge it is an eight or nine roomed house, possibly ten.

Q. Do you know the location of Mr. Heyniger's residence?

A. Yes, sir.

Q. Do you know whether he has his shop or garage behind it?

A. He has a shop there, and that is where you can find him if you want him.

Q. How is that approached? Is there any way to get to it from Tenth Avenue?

A. That is the only way you can get to it.

Q. You can get to it from the avenue behind, can you not?

A. Not that I know of.

Q. Does Heyniger manufacture cement blocks?

A. That I don't know.

Q. Has there been any change in the character of Tenth Avenue in the last six years, and if so, what?

MR. SNEDEKER: Objected to as calling for a conclusion.

THE COURT: The objection is sustained.

Q. During the last six years has there been more business or less business on Tenth Avenue; has it decreased or increased?

A. It has increased quite some.

Q. During the last six years?

A. Within the last three years — that I know of —

Louis Tafsinki — Cross

Q. What are the two principal business streets of Belmar?

A. F Street, and Tenth Avenue next.

Q. What would you say was the volume of business done on Tenth Avenue, as compared with the volume of business done on F Street?

A. Well, I could not pass any opinion about it, except about myself ——

Q. Have you changed the character of your house to do business?

A. I had to change it.

Q. Have you changed the windows in your house?

A. No, sir, the windows are just the same.

BY THE COURT:

Q. Have you changed any of the entrances to your house?

A. The entrance is the same way.

Q. How old are you?

A. I am 36.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Have you been in business there for 25 or 26 years?

A. No, sir, I have been in business there for about 11 years.

Q. Is there a sign on your house?

A. Yes, sir.

Q. How large?

A. I guess somewhere around two and a half feet.

Q. That is the only indication that there is on the premises that any business is carried on?

A. Yes, sir.

Q. Where is that — back on the piazza rail?

A. On the front of the building; it is right on the porch; it is on the roof of the porch.

Q. When did you put it there?

A. About three years ago.

Q. Did you move from F Street to Tenth Avenue because of the increase in business on Tenth Avenue?

A. No, sir, I moved because simply I wanted to cut my expenses down, and I was burnt out there.

Q. Have you got a business place anywhere else?

A. No, sir.

Q. Did you have a place in Red Bank?

A. No, sir.

Q. You never started up there in Red Bank?

A. Yes, sir, I did, but I gave that up.

Q. Before going through bankruptcy, or afterwards?

A. That was afterwards.

Q. You are doing considerabe business now on Tenth Avenue?

A. Yes, sir.

Q. It keeps you pretty well occupied?

A. If I would be pretty well occupied, I would be making a bunch of money.

Q. (Question read.)

A. Well, yes, I am busy most of the time.

Q. But not so busy but what you can observe all that is going on on your neighbor's property on Tenth Avenue, is that so?

A. Well, there is always plenty of time.

Q. Do you conclude, whenever you see any vegetables or fruit upon a porch, that it is a public market?

A. I just said that there was fruit there.

Q. Do you always draw the inference when you see fruit or vegetables on a porch that it is a vegetable stand?

A. I thought it was there for business.

Q. You simply saw some fruit or vegetables there?

A. I only said what I saw.

Q. You are quite a friend of Mr. Levinsohn in this case?

A. No more than anyone else.

Q. Are you friendly to him?

A. Well, as far as I know, I have nothing against him, and I have no right to be an enemy of his.

Q. Are you friendly with Levinsohn?

A. Yes, sir, I am, to a certain extent.

Q. Hasn't he assisted you financially in the past by lending you money?

A. No, sir.

Q. Hasn't he helped you financially in the past in your business affairs?

A. No, sir, he did not.

Q. He never has?

A. No, sir.

Q. Has his son helped you.

A. No, sir.

Q. Has he promised to give you assistance in the future to carry on your business or extending it?

A. No, sir.

Q. Are you related to him in any way?

A. No, sir.

Q. You said something about Dr. Thompson's office being on Tenth Avenue; there is no entrance to this office on Tenth Avenue, is there?

A. I always went to the front.

Q. You went to the front on C Street, didn't you?

A. It is on the corner of C Street.

Q. There is no entrance on Tenth Avenue to Dr. Thompson's office, is there, unless you did as you said, you walked around the porch to get to the entrance; is not that so?

A. I don't think I have been there more than once in my life, and all I know ——

Q. Answer my question.

A. I think it is on C Street, but I am not sure, but the sign is on the front of Tenth Avenue.

Q. Is there a sign on C Street also?

A. That I did not notice.

Q. How long ago is it since you were at Dr. Thompson's?

A. Three or four years ago.

Q. You pass it frequently, don't you?

A. In the summer time.

Q. Don't you ever pass it in the winter?

A. Very seldom.

Q. You cannot say whether there is an entrance on Tenth Avenue or not?

A. Well, I cannot make sure of it.

Q. But you are sure there is one on C Street?

A. I cannot be sure of that either.

Q. Are you sure of anything you have testified to to-day?

A. Yes, sir, I am sure of most of the others.

Q. Can you tell the Court whether there is an entrance to the Water Company's office on Tenth Avenue?

A. (No answer.)

Q. What do you say; is there an entrance to the Water Company's office on Tenth Avenue or not?

A. I think there is.

Q. Have you any knowledge on the subject whatever?

A. (No answer.)

BY THE COURT:

Q. When were you down there to look it over to see if there was an entrance or not; when were you down there?

A. I just came from there this morning.

Q. Which end of the building is the door on?

A. Almost in the center of the building on Tenth Avenue.

Q. Do you mean to say that that door is an entrance for the people having business to do with that office?

A. I don't know about that, but I know the office is there, and I was never there; all I know is that there is a door there.

Q. Is it part of a dwelling house?

A. Yes, sir.

Q. Did you ever see anyone go in or out of that door?

A. No, sir, I have not.

Q. Have Bamfords an entrance to their store on Tenth Avenue?

A. Of that I am not sure; there is a door there.

Q. Did you ever see anyone go in or out of that door on Tenth Avenue?

A. I have not seen anyone go in the store.

Q. Answer my question.

A. No, sir, I have not.

Q. You said something about the Wildman automobile place; do you know that there is an automobile business carried on there?

A. Automobile bodies, yes, sir.

Q. What business have you seen carried on there?

A. I know that people come there, and order automobile bodies, and come there to get them.

Q. How far is Wildman's place from you?

A. He is just on the next block.

Q. How many opportunities have you had to see people come there and order automobile bodies and take them away?

A. I have been there three or four different times, and every time I have been there I have heard where he made deals for delivery.

Q. When was that?

A. Within the last month or so.

Q. Did you ever see an automobile body there being made?

A. Yes, sir.

Q. Now, what is this building — won't you tell the Court — this automobile building where they make automobile bodies?

A. The entrance is on Tenth Avenue, and it is just in the rear of his house.

Q. And what is it — a carpenter shop or an old barn?

A. It is a pretty good sized building, and he had a lot of bodies there.

Q. Can you see it from Tenth Avenue?

A. Yes, sir.

Q. You would have to stretch your neck around the corner of the house to see it, though, wouldn't you?

A. No, sir.

Q. You walk in through the driveway?

A. Yes, sir.

Q. How far back is it from the street?

A. About 40 feet.

Q. How large is the house?

A. I don't know.

Q. How far from the rear of the house is the workshop?

A. About 25 feet or so.

Q. Where is this riding academy that has been mentioned by you and some others?

A. Two doors below us.

Q. That is in the rear of somebody's residence?

A. Yes, sir.

Q. Whose residence?

A. John Corliss.

Q. What is it?

A. There is a barn there; there is a sign in front, near the sidewalk.

Q. There is actually no place in this building where people can ride horseback in it?

A. No, sir.

Q. How large a building is it?

A. He has got a barn there, and people come there and hire the horses if they want to go horseback riding.

Q. How large is the barn where the horses are kept?

A. They accommodate about eight or ten horses.

Q. Is that being carried on now?

A. No, sir, it is carried on only in the summer.

Q. Was it carried on last summer?

A. Yes, sir.

Q. By whom?

A. A man named Howard.

Q. Can the barn be seen from the street?

A. Yes, sir.

Q. Through the driveway?

A. Yes, sir.

Q. That goes along the side of the house from Tenth Avenue?

A. Yes, sir, you can see it.

Q. The Kasban drug store, do you say that has an entrance from Tenth Avenue?

A. Yes, sir, it has a corner entrance.

Q. That is the building next to the post office?

A. Yes, sir.

Q. It is in Mr. Heroy's building?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Directing your attention to Wildman's automobile place, you know, is there a sign there?

A. Yes, sir.

Q. How big a sign?

A. A pretty good sized sign.

Q. Where is that located?

A. Right on the corner of Tenth Avenue and F Street.

Q. Do you mean out near the street?

A. Yes, sir.

Q. Is it on F Street or on E Street?

A. It is facing both; he has the sign placed in such a way that you can see it on both streets, on Tenth Avenue and on E Street.

Q. Then you mean to locate it on E Street and not on F Street?

A. The sign is placed that way in that shop — at an angle.

Q. So that you can see it from both E Street and Tenth Avenue?

A. Yes, sir.

Q. But not F Street?

A. No, sir.

Q. The sign is on a vacant lot?

A. Yes, sir.

Q. Not where the house and the so-called automobile place is located?

A. That is right.

Q. He has another sign on the top of the shop, too, hasn't he?

A. Yes, sir.

Q. That you can see from the road?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. What does it say on that sign?

A. "Keys and Locks Fixed, and Automobiles put in Condition"— I think it says "keys fixed."

Q. Does it say anything about automobiles at all?

A. That I cannot say.

JOHN ALLSPACH, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you live?

A. Belmar.

Q. How long have you lived there?

A. I have been there before it was Belmar, and before it was Ocean Beach or anything else.

Q. You are a property owner there?

A. Yes, sir.

Q. Where is your property?

A. Ninth Avenue, near the railroad, principally.

Q. How much property do you own there?

A. The European House, established in 1880.

Q. Do you own any property at Tenth Avenue?

A. No, sir.

Q. What is your business?

A. I have retired.

Q. What was your business before you retired?

A. Restaurant, boarding, since 1880 until 1907.

Q. Mr. Allspach, do you know where Osborne's Restaurant is in Belmar?

A. That is at the corner of Tenth Avenue and River Avenue.

Q. How long has that been there?

A. Well, I cannot say positively, but it has been there ——

Q. Longer than six years?

A. Yes, sir, longer than twelve years.

Q. The Adams Express Company's office, where is that located?

A. That is located now on Tenth Avenue.

Q. How long has that been there?

A. Well, that has been there three or four years, I guess.

Q. And Garrabrant and Conover's place; where is that located?

A. On Tenth Avenue.

Q. How long has that been there?

A. I don't know how long these parties have been there, but there has been real estate there two or three years.

Q. Any longer than that?

A. Not to my knowledge.

Q. Do you know where Newbury's milk depot is?

A. Yes, sir.

Q. Where is it?

A. On Tenth Avenue, the South side.

Q. How long has that been there?

A. I cannot tell you that.

Q. Has it come there within six years?

A. Oh, yes, inside of six years.

Q. The moving picture building, where is that located?

A. That is East of Newbury's milk dairy on Tenth Avenue, on the South side?

Q. Has that come there within six years?

A. Yes, sir, that has been there longer than that, I think.

Q. Longer than six years?

A. I think so.

Q. The moving picture place?

A. Yes, sir.

Q. The American House, where is that?

A. That is East of F Street, on the South side of Tenth Avenue.

Q. Do you know where Wildman's automobile place is?

A. Yes, sir.

Q. Where is that?

A. That is on the North side of Tenth Avenue, East of E Street.

Q. Has that come there within six years?

A. He has been there longer than that.

Q. In the automobile business?

A. Yes, sir.

Q. That same place?

A. Yes, sir, I think he has; I know he has done work for my sons in the automobile business more than six years ago.

Q. You don't know where his place of business was, do you?

A. Down in that same neighborhood.

Q. He used to be on F Street before he came on Tenth Avenue, didn't he?

A. I don't remember that.

Q. Do you know where Corliss' livery stable is?

A. Tenth Avenue, North side.

Q. How long ago has that been there?

A. I don't know; 20 years or more.

Q. The stable has?

A. Well, previous to Corliss, Aker had it.

Q. Was it used as a public stable?

A. Yes, sir.

Q. Mr. Tafsinki's optical parlor; where is that located?

A. That is on the North side of Tenth Avenue, East of F Street.

Q. Do you know where Bamford's store is?

A. The corner of Tenth Avenue and F Street.

Q. Do you know whether there is an entrance from Tenth Avenue into that store, from the Tenth Avenue side, or do you have to go round the other street?

A. That I cannot say; the only entrance I know is up the steps into the residence.

Q. Do you know where the Kasban drug store is?

A. That is on the North corner, West side of F Street.

Q. Is it on Tenth Avenue?

A. Yes, sir.

Q. Is there an entrance to it on the corner; how do you get into the store?

A. The entrance is on the corner and F Street side.

Q. Both?

A. Yes, sir.

Q. Do you know where Leddon's restaurant is?

A. That is just a little West of the drug store.

Q. How long has that been there?

A. Well, that has been a grocery store a couple of years; and a restaurant for a few months.

Q. How long has that drug store been open?

A. That man has been there five or six years, I think.

Q. Do you know the mason's shop on Tenth Avenue?

A. Newman and Brother's?

Q. Yes.

A. Yes, sir.

Q. What sort of work do they do there at that shop — Newman and Brother?

A. They are contractors — blasting and concrete work — sidewalks, and the like of that.

Q. Do they make concrete blocks there, or don't you know?

A. I don't know whether they do or not.

Q. Honce and DuBois, is that on Tenth Avenue?

A. Yes, sir, the North side.

Q. Where is Carpenter's pavilion?

A. That is right at the head of Tenth Avenue and the river.

Q. Where is the ice company's office?

A. That is next to the Kasban drug store, that is West of that drug store; they have a big yard there.

Q. How long has that been there?

A. Oh, 20 years or more, I guess.

Q. Do you know where Tilton's vegetable and fruit market is?

A. Not on Tenth Avenue, that I remember.

Q. Where is the public library?

A. That is on the South side of Tenth Avenue, near E Street.

Q. Do you know where the office of the Water Company is — the Belmar Water Company?

A. That is on the corner of Tenth Avenue, the West side of the steam cars.

Q. Do you know whether there is an entrance to it from the Tenth Avenue side or not?

A. Into the offices?

Q. Yes.

A. No, sir, I have never been there, inside.

Q. Is there an entrance to the house in which the office is, from the Tenth Avenue side?

A. There is an entrance from Tenth Avenue, and there is an entrance from the railroad, but I don't know whether that goes into the office or into the building.

Q. Where is Sanborn's pavilion?

A. That is down on the ocean, at the foot of Tenth Avenue; that is what we call the foot of Tenth Avenue.

Q. Do you know where the Brocksted boarding house is?

A. Yes, sir.

Q. Where is it?

A. At the corner of Tenth Avenue and D Street, the South side.

Q. How long has the public library been on Tenth Avenue?

A. Not a great deal — it has only been finished, I guess, about a year.

Q. How long has the office of the water superintendent been on Tenth Avenue?

A. That man has been there a good many years.

Q. How long has the office been there — opened up in that building?

A. The corner of Tenth Avenue and the railroad?

Q. Yes.

A. The water superintendent ——

Q. Yes.

A. I don't know — twelve years or more.

Q. That has been there twelve years?

A. Yes, sir, more than that.

Q. Do you know where the Belmont House, boarding house, is located?

A. I do not.

Q. You never heard of it?

A. Well, I might have heard of it.

Q. Do you know where Dr. Thompson's office is?

A. On the North side of Tenth Avenue, I think near E Street.

Q. Have you ever been in the office?

A. Yes, sir.

Q. Has it got an entrance on the Tenth Avenue side?

A. Yes, sir.

Q. Do you know where the New England boarding house is?

A. I cannot say that I do.

Q. Do you know where the Pinehurst is?

A. I cannot say that I do.

Q. What are the two most important business streets of Belmar?

A. Ninth and Tenth Avenues.

Q. What about F Street?

A. Well, I include F Street from Ninth to Tenth Avenue.

Q. You did not say so; you must have included that in your mind?

A. Yes, sir.

MR. WILSON: He means both sides of F Street, between Ninth and Tenth Avenues — Tenth Avenue, from F Street to the railroad; F Street from Ninth Avenue to Tenth Avenue

CROSS-EXAMINATION BY MR. FOSTER:

Q. When were you last at Dr. Thompson's office?

A. About two years ago.

Q. Are you sure that there is an entrance to the doctor's office on Tenth Avenue, or only on C Street?

A. Well, I know how I went in from Tenth Avenue up on the stoop.

Q. Your house is built within the building line, isn't it?

A. Yes, sir.

Q. When did you build it?

A. October, November, December, 1879.

Q. You have been pretty familiar with Belmar in all these years, haven't you?

A. I have, yes, sir.

Q. Do you recall where a number of people have been stopped from building in Belmar over the building line?

A. Well, yes, there have been some stopped, yes, sir.

DAN A. CONOVER, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. You live in Belmar?

A. Yes, sir.

Q. You have lived there how long?

A. I have lived there ever since 1900.

Q. What is your business?

A. Variety or Ice Cream Garden, and stationery, principally.

Q. Where is your place of business?

A. 902 F Street, between Ninth and Tenth Avenues, on the East side.

Q. You are familiar with Tenth Avenue and its activities, I suppose, and have been so for a number of years?

A. Yes, sir, ever since I have been there.

Q. Where is Osborne's restaurant?

A. At the corner of River Avenue and Tenth Avenue, on the South side.

Q. You say you have been there eleven years?

A. I have been there since 1900 — 14 years; I came there on the 20th of September.

Q. Where is the Adams Express office?

A. That is next to the railroad.

Q. How long has that been located there?

A. They have practically got moved over there about a month.

Q. And Garrabrant and Conover?

A. They went there about two months ago.

Q. That is on Tenth Avenue?

A. Yes, sir, on the South side.

Q. And Barcalow's livery stable?

A. That is located right along the same place.

Q. And you don't know how long that has been there?

A. Well, I cannot tell truthfully, because portions of it were moved over there, and some was built to it.

Q. Mr. Barcalow has testified that he opened it up after his lawsuit?

A. It was moved over there before they started the public building ——

Q. Now, Newbury's milk depot?

A. That has been there about five or six years; and he manufactured also ice cream there.

Q. And by "there," you mean on Tenth Avenue?

A. Yes, sir; but he is out of business at present.

Q. And what about the moving picture place?

A. I cannot say how long that has been there, exactly; four or five years; probably, six years; I do not say it for a fact.

Q. It has not been operated as a moving picture show for the last six years?

A. I cannot really tell you; it was a grocery store; it was built for a grocery store.

Q. And then was devoted to this purpose?

A. Yes, sir; and there have been four different parties; that makes four years.

Q. And the American House?

A. I cannot tell you how long that has been there, but that has been recently.

Q. You mean the building, or the house used for that purpose?

A. There was a fellow who had a mason business.

Q. How long has it been opened up as an hotel?

A. I cannot say — four or five years.

Q. Not longer than that?

A. It might be.

Q. What about the Wildman automobile place?

A. When he first came there he was on F Street, and he had Bennett's place.

Q. How long ago did he move East of Tenth Avenue?

A. Probably five or six years ago, somewhere around there; it is all straight that he does repairing, because I have got some white oak lumber; he was down at my place three or four weeks ago ——

Q. Has he a sign on his place?

A. He has a sign in front of the building, but I never stopped to read it.

Q. What about this stable of Corliss' where they have boarding horses for riding purposes?

A. That is over on Tenth Avenue, further up; I cannot tell you how many horses, and it is operated by the son-in-law; they had a hack business also.

Q. Tafsinki's optical place; is that on Tenth Avenue?

A. Yes, sir.

Q. And Bamford's store?

A. That is the corner of Tenth Avenue and F Street.

Q. Has that been there quite awhile?

A. They have remodelled that twice since I have been there.

Q. Has it been remodelled recently?

A. Yes, sir, about a year ago.

Q. And in that remodelling, was a plate glass put in on Tenth Avenue?

A. Yes, sir.

Q. Do you know whether there is an entrance to the store on Tenth Avenue?

A. There is an entrance on Tenth Avenue, but I cannot say whether it goes into the store; it used to go right in the back in the store, and you would come right through; that is when Mr. Leddon had the place; it did not open right directly as it would in this room, but you would go from the door into the vestibule, and then from the vestibule into the store.

Q. The door opened into a hallway or something of that sort?

A. Yes, sir.

Q. The drug store; how long has that been there?

A. I cannot say exactly; the post office was there before this Kasban went in.

Q. Is it as far back as six or seven years ago?

A. I have nothing to go by.

Q. Has that an entrance?

A. The main entrance is on the corner — between Mr. Kasban's and the delicatessen store; there is also an entrance; whether it is private or not, I don't know — just ammunition; this is just from memory; I am not prepared to say.

Q. Are you referring to your testimony now as ammunition?

A. Yes, sir.

Q. Have you any interest in this controversy?

A. None whatever, only I am a taxpayer, that is all.

Q. When did they get hold of you as a witness?

A. Last night; they wanted me to come up to-day.

Q. Who asked you to come up?

A. I think it was Mr. Levinsohn, the elder gentleman.

Q. Don't you know?

A. Yes, sir, I know he asked me.

Q. Were you subpoenaed?

A. No, sir, I did not have the subpoena.

Q. What about Leddon's restaurant?

A. Well, that has just started this spring; he formerly had a grocery store.

Q. Is that on Tenth Avenue?

A. Yes, sir.

Q. What about the mason shop; is there a mason shop on Tenth Avenue?

A. Yes, sir.

Q. And Honce and Du Bois?

A. Yes, sir.

Q. And Carpenter's pavilion?

A. Yes, sir, that is at the foot of Tenth Avenue.

Q. And the ice company's office?

A. They stable over there; that is where I go to get ice oft times.

Q. That is where they sell ice, isn't it?

A. I have got ice there at times.

Q. What about this Tilton vegetable and fruit market?

A. It is Tilton's residence, and then, of course, he calls that his headquarters; that is where he lives.

Q. Has he a store there?

A. No, sir.

Q. Does he display any wares there at all?

A. I have not seen any.

Q. You don't know whether he does or not?

A. No, sir.

BY THE COURT:

Q. Do you know whether he has a store anywhere else?

A. Not this year.

FURTHER DIRECT:

Q. Did he have one last year; has he got a sign out there of any kind?

A. There is "E. J. Tilton"; that used to hang over the door of his residence; that is about the only thing I saw around there by way of a sign.

Q. Now, the Belmar Public Library?

A. That is on the South side of Tenth Avenue and E Street.

Q. How long has that been there?

A. Well, I think about a year it has been completed.

Q. What about the office of the superintendent of the water works?

A. Well, I cannot say much about that; they have remodelled that building, but that is near the railroad and Tenth Avenue; you go down Tenth Avenue to go to the house; it is on the corner of the lot.

Q. Do you know whether there is an entrance to the house from the Tenth Avenue side?

A. As I say, they have remodelled it; there didn't used to be.

Q. The Sanborn pavilion?

A. There did not used to be to the office — but since they remodelled, I don't know whether there is or not.

Q. Is there an entrance to the house?

A. Yes, sir.

Q. And whether that has an entrance to the office as well, you don't know?

A. No, sir, I am not prepared to say.

Q. Where is Sanborn's pavilion?

A. That is what they have called the Tenth Avenue pavilion; that is Tenth Avenue, between Tenth Avenue and Eleventh Avenue, but facing more Tenth Avenue and the ocean; what is called on postcards "Tenth Avenue Pavilion."

Q. Do you know where the Brocksted boarding house is?

A. Yes, sir.

Q. Where is that?

A. That is D Street and Tenth Avenue, on the South side.

Q. And the Belmont boarding house?

A. I don't seem to know where that is.

Q. What about Dr. Thompson's office?

A. I know where that is; his office is in the residence, and I believe I went up to the front door.

Q. What about the New England boarding house?

A. I think that is C Street, and Tenth Avenue.

Q. That has been remodelled and opened new, hasn't it?

A. It used to be a private house, and then I think a lady has been running a boarding house and she takes this place, too.

Q. What about the Pinehurst?

A. That is not the Hyman property?

Q. Yes.

A. Yes, I know where that is.

Q. Is that a boarding house?

A. Yes, sir; they built an annex two or three years ago.

Q. How about George Heyniger?

A. Yes, sir.

Q. He is a mason?

A. Yes, sir.

Q. One of the complainants in one of these suits?

A. I did not know that.

Q. Is there a shop and garage back of the house?

A. He owns from Tenth Avenue to Eleventh Avenue, and, of course, his residence is in front; then his garage, etc., where he keeps his stuff ——

Q. You go into it from the Tenth Avenue side?

A. I am sure that there is a driveway on Eleventh Avenue, but I am not sure about the Tenth Avenue.

BY THE COURT:

Q. Where were you in there last?

A. I cannot say.

Q. Have you been in there in the last year?

A. Within the year, perhaps.

Q. How did you go in?

A. I went in on Eleventh Avenue.

Q. Has he got any sign displayed there?

A. I don't recall.

FURTHER DIRECT:

Q. Now, what are the most active business streets in Belmar?

A. The way it has been drifting, of course, it is going South all the time; I conclude that F Street and Tenth Avenue ——

Q. Has the business activity on Tenth Avenue increased any?

A. Yes, sir, I cannot help but say that.

Q. Has it increased in the last six years?

A. Yes, sir.

Q. How do the business activities of Tenth Avenue compare with F Street?

A. From a monetary standpoint?

Q. In volume?

A. When you take Mr. Carpenter's pavilion on one end, and Mr. Sanborn's pavilion on the other end, and the

depot, and the post office, and the public library, all on the same street, it makes considerable traffic.

Q. The post office is not on Tenth Avenue?

A. The post office is nearer to Tenth Avenue than it is to Ninth Avenue.

Q. Are these business places to which I have directed your attention confined generally to two or three blocks on Tenth Avenue?

A. Yes, sir.

Q. Now, confine your attention to those two or three blocks where these business places are all located; now, how would the business on those two or three blocks compare in volume in the summer time with business done on any two or three blocks of F Street?

A. I cannot say; I could not answer that, because all these places are there; I know the pedestrian traffic is there.

Q. Direct your attention to these two or three blocks where you say the business activities are confined; are these two or three blocks residential in character, or business in character?

A. You see they are getting mixed up ——

Q. Which is the more important — the residential part of it or the business part?

A. I presume the business.

Q. Is it expanding?

A. Yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. What you have said about Tenth Avenue applies more particularly to that portion of it lying West of F Street, doesn't it?

A. Well, it is expending towards the East, too.

Q. Does your testimony relate to all of Tenth Avenue, or only to the section lying West of F Street?

A. West and East.

Q. And how far Easterly of F Street does your testimony apply?

A. That Commercial Hotel is there — that is 75 feet from F Street.

Q. Is that an hotel?

A. It is a boarding house.

Q. As a matter of fact, are there any of these places hotels?

A. I guess they are boarding houses.

Q. And are not most, if not all of them, converted cottages?

A. I don't know.

Q. From the appearance of them, I mean.

A. That is a good sized boarding house.

Q. Isn't it a converted cottage, or an enlarged cottage?

A. I don't know.

Q. Then, aside from the invasion of the block East of F Street by Mr. Levinsohn's store, does not all your testimony that you have given about business, and the increase of the business establishments on Tenth Avenue, relate to the territory lying West of F Street; is not that true?

A. Tafsinki moved around the corner on Tenth Avenue; he went off F Street, and then Tafsinki had clothing and shoes, etc., since I have been there.

Q. Has he any business establishment there?

A. That is his headquarters; that is where they go in and buy.

Q. That is where he lives?

A. Yes, sir, that is his residence, too.

Q. Does he sell anything there, or have any business establishment there?

A. Yes, sir.

Q. Did you ever buy anything there?

A. Yes, sir.

Q. When?

A. Oh, when I first came to Belmar.

Q. Has he been living in that one place all the time?

A. Yes, sir.

Q. Does he do any more than to have a peddler's wagon to go around the town?

A. If anyone goes in there, he sells to them.
Q. But he has no show windows?
A. No, sir.
Q. Does he have any sign up?
A. Only on his wagon.
Q. Who paid your fare up here to-day?
A. I guess I am able to pay it.
Q. Who paid your fare, I asked you?
A. I expect Mr. Levinsohn to pay it.

BY MR. WILSON:

Q. Who did pay it, in point of fact?
A. I don't know; somebody gave me a railroad ticket.
Q. Who gave you the ticket?
A. Mr. Levinsohn.

FURTHER CROSS:

Q. Do you know why he gave you a railroad ticket or paid your fare?
A. No, sir.
Q. Did he know what you were going to testify to when you got here?
A. No, sir.
Q. You had not rehearsed your appearance upon the witness stand?
A. No, sir.
Q. You had not told him what you were going to say about Tenth Avenue as a business thoroughfare?
A. No, sir; I am a disinterested party.
Q. And you came up here without a subpoena?
A. Yes, sir.
Q. And you walked to the station from your home in Belmar, with the expectation that somebody was going to give you a railroad ticket?
A. I did not walk.
Q. Did you pay your trolley fare?

A. Yes, sir.
Q. Mr. Levinsohn was not on hand to pay that?
A. No, sir.
Q. Did he take you out to lunch to-day?
A. No, sir.
Q. Did you pay for your own lunch to-day?
A. No, sir.
Q. Do you own any property in Belmar?
A. Yes, sir.
Q. Where is it — on F Street?
A. I have some on F Street and some on 16th Street, and I have some on 14th Street.
Q. Have you some on Ninth Avenue?
A. No, sir.
Q. Do you have an entrance from Ninth Avenue to your property that leads in from F Street?
A. Yes, sir.
Q. Do you have one on Tenth Avenue?
A. No, sir.
Q. You have a dance hall there, haven't you?
A. I have an ice cream garden.
Q. Isn't it a dance hall also?
A. Yes, sir.
Q. Have you a cabaret there?
A. No, sir.
Q. Have you a stationery store in front?
A. Yes, sir.
Q. Did you ever have any postal cards showing the Tenth Avenue pavilion?
A. I don't know.
Q. Did you ever see one?
A. I don't know.
Q. You are not positive whether it says "The Sanborn Pavilion" or "The Tenth Avenue Pavilion"?
A. It is called the Sanborn pavilion now.
Q. Did you ever see postal cards calling it the "Tenth Avenue Pavilion"?
A. I cannot tell you truthfully now.

Q. Did you ever see one calling it the " Tenth Avenue Pavilion "?

A. Yes, sir.

Q. When did you see it?

A. I cannot tell you.

Q. How long ago?

A. I cannot tell you.

Q. Three years ago?

A. I don't know.

Q. Two years ago?

A. I could not say.

Q. Five years ago?

A. I could not say.

Q. Did you ever carry any in stock?

A. No, sir.

Q. Haven't you called for any stock where they were called the " Sanborn Pavilion "?

A. I have some now.

Q. You remember when the Sanborn Pavilion was called the " Jackson Pavilion "?

A. Yes, sir.

Q. That was when you first came there, about 1900?

A. Yes, sir.

Q. Do you recall that the place where the moving picture show is now, was formerly a grocery store?

A. Yes, sir.

Q. For a number of years?

A. Not very long. The fellow failed that built it.

Q. The moving picture — how long has it been in existence?

A. I don't know, really.

Q. Seven or eight years?

A. Probably.

Q. Take the show window in the Bamford store; the only thing that shows, in that window, on Tenth Avenue, is the end of the show window?

A. Yes, sir.

Q. They put a plate glass in the side; the principal part of the show window faced on F Street?

A. Yes, sir.

Q. And all that you see of the show window was that panel, that is, the end of the window?

A. It would be the side.

Q. That is the side on Tenth Avenue?

A. Yes, sir.

Q. Is that over three feet in width?

A. I would not say.

Q. Is not this the end of Tenth Avenue; and is not that the frontage on F Street — the plate glass window? (Indicating on a blotter.)

A. If you want to call that the whole front, including the door, the biggest part faced on F Street.

Q. Now, this door that you say also leads into Bamford's place, have you noticed anyone going in and out of that?

A. No, sir.

Q. Now, how large is this door?

A. About 2 feet 10 inches.

Q. Now, take this Leddon's restaurant; that was formerly a grocery, wasn't it?

A. Yes, sir.

Q. And as a grocery and restaurant, it has been in existence for about ten years?

A. No, sir, I don't believe it has been there more than two or three years, because he was on F Street, and he went around there.

Q. Has not the grocery and restaurant been there together for about ten years?

A. No, sir.

Q. The building has been there?

A. No, sir, they built that two or three years ago — Heroy built that two or three years ago.

Q. This shop, this mason shop, is that anything more than a place where things are stored?

A. I don't know where his office is; there is nothing manufactured there.

Q. Is anything more done there than to store mason's tools?

A. I don't know what is there.

Q. Did you ever see any business carried on there or not?

A. Not in the mason line — not manufacturing, no, sir.

Q. How long before the mason shop was there was the plumbing shop there?

A. I don't know how long it was.

CHARLES LEVINSOHN, sworn in behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. You are the son of the defendant?

A. Yes, sir.

Q. How long have you lived in Belmar?

A. About 20 years.

Q. How old are you?

A. 26.

Q. Do you know where the Osborne restaurant is in Belmar?

A. Yes, sir.

Q. Where is it?

A. The end of River Avenue and Tenth Street.

Q. Do you know how long that has been there?

A. It has been there almost ever since I can remember.

Q. The Adams Express office, do you know where that is?

A. Tenth Avenue and Railroad.

Q. How long has that been established?

A. The building has been there about four years.

Q. How long has the office been where it is now?

A. The express office has been in there about two months; there was an upholstery store prior to that.

Q. Garrabrant and Conover's, where is that located?

A. Right next to the Adams Express office.

Q. How long has that been there?

A. About four or five years.

Q. And what sort of business is conducted there?

A. It is a real estate office.

Q. Where is Barcalow's livery stable?

A. Next to the real estate office.

Q. Do you know when that was opened as a livery stable — whether before or after Mr. Barcalow's suit?

A. It was after Mr. Barcalow's suit that he opened it; it was during the construction that the suit was brought on.

Q. You mean the construction and preparation of the livery stable?

A. Yes, sir.

Q. Newbury's milk depot, do you know where that is located?

A. Right next to Barcalow's livery stable.

Q. How long has that been there?

A. The milk business has been there five or six years.

Q. The moving picture place, where is that located?

A. Next to Mr. Newbury's.

Q. How long has that been in operation?

A. The moving picture place has been there about four years.

Q. What was there prior to that?

A. A grocery store.

Q. How long has that been there?

A. (No answer.)

Q. Has there been any new construction in connection with the moving picture show built?

A. At the time they took it over, the front was built over and an office was built over.

Q. That has been within how long?

A. That has been within the last three or four years.

Q. Now, your father's building — the building in respect to which this suit was brought, is located where?

A. The Southeast corner of Tenth Avenue and F Street.

Q. What places of business are there in that neighborhood — in that building?

A. Aside from our store, there is a tailor's store, and an automobile ——

MR. SNEDEKER: Objected to as irrelevant and immaterial; this is a building that is put up after this suit is commenced, and I do not see that we are interested at all in the character of the building.

THE COURT: Well, insofar as I understand, the defence is going to contend that the character of this avenue has changed so much that it would be inequitable now to enforce a building restriction; I think it is relevant; it is cumulative; I understand your objection is directed to the point that they have established these things since the suit began ——

MR. SNEDEKER: Yes.

THE COURT: On what ground do you urge that as objectionable?

I can realize that they cannot make evidence in that way which will benefit their case; but, of course, it may be admissible on the ground that it describes one of the properties that is the subject matter of litigation.

MR. WILSON: And then, too, it is not necessarily self-serving, because it is not something that can be consummated wholly by the act of the defendant; he has got to have the co-

operation of somebody who wants to occupy the place for business purposes. I think it is part of the *res gestae* of the whole transaction.

THE COURT: The objection is overruled.

Q. You were asked what businesses were conducted in that building aside from your father's?

A. There is the tailor's store in one of the stores, and an automobile supply place where they do vulcanizing tires.

Q. Now, before your father put up this building on this present site, was the lot occupied for any sort of business purpose?

A. Not during the time that we owned it.

Q. Had it been?

A. It had been prior to the time we bought it.

Q. What sort of business purpose?

A. There was a place known as Huyler's Hall, with a number of small stores underneath the hall; the place burned down, and we bought the property after it had been burned.

Q. How long had it been burned down, prior to the time your father took it over about five or six years ago?

A. (No answer.)

Q. What about the American House?

A. It is right next to our store.

Q. And how long has that been there?

A. Why, as a boarding house, about five or six years.

Q. About five or six years?

A. About five years, I should say.

Q. How big a place is it?

A. At the present time, it has 22 sleeping rooms and a large dining room and parlor and two kitchens.

Q. I show you Defendant's "Exhibit 1 for identification," and I ask you if that is a correct representation of your father's store and shows the relative position of the American House?

A. Yes, sir.

Q. Indicate to the Court the location of the American House.

A. That is the American House with the porch coming out here (indicating on the photograph). The porch is made out of all heavy cement blocks. This foundation is all enclosed with heavy blocks; the porch, the large porch that extends out in front, is built of solid cement block foundation, that stands about, I should judge, maybe two feet high; and the pillars running to the porch are also of solid blocks.

Q. How far out beyond the line, the building line of your store, on Tenth Street, does this solid foundation of cement of the porch to which you referred, extend?

A. I should judge it may be about 10 feet.

Q. And how high do you say that foundation is?

A. About 1½ feet or 2 feet.

Q. And how big is the structure that rests upon it; how big a place is marked out by that foundation?

A. It is about 40 feet or 50 feet long, and 10 feet wide.

Q. And extends out from the hotel 10 feet?

A. Yes, sir.

Q. And extends out beyond the F Street side of your store how far — the Tenth Avenue side of your store — how far?

A. About 10 feet.

Q. Then, is the Tenth Avenue side of your store and of the hotel about on a line?

A. Not of the hotel proper, no, sir.

Q. How do you account for that discrepancy; if the piazza extension is only 10 feet, and the extension is only 10 feet beyond your store, there must be a space between the end of that extension and the hotel proper?

A. I mean, that the porch extended past the store about 10 feet.

Q. And extends back to the main hotel building?

A. Yes, sir, but it would extend back to the hotel more than 10 feet.

Q. How much more than 10 feet?

A. About 3 feet, according to the amount that they claim we are over the line.

Q. Who owns the American Hotel?

A. My father.

Q. Who owns the place next to the American Hotel?

A. I do.

Q. Can you see that here in this picture?

A. All that I can see is just the tower; that is there (indicating); you can just see it over the porch of the hotel.

MR. WILSON: We offer that in evidence, if your Honor please, the photograph; it is offered for identification.

MR. FOSTER: We have no objection.

Q. Do you know Wildman's automobile place?

A. Yes, sir.

Q. Where is that located?

A. Outside Tenth Avenue and E Street.

Q. How long has that been there?

A. He had his business there four years.

Q. He has had the automobile business there?

A. Yes, sir.

Q. What business was there, if any, before he had his automobile business there?

A. None that I know of.

Q. And what is the nature of the business place that he has occupied there?

A. He does almost everything; and he does cab work, and makes automobile bodies; does locksmithing work, and does automobile repairing.

Q. Where is his shop?

A. Right in back of his house.

Q. Is there a sign there?

A. Yes, sir, two of them.

Q. Where are these signs?

A. There is a sign on the lot on the corner of Tenth Avenue and E Street, right next to his house; and he has a large sign that runs across the top of his workship, right on the roof.

Q. What about this stable; is there a stable on Tenth Avenue, occupied by riding horses?

A. Yes, sir.

Q. Where is that located?

A. It is located right between E and F Street, on Tenth Avenue.

Q. How long has that stable been occupied for that purpose?

A. About three years.

Q. Was there a public stable there before that time?

A. Not that I know of.

Q. The building that this public stable occupies was there before this three years?

A. The building was there, but I think John Corliss just used that for his own personal use.

Q. And this public use is one which you say has continued for about three years?

A. Yes, sir.

Q. Is there a sign there indicative of that business?

A. Yes, sir; it hangs on an iron rod; it swings back and forth; it says something about saddle horses to hire, and then the proprietor's name; I would not swear to the exact wording of it, but something to that effect.

Q. Tafsinki's optical parlor, where is that?

A. Right across the street from our store.

Q. What sort of building does that occupy?

A. It is in a private dwelling, and he lives in the rear.

Q. Have you ever been in it?

A. Yes, sir.

Q. Is there any portion of it set aside for business purposes?

A. The whole front room is.

Q. What business equipment, if anything, is there in that room?

A. Fitted up as an optical parlor.

Q. What is there to indicate that?

A. He has his lenses and cards around the walls, where they gauge the distance; his desk and an instrument that he used for testing eyes.

Q. Do people patronize him?

A. Yes, sir, I have seen many people there.

Q. Has he got a sign?

A. Yes, sir.

Q. Where is that sign displayed?

A. Right over the front of the door, on the porch.

Q. Is there any display of jewelry there?

A. I never saw any.

Q. How long has that place been opened?

A. Two or three years.

Q. Kasban's drug store, where is that?

A. Tenth Avenue and F Street.

Q. Is there an entrance from Tenth Avenue?

A. There is a door there, but whether it leads into the store or into the house I don't know.

Q. Where is the main entrance to the store?

A. It is katicornered at F Street and Tenth Avenue.

Q. Do you mean that the right angle formed by the buiding at the corner of the two streets is cut off, and that the entrance is in that place that has been cut off?

A. Yes, sir, the same as this would be (indicating), and this would be the entrance (indicating).

Q. It is as much on one side as on the other?

Q. How long has that been occupied?

A. Four or five years.

Q. Where is Leddon's restaurant?

A. It is right next to Kasban's.

Q. How long has that been occupied as a restaurant?

A. Only a month or so.

Q. What was it occupied as before that?

A. A grocery store.

Q. How long had the grocery store been in operation?

A. I think the building has been there years.

Q. The whole building?

A. Yes, sir.

Q. It is a new building?

A. Yes, sir.

Q. What about this mason shop?

A. That belongs to Newman Brothers, and they keep their tools and bags of cement and wheelbarrows.

Q. Is it a residence?

A. No, sir, it is a barn, and they have a large sign over the front of it.

Q. What does the sign say?

A. "T. B. & J. E. Newman, Mason Contractors."

Q. Is there an entrance to it from Tenth Avenue?

A. Yes, sir.

Q. Have you ever been in that place?

A. No, sir.

Q. Have you seen people go in and out of there?

A. No, sir, only the masons themselves.

Q. Honce and Du Bois' real estate place, where is that?

A. That is on Tenth Avenue, between F Street and Railroad; that has been there a good many years, ever since I can remember.

Q. Carpenter's pavilion?

A. That is at the foot of Tenth Avenue and River Road.

Q. Has that been repaired or enlarged, of late?

A. Yes, sir.

Q. How long ago?

A. About two or three years ago — about two years ago, I judge.

Q. What about the ice company's place?

A. They have their ice yard where they keep their wagons; I have seen people go in and buy ice; that is on Tenth Avenue, between E and F Street; and also their horses are there, and they have a little sign out front.

Q. There is no office there?

A. No, sir.

Charles Levinsohn — Direct

Q. Do you know E. J. Tilton's vegetable place?

A. Yes, sir.

Q. Have you ever been there?

A. Yes, sir.

Q. For what purpose?

A. I have been there going to Shark River, and he has a stand out in the summer, and I have stopped there and bought fruit.

Q. Have you ever seen any fruit or vegetables displayed?

A. Yes, sir, baskets of vegetables on the porch, and the fruit would be displayed on this little stand that he would have out front, a little wooden stand, and he has a wagon that goes around town.

MR. WILSON: I offered this morning, the record on page 60, and read into the record what I desired. I think, perhaps, I ought to have the page marked, or the book.

THE COURT: All right.

MR. WILSON: And I will surrender the book now.

Marked "Exhibit D-B 1" (the book).

Adjourned until Thursday, May 27, 1915.

SIXTH DAY

Continuation of the taking of testimony in the above entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on Thursday, the twenty-seventh day of May, 1915, before HON. VIVIAN M. LEWIS, Vice-Chancellor.

Appearances as heretofore noted.

MR. WILSON: With your Honor's permission, and with consent of counsel, we withdraw the witness on the stand for the purpose of examining Mr. McDermott, who is a public official, and we desire to save his time.

JOSEPH McDERMOTT, recalled.

DIRECT EXAMINATION BY MR. WILSON:

Q. You are the County Clerk?

A. Yes, sir.

Q. And have been subpoenaed to produce a map of Belmar, formerly Ocean Beach Association; have you done so?

A. I have produced the map, yes, sir.

Q. How many maps of this land or tract are on file in your office?

A. Two.

Q. What is the date of the first map?

A. '75, as I remember it, sir — map made by H. H. Yard.

Q. And filed about when?

A. Shortly after that — about a year, I think, sir.

Q. Now, that is one map, you say?

A. Yes, sir.

Q. And there is still another?

Joseph McDermott Recalled — Direct

A. Yes, sir.
Q. Have you that there with you?
A. Yes, sir.
Q. Will you produce it?
A. Yes, sir.
(Witness produces a map.)

MR. WILSON: I presume, if your Honor please, that the County Clerk desires to take this back with him; it cannot be left here.

BY THE COURT:

Q. Is that a map on file in your office?
A. Yes, sir; this is the original.

THE COURT: (To opposing counsel) Have you seen it before?

MR. FOSTER: No, sir; I think it was here once before.

THE COURT: You had better take a look at it.

MR. WILSON: This is the map which we had assumed we were going to get a copy of.

MR. SNEDEKER: I understand this map has not yet been offered in evidence?

THE COURT: Not yet; it is just a map produced by the County Clerk.

MR. WILSON: I would suggest, if your Honor will permit me, that we read into the record the legend on the map, and some words of description to be agreed to.

Joseph McDermott Recalled — Direct

THE COURT: What are you going to do — offer the map?

MR. WILSON: I offer the map.

MR. FOSTER: I object to it, on the ground that there is nothing to show by what authority it was filed; there is nothing to show that it is a correct representation of the territory in question; there is nothing to show that it would be binding upon us in any way; that the delineation of Tenth Avenue, whatever it may appear to be here, is correct, or was made by any authority under which we are bound to recognize its validity.

THE COURT: I am going to let the map in, so you had better cross-examine this witness as to how it came into his hands, and get the record as complete as you can.

MR. SNEDEKER: I want to offer a further objection, on the ground that this same witness has been interrogated about this same map, and your Honor rejected it because it was not an authorized map.

MR. COOPER: I object further because there is no file-mark on it, showing it was filed in the Office of the County Clerk.

MR. WILSON: On the contrary, there is a file-mark on it —"Filed December 9, 1896"— and its authenticity is shown by the fact that it is signed by the President of the Association If your Honor will allow me to call your attention to the various legends on the map, I think its authenticity will be shown.

Joseph McDermott Recalled — Direct

THE COURT: I think you had better have that taken from the witness, and not call the attention of the Court, through counsel, to it; let the witness tell what the map shows.

MR. FOSTER: May we cross-examine?

THE COURT: Yes; I want to have everything drawn out clearly about it now. This is the second time I have had the map here.

Q. Do you know when this map was filed or left in the office of the County Clerk?

A. It appears on the map.

Q. When was it filed, or left at the office of the County Clerk?

A. December 9, 1896.

Q. Who was County Clerk then?

A. Theodore Aumack.

Q. Do you know by whom it was filed?

A. What person left it?

Q. Yes.

A. No, sir.

Q. Do you know by what authority it was sent to the County Clerk's office to be filed?

A. No, sir; I was not County Clerk at the time.

Q. Have you any knowledge whether the map accurately delineates the location of this territory in Belmar, or not?

(Objected to as being immaterial, incompetent and irrelevant. He is here as an official to produce a paper on file in his office.)

THE COURT: Well, of course, he has not any record of that; he is not competent, practically, to testify on that point. I do not see that he can testify whether it delineates the

streets. I do not see that there is any significance that can be given to this thing. It is only to influence the Court's mind ——

MR. FOSTER: I assume that what it is here for is to influence your Honor's mind; that is why I object to it.

THE COURT: It is not binding on you.

MR. FOSTER: Well, if that is the view your Honor takes, it is immaterial whether he knows or not.

THE COURT: I am going to take it, however; I am going to admit it.

MR. FOSTER: May I ask for what purpose it is admitted?

THE COURT: Well, it is admitted as showing the *locus in quo*, as I understand.

MR. FOSTER: Wouldn't your Honor have to admit that it does correctly show the *locus in quo*, then?

THE COURT: If I let it in?

MR. FOSTER: If you let it in.

THE COURT: I do not think so, in view of the testimony which has been offered here to indicate, according to the complainants' case, that there is no opening beyond River Street. I am not satisfied in my own mind, as yet, that there is any opening beyond there; I will tell you that for your own information. Vice-

Joseph McDermott Recalled — Direct

Chancellor Howell, in the Newberry case, was not satisfied that the street was open beyond River Street, evidently, because he did not consider this pavilion which extends so many feet beyond the line — is not that so?

MR. FOSTER: That is the way we consider it.

THE COURT: Well, here is a record of the County Clerk's Office, duly filed, which I am going to admit as a record filed with him.

BY MR. FOSTER:

Q. Do you know anything else about the map?
A. I have been familiar with it for many years.
Q. By seeing it?
A. Yes, sir.
Q. But, aside from what is printed on it, you don't know by whom it was issued?
A. Only what is printed and written.

FURTHER DIRECT:

Q. You are County Clerk, and in your official work in making searches, examining titles, etc., I ask you whether you know whether this map is accepted as authoritative of the tract of land delineated on it.

MR. FOSTER: Objected to as immaterial.

Q. Do you consult it in searching?
A. Very often.
Q. Do you know of any other map, official map, that shows the *locus in quo;* I mean by that, Tenth Avenue and neighboring streets in Belmar, except this map and the map to which you have referred as having been filed in 1875; do you know of any other map except these ——

A. Yes, sir.

Q. Filed in your office?

A. No, sir, not on file.

Q. Are you familiar with the handwriting of William S. Yard?

A. I remember him very well, and remember his writing.

Q. I call your attention to this legend on this map, "W. S. Yard, President"; is that in his handwriting?

A. I believe it to be.

MR. WILSON: I wish to call your Honor's attention to the fact that this map has upon it the following legend ——

MR. FOSTER: I object to the legend going on the record.

THE COURT: I don't think it is at all necessary to read that into the record; it is a duly filed record in the County Clerk's Office. However, let it go in.

Q. Please indicate what you find upon this map; what do you find upon this map by way of description, as to the map itself?

A. "Map of Belmar, formerly Ocean Beach, Monmouth County, New Jersey, 1895, scale 400 feet to 1 inch, J. H. Whittaker, No. 4 North Greene Street, Trenton, New Jersey; directors of the Ocean Beach Association, William S. Yard, President, Trenton, New Jersey, Abram Vollner, Vice-President, Lancaster, Pennsylvania; Peter W. Crozer, Secretary, Trenton, New Jersey; Crowell Marsh, Treasurer, Princeton, New Jersey; James G. Barnett, Newark, New Jersey; James S. Yard, Freehold, New Jersey; Thomas Kennedy, Philadelphia, Pennsylvania; James L. Hays, Newark, New Jersey; Timothy W. Lord, New York City; John W. Fielder, New Brunswick, New Jersey; Wil-

liam A. Ridley, Newark, New Jersey; John D. Skiles, Lancaster, Pennsylvania; Joseph B. Yard, Trenton, New Jersey; Sheldon S. Spencer, Lancaster, Pennsylvania; David H. Wilson, Philadelphia, Pennsylvania. For information appertaining to title, price of lots, etc., inquire of either of the above directors."

MR. WILSON: Read this.

A. "Note." I also find upon the map the following: "Note." A small parallelogram in blue and the words "Conveyed to Borough of Belmar."

Q. Do you find upon this map a red line running around the shore of Shark River?

A. Yes, sir.

Q. Do you find any legend upon that line?

A. Yes, sir, "Commissioners' exterior line."

Q. Does that line appear to be some distance from the shore line of the river as shown upon the map?

A. Yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Mr. McDermott, until the last year or two, hasn't it been a common practice for people to file various maps of tracts of land in Monmouth County, in the Clerk's Office?

A. Yes, sir.

Q. And you have no knowledge of the authority under which they attempted to file or did file such maps?

A. No, sir.

Q. If any grantee or other person sent a map to your office to be filed, it was filed?

A. That was the practice.

Q. Until recent legislation in regard to laying out roads and streets in the last year or two?

A. I changed it on my own volition as far as our office was concerned.

Joseph McDermott Recalled — Re-direct

Q. Do you know if the practice of filing a map upon the payment of the filing fee, prevailed prior to your incumbency as County Clerk?

A. I so understood it.

Q. I am showing you now "Exhibit 7½."

A. The map of 1873, the Yard map, is dated May 9, 1873.

Q. And not 1875?

A. No, sir.

Q. And that was the 1875 map that you referred to?

A. Yes, sir.

MR. WILSON: I would like to inquire of counsel upon what theory they deem the offering of this map, to which the gentleman's attention has been called, relevant in this case.

MR. FOSTER: I don't think this is the time to state it, because it was offered and admitted without objection.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Now, Mr. McDermott, this last map, I mean the map which you produced this morning — in your practical work in searching, do you make use of that map?

A. Yes, sir.

MR. FOSTER: Same objection to the same question.

Q. (BY MR. WILSON) Did you find of record a conveyance running from the Riparian Commissioners to the Borough of Belmar?

A. Yes, sir.

Q. Bearing date 1902?

A. Yes, sir.

Joseph McDermott Recalled — Re-direct

Q. Is this paper which I hold in my hand a true copy of it?

A. A certified copy.

Q. I notice there is a map attached to it?

A. Yes, sir.

Q. Is this a true copy of the map attached to the original deed?

A. I believe it to be, sir.

MR. WILSON: I offer this certified deed, with the accompanying map, if your Honor please.

MR. FOSTER: I desire to object to the offer; I object on the general ground, that no matter what recitals may be contained in it, I assume my friend is going on the idea that the map and the recitals have some relation to Tenth Avenue; I object to it on the ground, that there is nothing to show that it is authoritative, or that these are public streets or thoroughfares, as indicated on this map, any of them.

MR. WILSON: My understanding, if your Honor please, of the law of dedication is this, certainly as applied to this case: we have first to consider what is the theory of dedication. It is not my theory that in this case there was any affirmative act upon the part of the borough necessary to consummate dedication; therefore, it is wholly inconsequential whether the map shown in that deed, or whether the map just offered, was a map made, authorized, proved and sanctioned by the borough or not. The fact of dedication, the act of dedication, is consummated by the owner of the fee; and calling your attention to the map, and both maps, in fact, if the owner of the fee files the

map, and delineates Tenth Avenues running to the river, that act of dedication is complete and is irrevocable, and it is wholly immaterial whether the borough ever adopted it or did not. Therefore, to come back to the concrete inquiry we have here before us a deed running to the Borough of Belmar; the Borough of Belmar received it, and will be presumed in law to have recorded it. That deed recites, in one of its paragraphs, that the borough, the grantee therein named, takes the fee to a certain piece of land, lying under water, within the confines of Tenth Avenue, projected out into that water. The borough takes possession under that deed and proceeds to exercise dominion over that property; and by virtue of that fact, the borough is estopped, if for no other reason, from ever saying that Tenth Avenue did not extend to the high water mark of that river. Moreover, this deed is accompanied, as your Honor has, perhaps, conjectured, by a map, and that map shows Tenth Avenue; the map is referred to in the deed; the map shows Tenth Avenue, running down Tenth Avenue to Shark River, and it shows, just as the deed recites, an extension of the sides of Tenth Avenue across lands under water, to a line for exterior solid filling.

MR. SNEDEKER: You will note on that map that the line of the grant by the Riparian Commission does not take in any of Tenth Avenue whatever. We object to the map because it sets forth matters without showing any authority whatever for doing so, which are entirely irrelevant, or which are not binding, rather, upon the complainant in the case.

Joseph McDermott Recalled — Re-direct

THE COURT: I think I shall have to receive the map and note your objection to it. We will receive the deed and the map.

BY THE COURT:

Q. You say you consult this map in making searches, the Whittaker map?

A. Yes, sir.

Q. You are quite familiar with maps; you have been a searcher there for a great many years?

A. Yes, sir.

Q. You are quite familiar with the fact that many of the maps contain lines of streets proposed to be opened?

A. Yes, sir.

Q. You find that to be a common thing on maps?

A. Quite frequently.

MR. WILSON: I had supposed that the settled law was, that if a map be made, and that map be filed, or if sales be made by reference to it, in either event, that the law will construe that as an irrevocable dedication, and it makes no difference, so far as the consummated act of dedication is concerned, whether it is ever accepted by the municipality or not.

(After further argument.)

MR. WILSON: May I offer this?

Marked "Exhibit D. A. B. 1."

MR. WILSON: Now, I propose to show what the necessary ——

MR. FOSTER: It is offered in evidence, subject to our objection?

THE COURT: Yes, your objection is noted.

MR. WILSON: If your Honor please, in order to close this branch of the matter, I will call Mr. Hudnut.

CHARLES O. HUDNUT, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. You are the City Clerk?

A. Yes, sir.

Q. And you have produced here as official records, the minutes of the Board, Book No. 4, No. 6 and No. 5, have you?

A. Yes. sir.

Q. You were subpoenaed to bring here all maps of the borough on file in the borough office, whether relating to matters of assessment or fixing of grades or any other subject, showing Tenth Avenue, or any part thereof. Have you produced any maps in response to that request?

A. No, sir, I have no official maps on record.

Q. There is a grade map established by the city?

MR. FOSTER: Objected to as leading.

A. I don't know that.

Q. You never heard of it?

A. There is a map of street lines, but it don't refer to grades.

Q. Where is that map of street lines?

A. I think it is in the hands of the superintendent of the highway.

Q. But you haven't it?

A. No, sir.

Q. Did you endeavor to get it from him?

A. I did not know it at the time; I did not know where it was.

Q. You have learned it since?

A. Yes, sir.

Q. Will you be kind enough to get that map and bring it to us?

A. I will try to get it.

Q. Do you know of any other map?

A. No, sir.

Q. You know of no map in the borough establishing grades?

A. No, sir.

Q. Have the grades ever been established in the streets?

A. There was a survey to that effect, but I don't think it is on file; I have no record of it.

Q. Well, whether on file or not, I ask you if there was not a survey made for the purpose of establishing grades in the streets of Belmar?

A. I think there was.

Q. Do you know where that is?

A. No, sir.

Q. Will you make a search for that and bring that also?

A. Yes, sir.

BY THE COURT:

Q. Who has charge of those papers, generally?

A. The Clerk's office is supposed to be the resting place for them.

Q. Do you have an engineer or surveyor?

A. No, sir, just hire them as we need them.

Q. So that it would probably be in your custody if it is in existence at all?

A. It ought to be.

BY MR. SNEDEKER:

Q. Didn't you make a thorough search in the office to find any maps?

A. Yes, sir.

Q. And you found none?

A. I found none.

Q. When did you make this search?

A. Last night.

Q. And you made a thorough search, did you?

A. As thorough as I could, from the shortness of the time that I had.

Q. What has become of them?

A. They are in such a medley, they have never been systematized.

BY THE COURT:

Q. What time would it take to make a complete search to find the records?

A. I could not estimate on that.

Q. Would it take two or three days; how far do the files go back in your office?

A. There are partial files, back from the beginning, some of them.

THE COURT: I would like that map here.

FURTHER DIRECT:

Q. You were asked in your subpoena to produce any agreement in writing between Buhler and Carpenter, either or both of them, with the Borough of Belmar, in respect to the occupation of lands at the foot of Tenth Avenue or in Tenth Avenue, a lease; did you find any such lease?

A. No, sir.

Q. Did you look for it?

A. Yes, sir.

Q. And you don't know where there is any such lease?

A. I think there is one in existence, but I cannot tell you where it is.

Q. You cannot find it, and you are the custodian of the borough papers?

A. I could not last night.

CROSS-EXAMINATION BY MR. FOSTER:

Q. You stated to the Court that there was a good deal of confusion in your office?

A. I mean, the papers have never been systematized, there is no filing system.

Q. How long have you been clerk?

A. Ten years.

Q. Are there many papers accumulated in your office?

A. Yes, sir.

Q. Maps such as Mr. Wilson has inquired about?

A. There are no maps.

Q. Do you ever remember seeing that lease?

A. I think I did, sir, when it came in.

BY THE COURT:

Q. Then you know it was in writing?

A. There was a written lease, yes, sir.

FURTHER CROSS:

Q. I am referring to the Buhler lease; do you remember whether or not there was a lease of Buhler's?

A. There was a lease of Buhler's, that was some years ago.

Q. And that you have been unable to find?

A. That is true.

Q. And the Carpenter lease as well?

A. Yes, sir.

MR. WILSON: Now, I offer in evidence a minute taken from the record of meeting of October 28, 1902, as follows:

Charles O. Hudnut — Cross

"Dr. Thompson called attention of the Council to the obstruction at the west end of Tenth Avenue caused by the erection of Buhler's pavilion on borough property. On motion that the matter be referred to the Highway Committee for investigation and report, was so ordered."

This is offered with a view of showing that the borough was exercising dominion at that time over the *locus in quo*.

I have read from page 172 of the Record, Book, 1901.

MR. FOSTER: We offer the same objection.

THE COURT: Yes.

MR. WILSON: That I offer and ask to have the page marked, if you please.

Marked "Exhibit D. A. B. 2."

MR. WILSON: I desire to read and offer from the same record, Book 4, minutes of our borough of 1901, from page 207.

MR. FOSTER: Our objection will apply to all this.

THE COURT: Yes.

MR. WILSON: Reading from the records of a meeting, I think, under date of February 17, 1903:

"Highway Committee submitted an agreement between the Borough of Belmar and John A. Buhler, leasing to Mr. Buhler

the portion of Tenth Avenue in which a portion of his pavilion now stands, and for a term of three years, which was read. On motion that the Mayor and Clerk be authorized and directed to execute the same on behalf of the borough, was so ordered."

I offer this for the purpose of showing that the borough was then exercising dominion and control over lands in Tenth Avenue, occupied by the Buhler pavilion.

THE COURT: That will be received, subject to the same objection.

Marked "Exhibit D. A. B. 3."

MR. WILSON: I desire to offer in evidence a minute from the record of proceedings of the borough found in Book 6, and under date of October 4, 1910. In the margin in red pencil appear the words, "J. A. Buhler lease"; opposite that, in the body, in ink, I read the following:

"Mr. King offered the following resolution, which was read: Resolved, that the westerly end of Tenth Avenue, now occupied by John A. Buhler, be leased to said John A. Buhler for the term of two years from October 1, 1910, for a consideration of $100.00, payable $50.00 after signing lease, and $50.00 on October 1, 1911.

On motion that the resolution be adopted, it was so ordered, upon roll call as follows: Mr. Dillon, King and Ludlow voted 'Aye'; Mr. Beers voted 'No,' on motion of Mr. King, that the Mayor and Clerk be authorized and directed to execute a lease to John A.

Buhler, in accordance with the terms of the foregoing resolution."

That is page 233.

MR. SNEDEKER: That is subject to our objection.

THE COURT: Yes.

Marked "Exhibit D. A. B. 4."

Q. Mr. Hudnut, how many years do you say you have been Borough Clerk?

A. A little over ten years.

Q. Do you know, as a matter of fact, that rent has been paid to the borough by both Mr. Buhler and Mr. Carpenter for that structure in Tenth Avenue?

A. Yes, sir.

MR. FOSTER: I have not objected to that, because I supposed the whole line of examination was subject to our objection.

THE COURT: That is understood.

MR. WILSON: I understand we part with this witness with the understanding that he is the proper custodian of the borough maps and papers and will now make a further vigilant search with a view of finding the maps to which his attention has been recalled, and these agreements with Buhler and Carpenter.

THE WITNESS: Yes, sir.

CHARLES LEVINSOHN resumes the witness stand.

DIRECT EXAMINATION (continued) BY MR. WILSON:

Q. Did he have a sign there?
A. Yes, sir.
Q. What did he have on it?
A. I knew it had " E. J. Tilton " on it; whether it had " Vegetables " on or not, I don't remember.
Q. Is it a place that he has in summer time only?
A. No, sir, he lives there the year round.
Q. Does he do business in selling vegetables in winter as well as summer?
A. I don't think so.
Q. How long has that place been open — Tilton's place?
A. For the last four years.
Q. The Belmar Public Library, where is that?
A. E Street and Tenth Avenue.
Q. How long has that been open?
A. It was open about a year, or a little less than a year.
Q. Do you know where the office of the superintendent of water works is?
A. Yes, sir, it is at Tenth Avenue and Eleventh Avenue.
Q. Is that office in a residence, in a house?
A. Yes, sir.
Q. Does the superintendent live in the house?
A. Yes, sir.
Q. And the office is a room in the house which he occupies?
A. Yes, sir.
Q. Have you ever been in there?
A. Once.
Q. Has the house an entrance on Tenth Avenue?

A. There is an entrance on Tenth Avenue to the house, but whether it leads into the office or not, I don't know.

Q. How is that approached — by steps?

A. Yes, sir.

Q. Porch?

A. Yes, sir.

Q. Sanborn's pavilion, where is that located?

A. At the foot of Tenth Avenue and Ocean Avenue.

Q. Is there any larger pavilion in Belmar than Sanborn's?

A. There is only one other pavilion, and that is Gordon's, that is at Fifth Avenue and Ocean.

Q. How big a structure is Sanborn's pavilion?

A. The pavilion that is enclosed, would have a front of about 60 or 80 feet, I should think, and about 30 or 40 feet deep; it is right on the boardwalk, and then there is an open veranda which has a roof over it, but it is held up on poles, and that extends into Tenth Avenue — extends north and south.

Q. How big is that?

A. 30 or 40 feet.

Q. Do you know where Heyniger's mason place is?

A. Yes, sir.

Q. Where is that?

A. It is between Tenth and Eleventh Avenue, and back of his residence.

Q. His residence is at Tenth Avenue?

A. Yes, sir.

Q. His shop is behind his residence?

A. Yes, sir.

Q. Is there any sign on the shop?

A. It is painted on the building, I think it is "Heyniger Brothers, Contractors," and it has a large red star in the center of it.

Q. And is this building which you have described, may it be approached from the Tenth Avenue side?

A. By a sidewalk.

Q. What do you mean?

A. There is a sidewalk runs in like an alley along the house from Tenth Avenue.

Q. And may it be approached also from Eleventh Avenue?

A. I think there is a driveway on Eleventh Avenue, there is not any driveway on Tenth Avenue — just this sidewalk that runs in back there.

Q. Concrete sidewalk?

A. Yes, sir.

Q. How long has that been there?

A. About three years or four years.

Q. But I ask you how long the Public Library has been there on Tenth Avenue?

A. It was just built this last year.

Q. And the Water Company's office, how long has that office been opened in the place that you have described?

A. I should say five or six years.

Q. Do you know where the Belmont boarding house is?

A. Yes, sir, that is at the corner of Tenth Avenue and D Street.

Q. How large a building is that?

A. It is quite a good sized building, and also has an annex to it outside of the building proper.

Q. How many rooms has it?

A. Maybe 40; I have never been inside of it.

Q. How long has that been there?

A. Ever since I can remember.

Q. What about the Belmont boarding house?

A. That is on C Street, the second house from the corner of Tenth Avenue.

Q. How big a structure is that?

A. It is a place smaller than the Brocksted place.

Q. How much smaller?

A. About a quarter smaller.

Q. How long has that been there?

A. Ever since I can remember.

Q. What about Dr. Thompson's office?

A. That is on Tenth Avenue and D Street.

Q. His office is in his residence?

A. Yes, sir.

Q. The office is a room in his residence?

A. Yes, sir.

Q. Do you know whether the office has a door on the side street or not?

A. There is a door on D Street.

Q. Have you ever been to the office?

A. Yes, sir.

Q. How would you get access?

A. I would go up Tenth Avenue and go up the entrance on Tenth Avenue, and walk around the porch and into the door; the door is on D Street, but it faces towards Tenth Avenue.

Q. What does?

A. The door; you walk on a sort of an L to get to this door.

BY THE COURT:

Q. Describe how you would enter this place, again.

A. Give me a piece of paper and I will show you. This is Tenth Street, and that is D Street, and you would enter here, and then the porch follows this way, and the door is here leading to his office; the door faces towards Tenth Avenue.

Q. There is an offset on the house on the D Street side?

A. Yes, sir.

Q. It goes in here and the offset, the door would face Tenth Avenue?

A. Yes, sir, that is what I mean.

Q. What about the Pinehurst Inn or boarding house?

A. That is at B Street and Tenth Avenue.

Q. How long has that been there?

A. Well, it was remodeled as a boarding house two or three years ago.

Q. How big a place is it?

A. About 35 or 40 rooms, I should say.

Q. Have you been through it?

A. No, sir.

FURTHER DIRECT:

Q. I asked you about Bamford's store and all that last night?

A. I don't think so.

Q. Didn't I ask you about Bamford's store last night?

A. Not that I remember.

Q. Didn't I ask you about the Corliss' stables?

A. Yes, sir.

Q. And about the optician parlor?

A. Yes, sir.

Q. This Bamford's place, does that front on Tenth Avenue?

A. The door of the main entrance is on F Street.

Q. How recently have the show windows on Tenth Avenue been put in?

A. About a year and a half.

Q. Formerly, therefore, there were not any windows on Tenth Avenue?

A. No, sir.

Q. Is there any door that goes from Tenth Avenue right into the store?

A. There is a door that leads from Tenth Avenue into a hall which opens into the store; I won't say that it does that now, because it has been remodeled; that is the store that we formerly occupied; we vacated it about two years ago.

Q. I suppose that door was not ordinarily used by customers?

A. I have let many customers out of there; customers

would go out through the side door if they came in for overalls.

Q. Did I ask you about this drug store?

A. I don't remember.

Q. What about the New England boarding house?

A. That is at B Street and Tenth Avenue.

Q. How recently has that been opened?

A. About four years.

Q. How large a place is it?

A. I judge it is about a ten-room house.

Q. Do you recall when a notice was served upon your father preceding the Heyniger suit, and in connection with the Heyniger suit?

A. Yes, sir.

Q. Do you recall when that date was?

A. It was November 14, 1913.

Q. Had the building been started at that time?

A. Yes, sir.

Q. And how far had it progressed?

A. The foundation was level with the ground, and the south and east walls were up about seven or eight or more feet than that, maybe about nine feet, and on the Tenth Avenue side the pilasters were up about three feet.

Q. Have you any personal knowledge of the amount your father had paid or was liable for on his building contracts at that time?

MR. FOSTER: Objected to as being immaterial, on this theory — Mr. Levinsohn had a deed that contained certain restrictions ——

MR. WILSON: We have a case with which I have no doubt your Honor is familiar, quite a recent case, Smith vs. Spencer, 11 Buchanan, where it is held that a person who seeks to enforce a restrictive covenant of this kind, must act with great vigilance; and in that reported case, it appeared that the complain-

ant seemed to have contented himself with giving notice and asserting that he had certain rights.

THE COURT: That is the case you called the Court's attention to before.

MR. WILSON: And in that case the Court held that it was the duty of the complainant to act immediately after they had ascertained what the situation was. (Continuing.)

THE COURT: It may be evidential on the part of the defence to show exactly what they had done.

MR. COOPER: We served a notice on the 14th of November and filed a bill on the 19th of November; how can they get in under the doctrine of Smith vs. Spencer?

MR. WILSON: The delay begins from the time of knowledge.

THE COURT: It seems to me it is quite evidential for testimony to be introduced in this case on the part of the defence, as to exactly what they have done about this building; what expense they had gone to, and I shall admit the testimony and note the objection to it that it is immaterial and irrelevant and incompetent.

MR. COOPER: And on the further ground, that we had no notice of it.

Q. (Question read.)

New Jersey State Library

MR. WILSON: That is on the 14th of November, 1913. The question is about personal knowledge.

MR. FOSTER: Should not we have the contracts to speak for themselves; he is going to state now that his father was liable.

THE COURT: He is asked to state what expenditure his father had incurred.

MR. WILSON: No, he is asked so far, does he have personal knowledge.

A. Yes, sir.

Q. How did you know what sums he had paid on account of this?

A. I know, because I transacted nearly all the business for my father.

Q. In relation to the erection of the building, do you mean?

A. When it came to figuring up amounts, the bills and the figuring of amounts, yes, sir.

Q. How much had your father paid, in point of fact, and in cash, on the 14th of November, 1913?

A. About $3700.00.

THE COURT: It will be noted that the same objection is made to all of this testimony.

MR. WILSON: The bill in this case appears to have been filed on the 19th of November, 1913.

Q. How much had your father paid out on account of this building; how much had your father paid on account of this undertaking on the 19th of November, 1913, if you know?

A. Can I use my memorandum?
Q. Yes, if you need to refresh your memory.

BY THE COURT:

Q. You put these down at the time, I suppose?
A. Yes, sir.
Q. Did you just put them as you got them from the contractors ——
A. Yes, sir.
Q. In your books?
A. No, sir.
Q. Did you keep books for your father; did you keep this memoranda for your father?
A. Yes, sir, I kept the memoranda of the different items.
Q. How much had you spent up to that time?
A. I remember it was somewhere in the neighborhood of $5,000.

MR. COOPER: I object to that; he does not know.

MR. WILSON: We object to it, too.

THE WITNESS: I would not say positively.

Q. You want to be ready to say positively before this case is finished; you had that information, where is it?
A. I don't know what I did with that memoranda.

BY THE COURT:

Q. Have you got it among your papers? Have you looked through all your pockets?
A. This is the only pocket I would be apt to have it in.

FURTHER DIRECT:

Q. How did your father arrange to finance this matter of construction?

MR. COOPER: Objected to on the same ground, as irrelevant and immaterial.

THE COURT: Objection overruled.

Q. Do you know?

A. Yes, sir.

Q. Just tell us how.

A. Mr. Charlie Lewis, of the Lewis Lumber Company, was to take a $15,000 mortgage on the property.

Q. And did your father give him a mortgage?

A. Yes, sir.

Q. Then did Lewis advance materials for the construction?

A. Yes, sir.

Q. Do you know how much Lewis had advanced by way of material on these dates to which I direct your attention; first, November 14th; do you know how much he had advanced for material at that time?

A. I don't remember, no, sir, not without my memorandum.

Q. Is Mr. Lewis' man here?

A. Yes, sir, his bookkeeper is here.

Q. Do you know how much your father had advanced at that time for labor?

A. No, sir, I cannot tell you without my memorandum.

Q. What did you do with that memorandum?

A. I don't know; I had it in my pocket yesterday.

Q. We won't pursue this inquiry any further until you have a chance to dig it up; who was the contractor?

A. Traub Brothers.

Q. And under the contract, who was to furnish the material?

MR. FOSTER: I object to it.

BY THE COURT:

Q. Was there a written contract between you and the contractor?

A. Yes, sir.

FURTHER DIRECT:

Q. Where is that contract?

A. In the hands of the contractor, I guess.

Q. Is it here?

A. Yes, sir.

MR. WILSON: Is it proper for the witness to say, in a general way, who, under the terms of that contract, was to furnish material ——

MR. FOSTER: I object to it.

MR. WILSON: I don't propose to pursue his examination any further on that subject now. I shall have to recall him, and I surrender him now for cross-examination on the other subject.

THE COURT: Would you like to reserve his cross-examination until his testimony is complete?

MR. WILSON: I will go one step further.

Q. Do you recall how far the building had progressed, whether there had been any change in the work of construction between the 14th of November, 1913, and the 19th of November, 1913?

A. Yes, sir.

Q. Had there been any progress in those five days?

A. Yes, sir.

Q. What was the condition of the building on the 19th of November?

A. The Tenth Avenue walls, and the west wall, the pilasters on the Tenth Avenue side, on the west side, were up to about seven or eight feet, and the other two walls were up past the first story.

Q. And what about the other walls; had there been any change in them?

A. They were up past the first story.

Q. Won't you indicate on this picture, which is "Exhibit D 1," about how high these various walls were at this time, this Tenth Avenue?

A. They were up to about here; they were working from the scaffold at the time; they were up about eight feet.

Q. How far were they up on the F Street side?

A. About the same; the south and east walls were up a little over the first story, up to about here, a little past the first story.

Q. Why was it lower on the Tenth Street side than the other sides, if you know?

A. We used different kinds of brick on the Tenth Avenue side, and we did not have the material to go ahead with, for one reason, and the other reason was, that it was more particular work, and the contracting mason could only use certain masons on that work.

Q. Do you recall the notice was served upon your father preceding the suit brought by Belmar?

A. Yes, sir.

Q. What was the date of that?

A. December 4th.

Q. How far had the work progressed at that time?

MR. COOPER: Objected to on the ground that at the time this notice was served, this man was already in court in another case.

THE COURT: Objection overruled.

MR. WILSON: Your Honor will find it settled, that each case must stand on its own bottom —

A. The Tenth Avenue wall and the West wall were almost to the second story, and the other walls were all finished, ready for the roof.

Q. The notice in the Wildman — the Wildman and the Newman notice was served when?

A. December 6th.

Q. What progress, if any, had been made, in the work, between the 4th of December, the date to which you have just directed attention, and the 6th of December?

A. All the walls were completed.

THE COURT: Have you some special reason for pursuing this inquiry, Mr. Wilson?

MR. WILSON: I think I ought to make clear to the Court my theory about the thing; when a notice is served, if I understand the true theory of the Spencer case, the notice served no function whatever; it was necessary that there should be an insistment upon legal rights, enforced by suit. Now, I think it is entirely proper for us to show how far the work had progressed at the time the notice was given, and then how far the work had progressed at the time the suit was commenced; it is only following up the history of the transaction; and if it appears that when these various suits were brought — your Honor will remember we are dealing with two suits (continuing) —

THE COURT: You will argue, then, that the notice was not ——

MR. WILSON: I am going to argue, that the only thing that could be effective was the bringing of the suits.

THE COURT: I will let you prove that; I will let him testify to that point.

MR. COOPER: It is objected to.

Q. What time was the suit brought in which the Borough of Belmar and Wildman and Newman joined; when was that suit brought?

A. December 19th.

Q. What progress had been made in the work between the 6th of December and the 19th of December, if any?

A. The walls were all up; the rafters were laid, and the roof was framed.

MR. WILSON: I wish to reserve the right to go with this witness on the amounts actually expended on these various dates

MR. FOSTER: I will defer the cross-examination until the witness' examination is concluded.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Calling your attention to "Exhibit D 1," does your father own the building shown on that photograph on F Street, south of the building in controversy?

A. Yes, sir.

Q. Does he own the open space between the two buildings?

A. Yes, sir.

Q. And about what is the width of that space?

A. I should say about two feet, or a little over.

Q. Does it run the entire depth of your new building?

A. This building is not as deep as the new building.

Q. Did your father own the building on F Street, south of the building in controversy, at the time that he erected this new building?

A. Yes, sir.

Q. I show you photograph, which I will have marked "Complainants' Exhibit C 2 for identification," and ask you if this shows a porch on the American House, about which you testified yesterday afternoon?

A. Yes, sir.

Q. And does it show the cement piers?

A. Yes, sir.

Q. As they are now and were constructed?

A. Yes, sir.

Q. At the time your father was building the new store?

A. Yes, sir.

Q. And does it also show the end of the new store?

A. Yes, sir.

Q. Is the main part of the American Hotel building shown in this photograph, within the building line?

A. Yes, sir.

CROSS-EXAMINATION BY MR. SNEDEKER:

Q. Did your father own the land immediately south of the building in question at the time this building was commenced?

A. Yes, sir.

Q. Including this space of a little over three feet that you were speaking of?

A. Yes, sir.

Q. When were the foundation walls on the north side of the building in question commenced, on the Tenth Avenue side, I mean?

A. I cannot say exactly what date they were commenced, but at the time of the serving of the notice the pilasters were up about three feet.

Q. That is not what I asked; I asked you when they were commenced?

A. I cannot say that.

Q. Do you know how long before, that notice was served?

A. I don't know.

Q. If you are so particular, and know just the exact height that they were on the day that the notice was served, have you no means of knowing how high they were up before the notice was served?

A. No, sir.

Q. Or when they were commenced?

A. No, sir.

MR. FOSTER: We will reserve the rest of our cross-examination of this witness.

GEORGE K. ALLEN, JR., sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you live?

A. Red Bank.

Q. What is your business?

A. Civil engineer.

Q. Where did you get your professional education?

A. At Princeton.

Q. When?

A. I was graduated in 1896.

Q. Have you been actively engaged in your profession ever since?

A. Yes, sir.

Q. Were you employed to make measurements of houses on Tenth Avenue, with a view of determining if they were within the restricted building limit?

A. Yes, sir.

Q. And by whom?

A. By Mr. Levinsohn.

Q. And you were introduced to Mr. Levinsohn by whom?

A. By yourself.

Q. When did you do this work?

A. Yesterday.

Q. When were you employed to do the work?

A. The night before last.

Q. Who aided you in doing this?

A. Leroy Chamberlin, my assistant.

Q. Who is he?

A. My assistant.

Q. And he has been such for how long?

A. The past year.

Q. Was Mr. Emlen present?

A. Yes, sir.

Q. What sort or a measuring tape did you use?

A. A steel tape.

Q. Have you got it with you?

A. No, sir.

Q. Why didn't you bring it?

A. After finishing the job, we took the trolley, and the boy was carrying the tape, and it caught in a track and broke the end off, and I did not bother to bring it up.

Q. You have got it at home?

A. Yes, sir.

Q. You had better bring it up; where did you get the tape?

A. I bought it from Keupel and Esser Company.

Q. What sort of a tape was it?

A. It was originally a 100 feet steel tape, graduated to 1/10's and hundredths, standard tape, but I only had about 40 feet of it that I used on this case; it had been broken off, but it was standard tape.

Q. And was it steel, or something else?

A. It was steel.

Q. Was it the part that you use ordinarily in your business?

A. Yes, sir.

Q. Assuming that the building restriction confines the buildings to a place at least 20 feet distant from the lot line, did you adopt any method of determining where the building line would be?

A. Yes, sir.

Q. And what was your method?

A. I ran a line with my transit, parallel with the lot line; the lot lines were indicated by stones which were set on a three foot offset at the various corners of the different streets which crossed Tenth Avenue.

Q. And these were three feet offsets from where?

A. From the lot line.

Q. You just show the Court how you did this; assuming that to be the imaginary lot line and assuming this to be the sidewalk, which is said to be 20 feet wide; now, what did you do?

A. I took a point seven feet from the monument.

Q. Those monuments you assumed were how far away from the lot line?

A. Three feet.

Q. Now, what did you do next?

A. I measured seven feet from the monument.

Q. In which direction?

A. It depended on which side of the street I was on.

Q. Indicate where you measured to.

A. To that point (indicating).

Q. Then, what did you do?

A. Then, I did the same on another monument on the same side of the street, down here (indicating).

Q. Then what?

A. I marked a point seven feet towards the street from that monument.

Q. Then what?

A. I set the instrument up over the first point.

Q. Over here?

A. Yes, sir.

Q. That is your second point?

A. That is the one I marked first.

Q. Then what did you do?

A. Sighted the instrument to the second point.

Q. So that you sighted from two points which were seven feet distant from these two monuments?

A. Yes, sir.

Q. Why didn't you sight down the monuments themselves?

A There was foliage in the way.

Q. And you made this offset of seven feet yourself to get a fair, unobstructed view?

A. Yes, sir.

Q. Having established your — assuming this is a lot in here with a house on it, what did you next do?

A. I sent my assistant opposite each house to indicate a point that was in line with my instrument.

Q. How was that done?

A. He used a marking pin and made scratches on the sidewalk.

Q. How did he know how to do that?

A. I would signal to him.

Q. When he put his scratcher down, could you tell if that was in the correct place or not?

A. Yes, sir.

Q. How would he indicate the place where he put his scratcher down?

A. He would scratch an arrowhead at the point.

Q. Describe this instrument.

A. It is a transit.

Q. Suppose he had not scratched the place in the sidewalk with his scratcher which was in line with these two points, would you have known it?

A. Yes, sir, because I went to each point after he had scratched it.

Q. As soon as he had scratched it, did you go to it?

A. No, sir.

Q. When you went to the place where he had done the scratching, you were away from your instrument; you had the thing out of line then?

A. There was only one scratch there.

Q. But he could have scratched somewhere else other than a place immediately in line with these two points?

A. After he had made a scratch, he would put his pin back again and point, and I tested it the second time.

Q. Now, suppose, however, you were measuring at a place where there was no flag in the sidewalk, what was his habit then?

A. He left a hole in the ground, made with a sighting rod.

Q. Now, having established the place from which you measured into the house, that would make the building line back how far, from that point?

A. 30 feet from the line I established.

Q. That is, ten feet to the lot line and twenty feet in to the building line?

A. Yes, sir.

Q. Now, adopting that method, did you find any of the houses on that street within that restricted building line?

A. Yes, sir.

Q. Can you give us measurements which you made in respect to such houses?

A. Yes, sir.

Q. I wish you would begin and refer to that now by lot number, and in each instance tell whether the restricted area was invaded by the house proper, or the piazza, or the bay window, as the case may be — I meant to say the house number?

THE COURT: The witnesses for the rebuttal may go, if they wish, at this time, as it is evident that the case will not be finished to-day.

Q. When you measured from this point in your run-

ing line, established as you say it was, to what portion of the house did you measure?

A. I measured to the house on a level with the porch — the wooden portion of the house.

Q. And where you took the measurement to a piazza, what part of the piazza did you measure to?

A. To the end of the floor.

Q. And where you measured to a bay window, what part of it did you measure to?

A. To a part that projected furthest from the street at the floor level.

Q. In measuring to the house proper, then, it would seem that you did not measure to the foundation?

A. Only on two or three occasions; there happened to be no bushes in the way on two or three occasions.

Q. And except for those two or three occasions, you measured, then, to the woodwork superimposed upon the foundation?

A. Yes, sir; I have noted where I measured to the foundations, otherwise it is the woodwork.

Q. Now, won't you proceed by house number and tell us what your measurements indicated, and what portion of the building, if any, invaded this restricted building line?

MR. SNEDEKER: I object to that, if your Honor please, on the ground that the question has not been specifically directed as to various things and that anything except a violation of a foundation is irrelevant and immaterial to this issue; and that, except in only two or three instances, where this witness swears that he measured to the foundation, that any measurement that he made to other parts of the house, is immaterial, so that he cannot testify as to the location of the foundations, except as to those two or three houses, and I object to him so testifying in regard to any other houses except the two or three.

THE COURT: I will note your objection: I shall have to permit the question to stand as framed, because it is going to save a good deal of time, and I don't think it is irregular.

MR. SNEDEKER: Here is a witness, who I assume is going to testify, and who might testify under this question that is just asked him, the locations of foundations, and he has not made measurements in order to locate those foundations, except, as he says, in two or three instances. Your Honor can readily see that a measurement from the curb line to a place on the house that is level with the porch floor, may be several inches out from where the foundation is, and it must necessarily be different from what the foundation wall is, and for that reason I object to him testifying to the location even of foundations, except in two or three instances where he has actually made measurements in regard thereto.

THE COURT: I shall overrule your objection on this ground, that the witness has already testified that he established his measurements from the curb line, also from the monument; that he recognized the building line as 20 feet beyond the lot line; he has testified to that. The controversy now at issue is, as to whether there is anything over the building line. We have allowed testimony in, day after day, to show that bay windows, verandas and other things may be over the building line.

MR. SNEDEKER: I object to this witness naming any houses, stating anything in regard to any house in regard to this foundation, because it appears by his own testimony that he

has not measured from the curb line to any foundation except in two or three instances, and with that exception I object to him testifying to the location of any foundation walls.

THE COURT: I shall allow the question to stand for the sake of saving time. This witness is offered in a measure corrobative of the system employed by the other surveyor, and to verify his findings; is not that so, Mr. Wilson?

MR. WILSON: Yes, sir.

MR. SNEDEKER: Then, I assume the whole line of testimony will be taken subject to our objection.

THE COURT: Yes.

MR. WILSON: Counsel has entirely misapprehended the question as it stands unanswered on the record; this witness is not asked to fix the foundation walls where he did not measure to the foundation wall; he is asked to fix the location of the woodwork superimposed upon the foundation wall, or the foundation wall, as the case may be, as he measured. Counsel seemed to have proceeded upon the theory that where he measured the woodwork superimposed upon the foundation wall, he was going to testify where the foundation wall was; that misapprehends the entire scope of the inquiry.

Q. (Question read.)

A. Beginning on the southerly side of Tenth at the easterly end, house No. 103, porch encroaches 9 91/100 feet. House 4/100 feet.

MR. SNEDEKER: I don't understand what you mean by "house."

Q. When you say "house," Mr. Allen, what do you mean by that?

A. I mean the woodwork of the house at the floor level of the porch.

Q. And do you propose to use the word "house" as meaning that and no more, wherever you use it in your testimony?

A. Yes, sir.

Q. All right.

A. House No. 105, porch encroaches 12 feet. House encroaches 12/100 feet. House No. 107 — porch encroaches 11 82/100 feet. House encroaches 8/100 feet.

No. 109, porch encroaches 7 69/100 feet.

Q. Whatever you read we will assume is an encroachment?

A. Yes, sir. No. 111 — porch encroaches 4 3/100 feet.

No. 115 — porch encroaches 1 77/100 feet.
No. 201 — porch encroaches 2 84/100 feet.
No. 205 — porch encroaches 3 24/100 feet.
No. 207 — porch encroaches 8 78/100 feet.

Q. Have you made any attempt whether the porches were open or closed in any instances, on your memorandum?

A. No, sir, I made no observation in respect to that matter.

Q. Go ahead, please.

A. No. 211 — octagonal part of porch encroaches 13 3/10 feet. Porch encroaches 9 2/100 feet. Bay window encroaches 59/100 feet.

No. 215 — porch encroaches 4 2/10 feet.
No. 219 — porch encroaches 7 93/100 feet.
House encroaches 1/100 feet.
No. 301 — porch encroaches 9 8/10 feet.
House encroaches 5/100 feet.
No. 303 — porch encroaches 7 98/100 feet.

George K. Allen, Jr. — Direct

No. 307 — porch encroaches 6 98/100 feet.
No. 309 — porch encroaches 8 5/100 feet.
Bay window encroaches 27/100 feet.
No. 311 — porch encroaches 6 84/100 feet.
No. 317 — porch encroaches 8 2/100 feet.
No. 319 — porch encroaches 4 98/100 feet.
No. 407 — porch encroaches 4 19/100 feet.
No. 409 — porch encroaches 3/100 feet.
No. 411 — porch encroaches 2 63/100 feet.
No. 413 — porch encroaches 5 99/100 feet.
No. 415 — porch encroaches 4 feet.
No. 419 — porch encroaches 4 49/100 feet.
No. 503 — porch encroaches 10 28/100 feet.
House encroaches 21/100 feet.
No. 505 — porch encroaches 7 23/100 feet.
No. 507 — porch encroaches 8 1/100 feet.
No. 509 — porch encroaches 8 13/100 feet.
Bay window 3/10 of a foot.
No. 511 — porch encroaches 8 35/100 feet.
House encroaches 51/100 feet.
No. 513 — porch encroaches 9 63/100 feet.
No. 601 — porch encroaches 7 92/100 feet.
No. 603 — porch encroaches 8 19/100 feet.
House encroaches 22/100 feet.
No. 605 — porch encroaches 8 1/10 feet.
House encroaches 37/100 feet.
No. 607 — porch encroaches 7 3/10 feet.
House encroaches 45/100 feet.
No. 609 — porch encroaches 7 28/100 feet.
House encroaches 43/100 feet.

No. 613 — porch encroaches 6 93/100 feet. Bay window encroaches 2 68/100 feet. There is no number on this building. It is the American House. Column on overhead porch encroaches 10 58/100 feet. Building encroaches 8 1/100 feet.

Levinsohn's store — pilasters on the east end encroach 3 82/100 feet.

Water, table of building at east, building encroachment

3 48/100 feet. Pilasters at west end, encroachment 3 85/100 feet encroachment.

The next building was a moving picture building, no number on it. Cement porch encroachment 7 84/100 feet. Bay window 1½ feet.

Q. That cement porch, just describe in a general way the character of that structure.

A. About six inches or eight inches from the ground.

Q. Covered or open?

A. Cement porch.

Q. Is there a roof to it?

A. I think there is.

Q. What other structure was there in connection with it that ——

A. The bay window; that is the ticket room.

Q. It is a bay window used for an office or a ticket room?

A. Yes, sir.

Q. That goes down flush with the porch?

A. Yes, sir.

Q. And is enclosed?

A. Yes, sir. Main building 8/100 feet.

Q. Main building 8/100 feet?

A. Yes, sir. No. 709 — porch encroaches 8 11/100 feet.

Then the next building is a real estate office — no number on it — next to Barcalow's livery stable — porch encroaches 7 6/10 feet.

Next building is New York and Long Branch flag-house.

MR. SNEDEKER: I object to that; I have found on the record, which confirms the statement that I made, and that was this: if your Honor remembers, we put on the witness stand two witnesses from the County Clerk's office, or rather, from Mr. McDermott's office, the Title Company. They forced us to show in how

many deeds there were restrictions. Deeds executed by the Ocean Beach Association: we showed nearly 800, and each of those men that were on the witness stand referred to several deeds that were without restrictions: among them were the two deeds to the railroad company, which were without the restriction, and that being so, I submit that it is immaterial as to where any of their buildings may be located.

THE COURT: I will note the objection that it is immaterial, but will allow the question to stand — immaterial and irrelevant.

A. Encroachment 15 24/100 feet.

Osborne House, brick basement, encroachment, 13 feet and 75/100.

Main building, 9 38/100 feet.

That is the south side.

North side of Tenth Avenue, going west from the ocean, the first house was a house, the first building was a house facing on Ocean Avenue, no number on it — porch on the Tenth Avenue side.

BY THE COURT:

Q. Describe the building, if you can.

A. It sides on the north side of Tenth Avenue.

Q. Nearest what number?

A. Nearest 100.

Q. And on the next lot?

A. There is a porch and a bay window. A porch encroachment 8 4/100 feet; bay window, 38/100 feet.

BY MR. SNEDEKER:

Q. These encroachments you are speaking of; you speak of those as encroachments on Tenth Avenue?

A. Yes, sir, this is an encroachment on Tenth Avenue.

FURTHER DIRECT:

Q. And all your testimony has been confined, and will be confined, to encroachments on Tenth Avenue?

A. Yes, sir.

Q. All right.

A. No. 100 — porch encroachment 6 65/100 feet.
No. 102 — porch encroachment 8 85/100 feet.
Bay window encroachment 2 55/100 feet.
House encroaches 11/100 feet.
No. 106 — porch encroachment 2/100 feet.
No. 110 — porch encroaches 9 91/100 feet.
House, 29/100 feet.
No. 116 — porch encroachment 7 80/100 feet.
Octagonal part of porch encroaches
11 34/100 feet.
No. 200 — porch encroaches 9 63/100 feet.
No. 206 — porch encroaches 10 feet.
House encroaches 2 5/100 feet.
No. 208 — porch encroaches 10 17/100 feet.
House encroaches 2 8/100 feet.
No. 210 — porch encroaches 10 3/10 feet.
House encroaches 2 17/100 feet.
No. 214 — porch encroaches 6 93/100 feet.
House encroaches 1 18/100 feet.
No. 216 — porch encroaches 6 81/100 feet.
House encroaches 1 5/100 feet.
No. 218 — porch encroaches 9 73/100 feet.
Bay window, 3 5/100 feet.
House, 1 15/100 feet.
No. 302 — porch encroaches 7 4/10 feet.
House encroaches 33/100 feet.
No. 304 — porch encroaches 12 23/100 feet.
House encroaches 45/100 feet.
No. 306 — porch encroaches 7 72/100 feet.
No. 308 — porch encroaches 8 69/100 feet.

No. 310 — porch encroaches 8 75/100 feet.
No. 312 — porch encroaches 5 75/100 feet.
No. 314 — porch encroaches 5 42/100 feet.
No. 316 — porch encroaches 7 31/100 feet.
No. 318 — porch encroaches 10 6/10 feet.
House encroaches 66/100 feet.
No. 400 — porch encroaches 8 51/100 feet.
House encroaches 38/100 feet.
No. 404 — porch encroaches 6 86/100 feet.
No. 406 — porches encroaches 5 8/10 feet.
No. 416 — porch encroaches 9 24/100 feet.
Porch pilaster encroaches 9 73/100 feet.
House encroaches 13/100 feet.
No. 418 — porch encroaches 10 8/100 feet.
Bay window encroaches 3 14/100 feet.
House encroaches 2/10 feet.
No. 500 — porch encroaches 7 4/100 feet.
Bay window, 21/100 feet.
No. 502 — porch encroaches 6 74/100 feet.
House encroaches 7/100 feet.
No. 504 — porch encroaches 6 6/10 feet.
No. 506 — porch encroaches 7 98/100 feet.
No. 508 — porch encroaches 6 53/100 feet.
No. 510 — porch encroaches 2 24/100 feet.
No. 512 — porch encroaches 8 1/100 feet.
The house is clear.
No. 514 — porch encroaches 8 11/100 feet.
No. 516 — circular part of porch encroaches 11 33/100 feet.
Porch encroaches 8 49/100 feet.
House encroaches 57/100 feet.

Q. Take that porch, for example — was it upon a foundation?

A. Yes, sir, it might have been a post.

Q. You don't know whether it was on brick foundation or not?

A. No, sir.

Q. The circular porch, have you endeavored to indi-

cate in any way whether these porches extended up more than one story?

A. No, sir.

Q. Proceed.

A. No. 600 — porch encroaches 6 77/100 feet.
No. 602 — porch encroaches 8 38/100 feet.
No. 604 — porch encroaches 8 41/100 feet.
Bay window, 2 22/100 feet.
House, 41/100 feet.
No. 608 — porch encroaches 8 5/10 feet.
Everything I say is feet.
No. 612 — porch encroaches 5 87/100 feet.
House, 44/100 feet.

No. 614 — porch encroaches 8/42 feet. East end of house encroaches 36/100 feet. West end of building, pilaster encroaches 4/10 feet. West end of building proper encroaches 12/100 feet. Kasban's pharmacy building, east end of building encroaches 49/100 of a foot. West end of building encroaches 26/100 feet.

Office of T. B. and J. E. Newman, porch encroaches 5 5/10 feet. Building encroaches 25/100 feet.

No. 706 — porch encroaches 5 87/100 feet.
Bay window encroachment, 41/100 feet.
No. 800 — porch encroachment 7 69/100 feet.
No. 802 — porch encroachment 7 98/100 feet.
No. 804 — porch encroachment of 9/100 feet.

That is all.

Q. Now, Mr. Allen, did you, in some instances, find that there were houses that you measured that had an overhang in the second story?

A. Yes, sir, I saw some houses that way.

Q. Did you endeavor to make any measurements with a view to determine the amount of that overhang?

A. No, sir.

Q. And why not?

A. I did not have time.

Q. You made these measurements you say yesterday?

A. Yes, sir.

CROSS-EXAMINATION BY MR. SNEDEKER:

Q. Mr. Allen, you know what a registered tape is, do you?

A. Yes, sir.

Q. Was the tape that you used a registered tape?

A. It was the standard tape.

Q. What is the difference between a registered tape and a standard tape?

A. A registered tape is sent to Washington, and you get it registered by the official measurer.

Q. But a standard tape is not measured by the official measurer?

A. No, sir.

Q. And the tape that you used had been broken, you say, so that there was only 40 feet left of it?

A. Yes, sir.

Q. Which end did you use — the part that was marked from 1 to 40 feet, or the other?

A. The part that was marked from 1 to 40.

Q. You have not that tape in court with you?

MR. WILSON: Do you want it produced?

MR. SNEDEKER: No.

Q. Now, had the tape that you used been patched in any way?

A. No, sir.

Q. I will ask you to look at Tape No. 1 in this case, and state whether or not that has been patched?

A. Yes, sir, that has been repaired.

Q. Look at that tape and state whether that is a registered tape?

A. That is not a registered tape.

Q. (BY THE COURT) Is it a standard tape?

A. It might be; I don't know.

FURTHER CROSS:

Q. There is nothing upon it that will tell us that it is a standard tape, is there?

A. The maker's name is on.

Q. What do you call a standard tape?

A. Made by a standard tape maker.

BY THE COURT:

Q. Made by a standard tape maker?

A. The standard tape makers will guarantee their tape as being correct.

FURTHER CROSS:

Q. A registered tape is sent to Washington and an official measurement is made, and it is stamped "Registered"?

A. Yes, sir.

Q. And the standard tape is a tape put out by some manufacturer, and he simply guarantees that he has tested it?

A. Yes, sir.

Q. Now, this tape which —

BY THE COURT:

Q. Have these standard tape makers any special advantage over any other person selling tape?

A. No, sir, only by reputation.

RECESS TO 2 P. M.

AFTER RECESS

GEORGE K. ALLEN, JR., resumes the witness stand.

CROSS-EXAMINATION (continued) BY MR. SNEDEKER:

Q. Look at this tape, which has been marked "Tape No. 1," and state, if you know, by whom it was made?

A. Yes, sir.

Q. By whom was the tape made that you made your measurements with?

A. Made by Keupel & Esser Company.

Q. And, in your opinion, was one of the standard makes?

A. Yes, sir.

Q. This tape seems to have the stamp upon it: "E. D. Co." You don't know them as a standard maker, do you?

A. No, sir.

Q. In making these measurements you relied that the stones that you measured there, are properly placed?

A. No, sir.

Q. Are those stones on each corner of each street?

A. I did not use every corner; I don't know whether there were stones on every corner or not; I sometimes skip two or three streets ——

Q. You mean to say, then, that you measured from one monument on one block, to another monument that was two or three blocks distant?

A. Yes, sir.

Q. Did you measure diagonally across the street from any monument to another monument?

A. Yes, sir.

Q. And your whole measurement depends on whether or not those monuments were properly placed?

A. Yes, sir.

Q. You say you made a set-off line — there was 10 feet from the building line — and that you did that because

of trees or shrubbery or something of that kind; was it necessary to do that?

MR. WILSON: That is not the testimony.

Q. Why is a set-off line used in measurement?

A. Because the foliage interfered with my using a transit.

Q. These monuments were 17 feet back from the curb line, were they not?

A. I don't know.

Q. Do you know that the street line is 20 feet back from the curb line?

A. That is the understanding; I don't know.

Q. You had never made any surveys in Belmar before you made this survey?

A. No, sir.

Q. All you had to go by were these monuments which you found?

A. That is all.

Q. And the monuments were 23 feet nearer the street than the house lines, were they not?

A. Yes.

Q. Is that right?

A. That is the basis on which I made my survey.

Q. Who showed you those monuments?

A. Mr. Emlen.

Q. He was with you when you made the surveys?

A. Yes, sir.

Q. Did you and he agree on the measurements that you made?

A. Not exactly.

Q. You did differ in most every case?

A. In a number of cases; but we agreed in some cases.

Q. Now these monuments that were placed 23 feet nearer the street than the building line, you say were ob-

structed by foliage, or something of that nature; where were they obstructed; on what blocks?

A. Between C Street and D Street, on the North side, was the first set-off I made; I used an off-set on all occasions after that.

Q. And why was it necessary to use an off-set on all occasions?

A. It was more convenient.

Q. It was more convenient to fix a line that was 7 feet away from the monument than it was to measure from monument to monument, you think?

A. Yes, sir.

Q. Do you know whether or not the streets in Belmar are at right angles to the avenues?

A. I don't know.

Q. So that, if you measured from a monument to another monument, that was two or three blocks away, and the avenue was not running at right angles to the street, would your measurements be correct?

A. Yes, sir.

Q. You think that would be so, do you?

A. Yes, sir.

Q. Do you know whether or not Tenth Avenue runs in a straight line?

A. I don't know.

Q. If it does not run in a straight line, your measurements might vary?

A. Some of them might.

Q. I understand that you made your measurements from the building over the floor of the piazzas, and that necessitated drawing your tape line taut, and using a plumb line, didn't it?

A. Yes, sir.

Q. How many pounds are required to draw a tape line taut?

A. It depends on the length of the tape, and the length of your measurement which you take; the weight of the tape also.

Q. In using a steel tape, I had reference to.

A. 100 feet from 12 to 15 pounds; the average pull depending on whether the tape is supported or not.

Q. Is that about the same pull that you would make for the 40 feet, using a steel tape?

A. It would not be necessary to pull it 12 pounds.

Q. What would be the pound pull when you were using a 40 foot tape, considering it was a steel tape?

A. Seven or eight pounds, approximately.

Q. Is there another rule amongst surveyors that the pull on a steel tape of a measurement of anything less than 100 feet, should be at least 10 pounds?

A. I never knew of any fixed rule about it.

Q. Is not there a Government rule to the effect that it shall be 10 pounds on a tape of 100 feet?

A. (No answer.)

Q. Do you know anything about the rule or the law that requires that a steel tape 50 feet in length, of the United States' standard measurement, graduated to feet and hundredths, with a proper adjustment for temperature, with a spring balance attachment to pull not less than nor more than seven pounds; do you know anything about such a rule?

A. No, sir, I never heard of that.

MR. WILSON: What length is that?

MR. SNEDEKER: Fifty feet.

Q. You don't know that that is required by the State law of this State?

A. I never heard of it being required by any law.

Q. And your measurements were not made to the foundation walls, were they?

A. No, sir.

Q. In measuring them to the house line, instead of the foundation wall, you have found — what would be the dif-

ference, approximately, between the measurement to the house line and the foundation wall?

A. The house would be about from one inch to two inches nearer the street, if you measured from the house line.

Q. So, for instance, where you have testified as to No. 103, that the house was 4/100 feet over the line, — if you had made that measurement to the foundation wall, it would not have been over the line, would it?

A. It might not have been.

Q. That is true of all the measurements that you have given?

A. Yes, sir.

Q. You spoke of a porch of the moving picture place: is not that an open porch?

A. Yes, sir.

Q. And the cement pillars that you spoke of extend up from the ground how high?

A. I did not speak of any cement pillars.

Q. What did you speak of then — pilasters?

A. The bay window was on the moving picture place.

Q. I am talking about the porch.

A. I have no record of any pillars.

Q. Describe to us the nature of that porch on the moving picture place?

A. There is a cement platform about 12 inches — 8 inches to 12 inches above the sidewalk level.

Q. And it is open above that?

A. I think there is a roof over it; I am not sure.

Q. And this porch is not enclosed on either side, is it?

A. No, sir; you can walk in anywheres on it.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Allen, this tape that has been referred to as tape No. 1, did you see that yesterdaey?

A. Yes, sir.

Q. And who showed it to you?

A. Mr. Emlen.

Q. Did you test this as to its accuracy with your own tape?

A. Yes, sir.

Q. Did you find it corresponded?

A. It corresponded exactly.

MR. WILSON: It appears that this tape has been broken; has your Honor observed where it was broken?

THE COURT: Yes.

Q. I ask you if there is any way of demonstrating to the Court whether the mending of that tape has shortened it in any way or lengthened it, as the case may be; in other words, whether the mending has been an accurate one?

A. Yes, sir, you can take an even foot somewhere else on the tape, and stretch it between the broken portion, and they should correspond. (Witness does it.) It is about, I should say, 1/64 of an inch slack in that particular foot, in that particular foot where I am illustrating; we tested it for its full length and for five feet, and found it to be accurate.

Q. You were asked if your measurements corresponded with Mr. Emlen's, and you say there was a slight difference?

A. Yes, sir.

Q. Were you informed by Mr. Emlen that his measurements were to the foundation walls?

A. Yes, sir.

Q. And yours were to the house, to the wooden part of the house?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. SNEDEKER:

Q. Notwithstanding you took into consideration that your measurements were to the foundation wall and his

were to the house, or that your measurements were to the house and his were to the foundation wall, you still had difference of measurements?

A. There were some variations.

LEROY CHAMBERLAIN, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. You were an assistant to Mr. Allen?

A. Yes, sir.

Q. And you were with him yesterday in making these measurements at Belmar?

A. Yes, sir.

Q. And how long have you been his assistant?

A. About a year.

Q. How was the line fixed from which the measurements were made in to the houses; how was that line fixed?

A. Mr. Allen established a point seven feet from the monument, and then another point seven feet from another monument, and that would make the line, and I would make the mark in that line opposite those houses.

Q. Opposite the house you wanted to measure into?

A. Yes, sir.

Q. And how was that line seven feet away from the monument established?

A. Mr. Allen measured that seven feet from the monument — out towards the street.

Q. And the line he laid out was out towards the center of the street?

A. Yes, sir.

Q. Now, how would you make the mark in the sidewalk from which the measurements were taken into the house; how was that done?

A. He would give me the line, which would be a point, and I would make an arrowhead, and then I would

place the pin at the point of that arrowhead, and he would correct it.

Q. You mean to say you would make the mark of an arrowhead on the pavement?

A. Yes, sir.

Q. And how would you know where to make that arrowhead mark?

A. He would signal it to me from the instrument.

Q. Were there any instances where there was no pavement to mark upon?

A. One instance — on the North side of Tenth Avenue, near River Street.

Q. What did you do there?

A. Made a hole in the ground with the pole.

Q. What do you mean by that?

A. The pin would not have been large enough to distinguish this hole, so I used the pole, which made a larger hole in the ground.

Q. What is the pole?

A. An iron circular rod.

Q. Used by a surveyor?

A. Yes, sir.

Q. Who held the end of the tape to read the numbers when these measurements were made?

A. I did, and Mr. Allen also held it; we reversed the tape; I would hold one end, and then he would hold that same end.

Q. Did the work which you did in holding this tape and reading it, and in marking the places on the sidewalk in which the measurements were taken; was that done by you in each instance accurately and honestly?

A. Yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. After you marked off the seven feet from the monument, was any rod or anything placed at that point?

A. It was marked with an arrowhead on the sidewalk.

Q. And then Mr. Allen went two or three blocks away?

A. Yes, sir, and measured seven feet from another monument.

Q. And then he gave you signals where to make the arrow opposite the different houses?

A. Yes, sir.

Q. Now, when you got half-way up the block, and Mr. Allen was a block or two away from you, what was there at the starting point, opposite the first monument ——

A. We marked it seven feet from the monument, and he would sight to that to get his line, and then I would walk towards the instrument, making these different marks opposite the houses.

Q. When you had walked half a block you were between him and his instrument and the monument?

A. Yes, sir.

Q. How could he see the starting point with you in the way to obstruct it?

A. I don't know.

Q. How did he know that you were standing in line with the starting point seven feet from the building line?

A. By his instrument; I am not an engineer.

GEORGE K. ALLEN, JR., recalled.

CROSS-EXAMINATION (continued) BY MR. FOSTER:

Q. When this helper of yours was walking away from you and on the line of observation, how were you able to determine that marks that he made were in the line of this parallel line you had laid off ——

A. My instrument was clamped at that point?

Q. You had a perfectly clear vision?

A. Yes, sir.

Q. Can you tell us what you mean by being clamped?

A. The instrument is sighted to the point which we establish from the monument, and then clamped — fixed in an immovable position; he walked towards me.

Q. Now, this monument in some instances, was below the level of the sidewalk?

A. Yes, sir.

Q. You had nothing, then, to guide you from the starting point to your instrument?

A. Yes, sir, we put this mark in from the monument.

Q. Now, what is there to indicate to you, unless you have a rod up at the starting point, where that point is?

A. The cross-horse in the instrument will indicate the direction.

Q. Mr. Emlen told me that he had his rod on the beginning point seven feet from the monument on the offset line when he got two or three blocks away, and that by reason of the rod, his assistant in between could not interfere with his observation from the starting point; now you had no such assistant as a rodman?

A. My assistant served as a rodman and as a chainman.

Q. That is on the assumption that he walked in a straight line?

A. Not necessarily.

Q. For the distance of two or three blocks that your instrument was away from the beginning point?

A. No, sir.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Now, Mr. Allen, I wish you would demonstrate, if you can, to the Court that you did this thing in an intelligent way and not in an impossible way.

A. We established a point seven feet from the monument; put in a mark and established another point seven feet from the other monument; and put in a mark. I set my instrument up over this point, and got my boy to hold the rod at that point, and I clamped my instrument.

George K. Allen, Jr., Recalled — Re-cross

Q. So that every time you looked through the instrument ——

A. As long as I was looking through the instrument, I had the line.

Q. Now, if the boy walked right in the path of your vision and then leaned over with his back between you and where he stuck that down in the pavement, how could you see through the boy where he put the thing in the pavement?

A. He did not lean with his back towards me; the boy faced me.

Q. Isn't it customary with surveyors to verify that line by having the rodman go back to the beginning point, from time to time, on account of the danger to your instrument from the wagons passing; would not that upset your range of vision?

A. It would show on the instrument; as long as the instrument is level and the plumb bob up over your point, then it would show if it is a proper instrument.

Q. Now, you were there for some hours at work?

A. Yes, sir.

Q. Was the sun shining?

A. At times.

Q. Now, would not the sun draw your instruments at times?

A. It would, it would show on the levels.

Q. And isn't it customary, because of the fact that the sun does draw the instrument, and because of the fact that the passage of a vehicle will jar the instrument, isn't it customary for surveyors to verify the measurements, by sending the assistant back to the beginning point of the rod, from time to time?

A. It depends on how long your instrument stands.

Q. How long would one set-up take?

A. 15 or 20 minutes.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. If the sun did draw your instrument off the line, you had to set it up again to be accurate?

A. Yes, sir.
Q. You did not set it up again?
A. I did not have to.

JAMES H. EMLEN recalled.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. This tape of yours seems to have been mended?
A. Yes, sir.
Q. Did the mending of this tape in any way alter its accuracy for measuring purposes?
A. (No answer.)

BY THE COURT:

Q. Who mended it?
A. I did.
Q. Have you tested it since you had it mended?
A. Yes, sir.
Q. In what way?
A. Tested it by comparing it with another tape that has not been broken.
Q. What did you find the facts to be?
A. I found at that point that it is one division longer — one of those ——
Q. Longer than it ought to be?
A. Yes, sir.
Q. And in making your measurements did you make allowance for this?
A. No, sir, I did not take that into account at all.

FURTHER RE-DIRECT:

Q. Now, when you say that it makes a difference of one division on the tape, what is the length of that division, and show the Court what you mean by it?

James H. Emlen Recalled — Re-direct

A. One of those little marks on there — probably 1/64 of an inch.

Q. Does it make it longer or shorter?

A. It measures a little bit longer.

Q. And how much longer?

A. Probably the thickness of a lead pencil mark — 1/64 of an inch, not more than that.

Q. About the width of a lead pencil mark?

A. Yes, sir.

Q. You were going to look and see if the piazzas at one or two of these houses were enclosed; did you look?

A. I did, yes, sir.

Q. And where did you look — what houses?

A. I took an account of all of them from Ocean Avenue to the River Road. I only found one which was in any way enclosed.

Q. And which one was that?

A. Number 603.

Q. And how was that enclosed?

A. In wire netting; also on the west side it had one glass window, and on the northwest corner it had a glass window and a glass door; the rest were wire netting.

Q. The glass door was in the wire netting?

A. No, sir.

Q. What do you mean then?

A. I mean that the door leading or giving entrance from the street up to the porch, was glass — the upper part glass and the lower part of it frame, as ordinary doors are.

Q. Now, do you mean that the rest of the piazza was enclosed in mosquito netting?

A. Wire netting, yes, sir.

Q. And in that same wire netting there was also a glass window?

A. In one window they did not have the netting in — two windows — there were two glass windows.

Q. Was this all on the same porch?

A. Yes, sir.

James H. Emlen Recalled — Re-direct

Q. Did the arrangement of it make it clear that it was such a piazza as would be enclosed wholly in glass in the winter?

MR. SNEDEKER: Objected to; this witness is incompetent to testify on that, and he is calling for a conclusion.

Q. Was not the railing of this porch a solid construction for three feet up from the bottom?

A. Yes, sir.

Q. And was not the top of the porch such as would make a natural support for an enclosure of glass?

A. It could be, yes, sir.

Q. Did you ever see this house in the winter time?

A. I never paid any attention to it.

BY THE COURT:

Q. You have testified that a number of the bay windows extend beyond the building line?

A. Yes, sir.

Q. Now, can you tell me whether these bay windows — have you gone over and looked them over to see if they all rest on the foundation wall?

A. I have not, no, sir.

Q. You have not gone over to find out if it is a continuation of the foundation wall?

A. No, sir; most of the porches have this lattice work underneath, and we have to go in — and in some cases we would not be able to tell.

MR. WILSON: Now, Mr. Emlen, you were asked to go and look at his bay windows and see how they were supported on the ground floor; will you still do that?

THE WITNESS: Yes, sir, if you require it.

BENJAMIN PINE, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Where do you work?
A. I work for the Lewis Lumber Company.
Q. You are the bookkeeper?
A. Yes, sir.
Q. Do you remember that the Lewis Lumber Company supplied materials for the construction of this building of the defendant at Belmar?
A. Yes, sir.
Q. Can you tell how much had been advanced of material on the 14th of November, 1913?
A. About $870.38.
Q. Have you a memorandum there you made up from the book?
A. Yes; may I use the memorandum made from the books?
Q. How much had you advanced on the 19th of November?
A. $1093.20.
Q. How much had you advanced on the 4th of December?
A. $2959.90.
Q. And how much had you advanced on the 6th of December?
A. $2971.40.
Q. And how much had you advanced on the 19th of December?
A. $3637.73.
Q. You mean, delivered at the job?
A. Yes, sir.

MR. SNEDEKER: This is all taken subject to our objection. We object to it on the grounds that we stated before; it is immaterial and

irrelevant, and the defendant cannot make evidence by his own acts,— and it does not establish anything.

NO CROSS-EXAMINATION

ABRAHAM LEVINSOHN, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. You are the defendant in this case?
A. Yes, sir.
Q. And how long have you lived in Belmar?
A. About 24 years.
Q. And what has been your business down there?
A. Department store.
Q. I want to direct your attention, first, to the business places upon the Street: Osborne's restaurant is on Tenth Avenue?
A. Yes, sir.
Q. That has been there a number of years?
A. Yes, sir.
Q. How long?
A. Since I can remember, but it has been remodeled since then.
Q. Since when?
A. I should judge about five or six years; I could not tell you exactly.
Q. The Adams Express office, how long has that been on Tenth Avenue?
A. (No answer.)

MR. FOSTER: We will admit that this witness will testify to the same business places as the other witnesses for the defence have testified to.

MR. WILSON: Do you mean you will stipulate that the statement of this witness will be identical as to the number of business places and the persons who operate them, and as to the time they were opened?

MR. FOSTER: Yes.

Q. Mr. Levinsohn, do you remember when the notice was served on you?

A. Yes, sir.

Q. In the Heyniger case?

A. Yes, sir.

Q. What year?

A. 1913.

Q. What year had your building progressed at that time?

A. The back walls had arrived at about 10 feet high, and the Tenth Avenue wall was about 3 feet high.

Q. What about the F Street side?

A. The F Street side was, as I recall, about 6 or 7 feet.

Q. And how far up was the other wall?

A. Which other wall?

Q. Well, you have told us about three walls?

A. Well, the other walls were up about 10 feet.

Q. Was there any cellar to this?

A. Yes, sir.

Q. And, of course, the cellar had been excavated at that time?

A. Yes, sir. All these walls I have described were above the cellar.

Q. How far had the walls arrived on the 9th of November?

A. Tenth Avenue arrived at 7 feet.

Q. How far had it arrived on F Street?

A. On F Street?

Q. Yes.

A. About 10 feet.

Q. And how far on the back, on the other side?

A. That was about the second story.

Q. About the second story?

A. Yes, sir.

Q. And do you remember what happened to you on the 19th of November, 1913?

A. Yes, sir, there was an injunction placed against the building, and I stopped.

Q. Did you get another notice, and a notice from the Belmar Borough on the 4th of December, 1913?

A. Yes, sir.

Q. How far had the work progressed at that time?

MR. COOPER: The same objection, your Honor.

Q. How far had the walls arrived at the time you got the notice on the 4th of December?

A. It was above the second story.

Q. You mean all the walls were above the second story?

A. Yes, sir.

Q. And did you get a notice from Wildman and Newman on the 6th of December?

A. Yes, sir.

Q. Had the work progressed between the 4th of December and the 6th of December?

A. About the same — about the same as it was before.

Q. Do you mean that there was not much difference?

A. Very little difference.

Q. Now, what happened to you on the 19th of December?

A. The second suit started.

Q. How far had the building gone on at that time?

A. Almost completed; the roof was on; the roof was erected and almost completed — the whole business.

MR. COOPER: It is understood that we object to all these questions.

Q. Were the floors in at that time?

A. Yes, sir.

Q. Any plastering inside?

A. That is all that had to be done to the finish of the building — the plastering inside — to finish the plastering inside.

Q. Were the windows in?

A. No, sir; they could not get them in on account of plastering.

Q. Who had the contract for the erection of this building?

A. Traub Brothers.

Q. What was the contract price?

MR. SNEDEKER: That is objected to.

THE COURT: It is in evidence that there was a written contract between these parties.

Q. Have you got a copy of that contract?

A. Not here I have not.

Q. About when had you entered into this contract?

MR. FOSTER: That is objected to.

Q. With the Traub Brothers?

THE COURT: Do not answer that; that is objected to.

Q. Mr. Poole has testified in this case, that he had a talk with you, in which he stated to you that if you built over the line, it would mean a fight for you, because he, Poole, was very strongly opposed to your building?

A. He did not.

Q. Now, what occurred in connection with that, if anything; did Poole come to see you?

A. Yes, sir.

Q. What did he have to say to you?

A. He had said to me, that for himself he did not care at all.

BY THE COURT:

Q. Whether you did what?

A. Whether I went over the building line or not.

FURTHER DIRECT:

Q. What else did he say to you?

A. I said to Mr. Poole that I had a picture made of the building before I built it.

Q. You mean by the architect?

A. Yes, sir.

Q. Did you show it to Mr. Poole?

A. Yes, sir, and I said, "Mr. Poole, there is a picture of the building that I expect to build on the next corner;" I suggested to him that that building would be a very nice, modern building and that it would improve the whole business section around there, and would be a credit to the town, and I asked him what he thought about my going over the building line; and I told him the size of the building — that the building was 40 feet wide, and I got a 50 foot lot, and the way they were talking about the building line — I heard them say that I could not build over 30 feet — and I said, "If that is the case, I cannot have what I want to have, what I need to have;" and I said if he would stand for my going over the building line, I would put the building there, otherwise, I would not build it at all, because if I could not have what I wanted, it would be no use for me to spend any money and not to have what I wanted; and he said, "Yes, it is a very nice picture of the building that you are going to have;" and he said "I think it is really just what you say, and I do not care myself where you put your building."

Q. Is that all the talk you had with him that time?

A. Yes, sir.

Q. Did you ever see him again about the building?

A. No, sir.

Q. After the trenches had been dug for the foundation, did he talk with you at the Board of Trade dinner?

A. No, sir.

Q. You did not have any talk with him at the Board of Trade dinner?

A. No, sir, I have not been there.

Q. Mr. Michaelson has testified in this case, that you asked him not to go against you if you built over the line; now, what occurred about that?

A. I never asked him that.

Q. Did you have any talk with him at all?

A. No, sir; I showed him the picture of the building, what I was going to have, and he said, "It is very nice:" I never asked any advice from Mr. Michaelson.

Q. Do you remember having a conversation with King?

A. Yes, sir.

Q. King has testified that you said to him that you had laid away $500.00 to fight this case, "and if I win it, it will be worth $500.00 to me;" now, what talk did you have with Mr. King about that matter, if anything?

A. Mr. King came to me, and he suggested to me that I — when I was above the ground built already — above the ground with the cellar foundation, he suggested to me that I should stay away ——

Q. What do you mean "stay away"?

A. That I should stay away the building from the building line.

Q. What passed between you?

A. And I said, "Mr. King, I cannot do it — first, I spent that much money already, and second, I cannot see why I should — I bought this lot and paid for it — paid taxes for it — I cannot see why I cannot use it — it belongs to me;" he said, "Don't think I care anything about it, but suppose that half a dozen property owners on Tenth Avenue should combine together, and they make a collection of $500

to fight you, what will you do then?" I said, "Well, I will have to meet you, that is all;" that is all I said.

Q. Did you give your contract out on competitive bidding; did you receive bids on your contract?

A. Yes, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. I show you "Exhibit D 1," a photograph, and I ask you if you own the building to the south of the building in question?

A. Yes, sir.

Q. On F Street?

A. Yes, sir.

Q. Did you own it at the time that you commenced the erection of the building in question?

A. Yes, sir.

Q. Do you own the alley between the two buildings shown on the picture?

A. Yes, sir.

Q. And did you own that alley at the time you commenced the erection of the new building?

A. Yes, sir.

Q. How wide is the alley?

A. I think it is about three feet.

Q. Something like three feet or over?

A. I could not tell you.

Q. Does it extend all the way through?

A. Yes, sir.

Q. Parallel with Tenth Avenue?

A. Yes, sir.

Q. Did you ever have the exact width of the alley measured?

A. Myself?

Q. Yes. Do you know what its exact width is?

A. No, sir — I mean, not at that time.

Q. Do you know now what its exact width is?

A. No, sir, not exactly.

Q. Now, have you a cellar under your new building — the entire area?

A. I have got a cellar; it is excavated over the whole building, about 131 feet.

Q. Then you have a cellar under the whole building?

A. Yes, sir.

Q. How long have you owned this lot on which you have built this building?

A. About six or seven years.

Q. You had a store across the street from your present building, didn't you, for some years?

A. Yes, sir.

Q. And you had a lease on that store, didn't you?

A. Yes, sir.

Q. From Mr. Bamford?

A. Yes, sir.

Q. And in that lease from Mr. Bamford, was not there a prohibition preventing you from placing anything on the Tenth Avenue side of your store?

MR. WILSON: We object; I think he should produce the original lease from Mr. Bamford.

THE COURT: Was it a written lease?

THE WITNESS: Yes, sir.

THE COURT: The objection will be sustained.

Q. You knew of these restrictions when you bought this land?

A. I did.

Q. When did you first learn after buying the lot, that there was a restriction that prevented you from building within 20 feet of the lot line?

A. I learned it just when I started to try it.

Q. When you started to build, do you mean?

A. I learned it when I started to try this case, and I heard straight talk, but I do not accept that.

Q. Did you read your deed when you got the title to your lot?

A. Yes, sir.

Q. Do you remember being approached for a subscription to help fight the Newbury case, and refusing to subscribe?

A. (No answer.)

BY THE COURT:

Q. Were you solicited, did anyone ask you to subscribe to the Newbury fund?

A. No, sir, nobody.

MR. WILSON: My understanding is, that if no foundation is laid for the purpose of contradiction, the witness has the inviolate right of saying to the person who presents the interrogatories: "Who made this solicitation?" It must be identified as the transaction.

Q. You know Mr. Cyrus B. Honce?

A. Yes, sir.

Q. Did he ask you to subscribe to a fund to fight the Newbury case, in order to set aside the building line restriction?

A. No, sir, I do not recall it.

Q. Did you refuse to subscribe to such a fund when solicited to do so by Mr. Honce?

A. I don't remember that I ever was asked for it; I don't know that they asked me for it; I could not refuse a thing when I was not asked for it.

Q. Do you say that you did not know of this building restriction until this suit was started?

A. Not to my knowledge.

BY THE COURT:

Q. Did you read your deed when you got it?

A. Yes, sir, and my deed did not say anything against it.

MR. WILSON: It is not in his deed in express terms.

THE WITNESS: I read the agreement, and I went over it to find the particular point, what it says about my lot; I went over it, and I found it says I must not sell any liquor; it says that very plainly.

Q. What else?

A. Afterwards it says I must keep up with the rules and regulations of the Ocean Beach Association.

FURTHER CROSS:

Q. Now, did you make any inquiry then or investigate, as to what the rules and regulations of the Ocean Beach Association were to which you were apprised under your deed to live up to?

A. Yes, sir.

Q. State what you did and when you did it.

A. I went to Mr. Hudnut's office; that is the gentleman who was on the witness stand this morning — the clerk of the Borough; I asked him if he got the complete deed of the Ocean Beach Association, the original deed, and would he explain to me what it means by "the rules and regulations of the Ocean Beach Association;" and he said he had not got it, and I went to work and I searched at Freehold; I thought I would find his on the record down to the County Clerk's office, and they told me there that they had not got it — had not got the rules and regulations; so I made up my mind this way: Now, if I buy a lot of fifty feet, pay

for fifty feet, and pay taxes for it, and if I have got to give away 20 feet of my lot, for no purpose at all, then that seems to me to be a very particular point, the same as the liquor business, and should be specified in my deed.

Q. While you were having this soliloquy about yourself, how did you know anything about 20 feet?

A. I heard the talk about it on the street, but I could not find the record of it, so I took it for granted.

Q. You have been a resident of Belmar for 24 years?

A. Yes, sir.

Q. You own the property adjoining this present structure — the American Hotel?

A. Yes, sir.

Q. You knew that was back of the building line, didn't you, with the exception of the piazza?

A. I never noticed it; I remodelled it, and since then I built a new house — well, I might say my son built a new house, next to the American Hotel.

Q. That was before you started this house?

A. Yes, sir.

Q. Did you then make any inquiry as to the building line when your son built?

A. No, sir; it did not belong to me.

Q. Did you conclude that you had the right to build within the 20 feet?

A. Well, I took that for granted from my deed, the way it reads, and I could not find anything on the record to show that I have got to stay away 20 feet; and I took it for granted that the Ocean Beach Association did not mean to rob me of half of my lot, otherwise, they would specify plainly that I have got to stay away 20 feet from it.

Q. Who was the grantor in your deed — who sold you the lot?

A. A man in New York.

Q. Do you know his name?

A. Mr. Miller.

Q. Why did you go to Mayor Poole with your picture of the building before starting the excavation, to see if he

would oppose you if you invaded the building line restriction?

A. I thought it would save a lot of trouble and back talk.

Q. You wanted to make use of the entire 50 feet for which you had paid?

A. Yes, sir, to use whatever quantity I wanted.

Q. Why didn't you build more than three feet over the building line?

A. I did not need it.

Q. You had this alley?

A. One thing is to have the alley clear the next building where I have got tenants; in case of a fire they would have no place to save themselves.

Q. There are not any building laws in Belmar requiring you to leave that alley for your tenants?

A. (No answer.)

Q. You are quite familiar with the progress of the Newbury case; you heard it talked about and discussed?

A. Yes, sir.

Q. And you heard the outcome of it, didn't you?

A. Yes, sir.

Q. And don't you remember knowing that Mr. Barcalow, as the outcome of that, was obliged to move his building back from the building line?

A. Yes, sir.

Q. And you knew that years before you bought this lot, didn't you?

A. Yes, sir.

Q. Was that the reason you went to Mayor Poole so as to disarm any fight against your building?

THE COURT: Now, I am not sure that it appears on the record, from the questions directed on direct examination, that he went to Mayor Poole; he met Mayor Poole on his property and he showed him the picture.

THE WITNESS: I showed it to him in my store.

Q. You called him in to show him this picture?

A. No, sir, he came in.

Q. Did Mr. Poole call on you?

A. He came in to buy a pair of shoes.

Q. Then you opened the subject to him when he was in your place?

A. Yes, sir.

Q. Then you were the one that invited his attention by a conversation on this subject?

A. Yes, sir, anybody could see it if they walked in the store; I don't know whether he drew my attention to the picture, or whether I drew his attention to it.

Q. Do you wish the Court to understand that Mr. Poole came to see you about the building at all?

A. No, sir; he came in the store, I know, to buy a pair of shoes, or something else; he came in the store I know.

Q. You know that he bought a pair of shoes the day that he was in there?

A. I could not swear as to what it was that he bought.

Q. Well, you know he bought something; did you hand him the goods that he bought?

A. I guess my son did.

Q. Did he come in your store as a customer?

A. Yes, sir.

Q. He did not come there as Mayor of the town to see you about this building?

A. He always claimed that he was the Mayor of the town; he knew that I knew that he was the Mayor.

Q. He did not come there and tell you not to build over the restrictive line, as you would have trouble if you did?

A. No, sir, he did not say so; if he had, I would never have built it.

Q. This interview took place before you had put a shovel in the ground to excavate any part of your lot?

A. What is that?

Q. (Question read.)

A. Yes, sir.

Q. When was it; do you remember?

A. I think it was some time in September, 1913.

Q. Are you sure that the day that Mayor Poole came in your store he bought things?

A. I am sure of that.

Q. Did he buy things before you had this conversation with him, or afterwards?

A. Oh, yes.

Q. Mr. Poole has fixed it as the 11th of October; do you think that is correct?

A. (No answer.)

Q. Do you remember sticks being set by the borough officials in the building line?

A. Yes, sir.

Q. And those sticks were set before you did any excavating for your cellar?

A. Yes, sir.

Q. And after they were set, what was said to you about them by the borough officials, and by which official?

A. Well, they said, "This is the line."

Q. Line for what?

A. For my building.

Q. What did you say in reply to that?

A. I said, "It does not suit me."

Q. What else did you say; did you say you were going ahead and disregard the line?

A. No, sir.

Q. You knew you were disregarding the line when you built this at your peril?

A. I don't understand you.

Q. You knew you were taking a chance that you might have either to move it back or take down the part that went over the building line?

A. Not exactly; I had the promise of the Mayor that he would not bother me.

Q. Did you have the promise of Mr. Wildman or Mr. Heyniger or the other complainants in this case, that they would not bother you?

A. I did not ask them.

Q. Why did you think the promise from the Mayor was all you needed to violate this restriction?

A. Because I wanted to avoid having any trouble.

Q. Did you think if you spoke to the Mayor and had his promise, that that would avoid any trouble?

A. Yes, sir, I was quite sure that no one would disturb me then.

BY MR. WILSON:

Q. Are you sure of it yet?

A. Yes, sir.

FURTHER CROSS:

Q. Is there any reason why Mr. Poole should be against you?

A. Yes, sir.

Q. What is it?

A. Because I do not deal in his bank.

Q. When did you stop dealing there?

A. Five years ago.

Q. Did you have some trouble over a loan?

A. We had some trouble about some bank business.

BY THE COURT:

Q. What was that trouble? Just tell me now.

A. Before Mr. Poole became cashier in the Belmar Bank, I had been doing a big business with Mr. Berry, of Asbury Park. Of course, it happens a good many times in business that you never knew your standing; you send checks out and you deposit money and send the checks out, and so it goes; so, many times we had an overdraft in the

bank account, and Mr. Berry used to make it all right, and they would send me a note and I fixed it right up; now, when the cashier was changed, and Mr. Poole became the cashier, a check of mine came in this bank for $400 and something over, from a Trenton concern, and I had the funds there all except 20 cents, and I learned that they protested my check, and, of course, that hurt me very bad in my character, because that is the first check I had ever had protested.

Q. Then, you withdrew your account; is that right; or did you wait?

A. (No answer.)

Q. Did you withdraw your account then?

A. (No answer.)

(The witness at this moment went into hysterics.)

THE COURT: The witness is evidently overcome, and we will adjourn the case tentatively to June 16th and 17th, 1915. Mr. Goldenhorn has a case set down for those two days, but that case may not be tried on those days. You can find out from Mr. Goldenhorn about that, and if you cannot get those dates, I will give you two other days.

SEVENTH DAY

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the first day of December, 1915, before HON. VIVIAN M. LEWIS, Vice-Chancellor.

APPEARANCES:

Harry R. Cooper, H. H. Snedeker and John E. Foster, Esqs., for the complainants;
Patterson & Rhome, Esqs., associated with Edmund Wilson, Esq., for the Defendant.

ABRAHAM LEVINSOHN resumes the witness stand.

CROSS-EXAMINATION (continued) BY MR. FOSTER:

Q. Were you a tenant at one time of Mr. W. B. Bamford?

A. Yes, sir.

Q. Occupying a store directly across from your present building?

A. Yes, sir.

Q. On Tenth Avenue?

A. Yes, sir.

Q. And about when was that; when was the last year that you occupied the Bamford store?

A. That was 1913.

Q. This store of Bamford's faced on F Street, and the side is on Tenth Avenue?

A. Yes, sir.

Q. Do you remember, while occupying that store, requesting Mr. Bamford to build the Tenth Avenue side out beyond the building line?

A. No, sir.

Q. In order to enlarge your facilities for doing business?

A. No, sir.

Q. Do you recall Mr. Bamford's refusal to extend the store out on Tenth Avenue, as you requested, over the building line?

A. No, sir.

Q. Did you request Mrs. Bamford to have her husband make such an extension?

A. No, sir.

Q. Or did you request Mr. Bamford, Jr., to have such an extension made?

A. No, sir.

Q. Do you recall having any conversation with any member of the Bamford family in relation to the extension of the Tenth Avenue side over the building line?

A. Nothing at all.

Q. Will you say you never had such a conversation with any of them?

A. I had a conversation to put in a new front on F Street.

Q. But you say you never had a conversation with any of them with regard to extending the Tenth Avenue side, only to make a show window on the Tenth Avenue side.

RE-DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Levinsohn, you, in your cross-examination, referred to the fact that a certain check of yours was dishonored, not paid, by Mr. Poole's bank, because your account was 20 cents shore; do you wish to correct that statement?

A. Yes, sir, I wanted to say it was about $20.00 short, not 20 cents.

Q. In your statement you referred to the time as being, you thought, about five years ago; have you located the time with any more definiteness?

A. It was eight years ago.

Q. And you have done no business with the bank during the past eight years?

A. I did not.

Q. Was Mr. Poole the cashier eight years ago?

A. Yes, sir; it was at the time when Mr. Berry changed off.

Q. Was Mr. Berry formerly the cashier?

A. Yes, sir.

Q. And was it after Mr. Berry went out and just when Mr. Poole came in?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. FOSTER:

Q. Mr. Poole had not been a resident very long in Belmar before becoming cashier of the bank?

A. No, sir.

Q. And he was not very well acquainted with you at the time?

A. No, sir.

Q. And after this incident of the check, and from that time up to the present time, Mr. Poole has been a customer at your place from time to time, hasn't he?

A. Not exactly my customer, but my son's.

Q. He has bought goods in your store?

A. What do you say?

Q. I say he has bought goods in your store from time to time?

A. Yes, sir.

CHARLES LEVINSOHN recalled.

DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Levinsohn, I think you have already testified to the service of notices on your father as an incident of

these suits; now, have you the original contract for the construction of this building with you?

A. Yes, sir.

Q. Let me take it, please.

A. (Witness delivers it to counsel.)

MR. WILSON: We will offer this in evidence. Do you wish to see it, gentlemen? The purpose of it is to show, that before the first notice in the first suit was filed, before, therefore, the notice in the second suit was filed, and before any suit was commenced, we had given out our contract.

MR. FOSTER: I do not see that it is competent unless we had knowledge of the fact that the contract had been so awarded.

THE COURT: Is it a filed contract?

MR. WILSON: No, sir.

THE COURT: How do you think it is competent?

MR. WILSON: I think it is competent on this theory: it bears upon the question of laches, which we discussed with your Honor on two or three previous occasions; our theory being that the case falls within the principle of the Spencer suit. The testimony in the case already discloses how soon the borough, and how soon the other complainant had notice of our intended construction; the testimony even goes to the extent of showing that the borough sent us notice before we broke ground, that we must not break in a certain way. Now, my theory is, under the Spencer case, that notice

was ineffective, as it was said in that case, that you must actually begin suit; and anything that may have transpired in the interval, which was an expenditure of money, or an assumption of obligations on the part of the defendants, becomes germane as bearing on the question of laches. The question is, whether they knew that we intended to do this thing which they say is forbidden. If they did, then anything that we did after that notice, and before they began suit, becomes competent in an inquiry of this kind. That is our theory.

THE COURT: I shall rule that it is immaterial; I do not think it affects the question of laches.

(Further argument by Mr. Wilson.)

THE COURT: I am inclined to admit it; I will note your objection to it.

MR. WILSON: We offer this.

MR. FOSTER: It is objected to as immaterial.

Marked "Exhibit C. F. 1."

Q. Now, before this contract had been signed what, if anything, had been done in respect to this proposed construction?

A. It had been excavated too low for the foundation, and a lot of the foundation had been put in. The cribbing had been built.

Q. Now, who was the general contractor?

A. Traub Brothers.

Q. Is he here as a witness?

A. Yes, sir.

Q. Who had the contract for the steam heating?

A. Crammond & McFadden.
Q. Have you that contract?
A. Yes, sir.
Q. Will you let me take it, please?
A. Yes, sir, here it is.
Q. This contract appears to be dated the 12th of October; now, had any work been done on this contract prior to the 14th of November?
A. Yes, sir.

MR. FOSTER: I do not see where it is at all material.

THE COURT: I don't either.

MR. WILSON: Now, suppose that before either of these suits was commenced we had either spent money or entered into obligations to spend money; suppose we had done so. Then, if the Spencer case means anything, as it seems to me to, it means that if, prior to the time we spent that money, and prior to the time we entered into those contracts, the complainants had knowledge of our proposed violation of this building covenant, those circumstances may or may not, according to the conscience of the court, amount to laches; therefore, to summarize the situation: if it appears in this case, as it does, that the first of these cases was not begun until the 19th of November, and yet, if it appears that before the 19th of November, and before we entered into this contract, the complainants had knowledge of our alleged violation of this covenant, and yet did not begin their suit, the fact that we had assumed this obligation and had paid money on it, or whether we had or had not, becomes a question which is relevant

to this matter of laches. May I recall to your Honor the reasoning in the principle laid down in the Spencer case; that was a case in equity; it was a case where equity applied. (Further argument.)

MR. FOSTER: The case is one where the six months had elapsed between the commencement of the building and the commencement of the action.

THE COURT: I must confess in this case it does not appear that, so far as I have examined the testimony, — that there was any great laches on the part of anyone.

MR. FOSTER: I do not see the application of the case at all.

MR. WILSON: I am very firm in expressing my view to the Court. I do not understand, if your Honor please, that the application of the principle of laches has anything to do with our knowledge of our rights; we might have been, if you please, exercising squatter sovereignty; the principle of laches proceeds on this assumption, that if I undertook to do a thing, and A has a right to stop me, and A sits by and lets me do it all, which they did —

THE COURT: Oh, no.

MR. WILSON: We differ simply on the facts, that is all. If A shall represent the complainants in this case, the testimony in the case is conclusive that a month and more ——

THE COURT: I don't want you to not properly

Charles Levinsohn Recalled — Direct

put before the Court anything you ought to do, but I am not at all impressed with the idea that this party did not have any notice, or that there is any laches involved in this case at all. The case has been tried out along the lines that there are violations of the building law, and that those violations are of such a character that the municipality cannot at this time take advantage of this building law and have it enforced as against the defendant. The case has been tried out along those lines.

MR. WILSON: Let me refresh your Honor as to what was said in the Spencer case. This case was decided in 1913. It was a case in the Court of Chancery. The complainant and defendant in that case were bound by mutually restrictive covenants in their deeds, just as in this case. (Reads the case.)

Now, the defendant began his construction in 1911, and after the foundation was laid, the complainant suspected that some portion of the house was within the restricted area and notified the defendant.

Here we have not laid our foundation when the first notice was given, but we had broken ground and marked out where we proposed to put our foundation. Now, the defendant continued building — the defendant there her perfect knowledge. (Continues argument.)

This testimony is designed, under the theory of that case to offer testimony to the effect that there was a serious expenditure of money after the complainant had knowledge of our alleged violation of this covenant, and before either of them instituted a proceeding in the Court of Chancery, by which they

sought to defend their right. Now, it is upon that theory that this testimony is offered. I am perfectly willing to take your Honor's ruling that the entire evidence is improper, but I simply want to get it fully before the Court.

THE COURT: How soon was the bill filed after the discovery?

MR. FOSTER: At once; that is, in the first place, we had to convene a meeting of the municipal body that had control of the situation, and have them take appropriate action. (Further argument.)

THE COURT: I have indicated that my view of the matter is, that there were no laches in this case. I will admit the question and rule upon it on the final disposition of the case.

Q. (Question read.)
A. Yes, sir.
Q. Tell us what it was.
A. All the roughing out had been done under the floors.
Q. Anything else?
A. No, sir.

MR. WILSON: I offer this contract, if your Honor please.

Marked "Exhibit C. F. 2."

MR. WILSON: This is the contract for the heating entered into on the 12th of October, showing that the consideration price was $1061.00.

MR. FOSTER: We object to it for the same reason.

Charles Levinsohn Recalled — Direct

THE COURT: The objection is overruled.

Q. Who had the plumbing contract?

A. Mr. Ray Crowder; my father was to supply the material, and he was to do the work.

Q. Had you paid anything on account of the plumbing of the building prior to the 14th of November?

MR. FOSTER: We make the same objection.

THE COURT: Objection overruled.

A. Yes, sir, about $50.00.

Q. This is prior to the 5th of November?

A. Prior to the 14th of November — permits the laying of sewers to the building.

Q. And had you paid anything more on account of the plumbing prior to the 19th of December?

A. Yes, sir.

MR. FOSTER: We make the same objection.

THE COURT: Objection overruled.

Q. And how much?

A. About $100.00.

MR. FOSTER: None of these matters have been brought home to us; that is the ground of our objection.

Q. Had you, prior to the 14th of November, paid anything on account of materials to be used in the plumbing contract?

A. No, sir; they had been ordered but they had not come yet — they had been ordered, though.

Q. They had been ordered by your father?

A. Yes, sir.

Charles Levinsohn Recalled — Direct

Q. Were the bills that were ordered prior to the 14th of November — the bill of goods ordered prior to that time, afterwards paid by your father?

A. Yes, sir.

Q. When?

A. On December 8th, I believe, there was a draft on the Belmar Bank.

MR. FOSTER: We make the same objection.

THE COURT: Objection overruled.

Q. To whom was that money paid?

A. Froelich Brothers, $246.00.

Q. When had that order for these materials been given to Froelich Brothers by your father? When had the goods been contracted for?

A. I cannot say exactly.

Q. When were they received — November 5th?

A. They were received on November 5th; that is, this bill is dated then.

Q. How soon after that were they received?

A. I should say November 5th, — that is the day we paid for them.

Q. Who had the contract for the work?

A. Mr. Wolverton.

Q. Is he here as a witness?

A. Yes, sir.

Q. Had any contract been made for the electrical work prior to the 14th day of November?

A. Yes, sir.

Q. With whom?

A. Ray Herbert.

Q. And when?

A. In October.

Q. What time?

A. The 12th of October.

Q. Have you the memorandum here?

A. Yes, sir, I have his directions.
Q. What was the amount of it?
A. $101.50.
Q. Had any part of that work been done prior to the 14th of November?
A. Yes, sir.
Q. How much could you say in amount?
A. He did all the wiring under the floors; I have no idea of the amount.
Q. Proportionately; could you give any idea of the proportion as to how much of the contract price of $101.50 that would represent?
A. I should say $25.00 or $30.00.
Q. Let me take that memorandum, won't you?
A. Yes, sir.

MR. WILSON: We offer this in evidence.

MR. FOSTER: Objected to as immaterial.

THE COURT: Objection overruled.

Marked "Exhibit C. F. 3."

Q. Without referring to these provisions and the work done under them, to which you have referred, how was the cellar dug?
A. My father had that excavated by day's work, because he wanted the dirt for himself, and had it carted on some other land that he was filling in.
Q. And that was not in any of these contracts?
A. No, sir.
Q. How long a period did this work occupy?
A. About ten days.
Q. When was it begun?
A. Sometime in the early part of October.
Q. Can you give us definitely the time when it was begun?

A. No, sir, I know it was in the early part of October.

Q. Now, what of the cost of that excavation?

A. It cost about $500.00.

A. Paid every week to the men; they were working on day's work; on Saturday night they were either paid in checks or cash.

Q. How many teams were engaged?

A. Five.

Q. How many men were engaged in the excavation?

A. 14.

Q. Have you counted the number of structures of all kinds on Tenth Avenue?

A. Yes, sir.

Q. And on both sides?

A. Yes, sir.

Q. And how many are there?

A. There are 48 on the South side and 54 on the North side.

Q. And how many of these were there in November, 1913, when the first of these suits was brought?

A. I should say all of them, but two or three, I could not say positively.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Mr. Levinsohn, do you remember attending a meeting of the Borough Council?

A. Yes, sir.

Q. Shortly after the Heyniger suit was brought?

A. Before the Heyniger suit was brought.

Q. Was the question of instituting legal proceedings against your father to prevent the encroachment of this building line discussed at that meeting when you were present?

A. Yes, sir.

Q. Did you tell the Council that if they attempted to bring any such suit you would have them indicted?

A. No, sir.

Q. You did make any such remark as that?

A. No, sir.

Q. Do you recall any such remark being made while you were present?

A. No, sir.

Q. You are quite clear in your recollection of that?

A. Yes, sir.

Q. Why did you attend that Council meeting?

A. Because I assumed they were going to bring up something about the building, and they did bring it up.

Q. And discussed the question whether they should institute legal proceedings to prevent the erection of the building?

A. Yes, sir.

Q. Did you take any part in the discussion?

A. I said something, but what it was, I don't remember.

Q. You don't remember telling them you would have them indicted?

A. I know I did not say that.

BY THE COURT:

Q. What did you say?

A. I don't remember.

FURTHER CROSS, BY MR. FOSTER:

Q. You remember the dollars and cents, even the cents that you paid out on your contract?

A. I have that in writing.

Q. Have you looked it up as you had it in writing?

A. I have the contract here.

Q. That is the only way you know how much you paid on them?

A. Yes, sir.

BY THE COURT:

Charles Levinsohn Recalled — Cross

Q. To whom did you repeat what passed at that meeting?

A. No one.

FURTHER CROSS:

Q. Didn't you tell your father what passed at the meeting you attended?

A. I suppose I did, yes, sir.

Q. Do you remember what you told him?

A. No, sir, I don't remember what transpired at the meeting.

BY THE COURT:

Q. What did they say?

A. No action was taken at that meeting.

Q. Do you remember telling the Mayor and Council, that they would not dare to bring such an action against your father?

A. I don't remember saying that.

FURTHER CROSS:

Q. Do you say you did not say that to them?

A. I say I don't remember saying it.

Q. When you said the wires were under the floors, what did you mean?

A. Under the joists, that the floors run on.

Q. Do you mean to say there was more than one floor laid before November 14th?

A. No, sir.

Q. When did the mason first begin to do any work there?

A. October 9th.

Q. Isn't he the one that had this contract of October 31st?

A. No, sir.

Q. Does not this contract of October 31st cover the mason work?

A. Yes, sir.

Q. Then how did the mason start in to do work on November 29th, 22 days before the contract was signed?

A. We had done quite a lot of work before the contract had been signed.

Q. And that was done by Wolverton?

A. No, sir, it was Traub Brothers.

Q. Traub Brothers' contract calls for the building of the entire structure, doesn't it?

A. Yes, sir, but we had a few contracts that we gave out ourselves.

Q. Had you paid Wolverton prior to the signing of this contract for what he did?

A. We paid Traub Brothers ——

Q. Had you receipts from them for what you paid prior to October 31st?

A. No, sir, only checks that we used to give them.

RE-DIRECT EXAMINATION BY MR. RHOME:

Q. Who drew this contract for your father?

A. I believe Joseph Silverstein, from Asbury Park.

Q. Was he an attorney at that time?

A. Yes, sir.

ISAAC TRAUB, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Traub, are you a member of the firm of Isaac, Samuel and David Traub, partners?

A. Yes, sir.

Q. Did you have the contract with the Levinsohns for the building of this building?

A. Yes, sir.

Q. How much had been advanced to you in cash on November 14th, on or before November 14th?

MR. SNEDEKER: Objected to; I think it ought to be shown, at least, when that money was paid; "on or before" is too indefinite. My point is, that if they had spent some money just a day or two before we commenced, or a week or two before, the question of laches does not enter into it.

Q. (Question read.) And when, if at all, prior to November 14th, had the payments been made?

MR. SNEDEKER: Of course, we object to all of it.

BY THE COURT:

Q. Put the word "paid" in when you answer.

A. Up until November 14th, I received $200.00 by check.

FURTHER DIRECT:

Q. When did you, in point of fact, receive that $200.00; can you tell by your books when you received it?

A. Yes, sir.

Q. Please do so.

A. November 8th I received $200.00.

Q. Then, that is the $200.00 you referred to, is it?

A. Yes, sir.

Q. Now, how much, if anything, had you been paid on account of this contract prior to November 19th?

A. It was $400.00.

Q. And when had you received the additional $200.00?

A. The 15th of November, $200.00 more.

Q. Making in all $600.00 up to that time?

A. Yes, sir.

Q. Now, when was your next payment on account of the contract?

A. The next payment was the 22nd of November, $900.00.

Q. And when was your next payment?

A. December 8th was $1,000

Q. And when was your next payment?

A. The next payment was December 8th, that was paid by — it was a lump bill paid; instead of getting money from Levinsohn and paying our bills for the lumber, we got an order from Levinsohn to the Charlie Lewis Lumber Company, and instead of getting money from Levinsohn, he used to deduct and give us credit on the bill; when I credited that bill, I credited Mr. Levinsohn with $1615.00.

Q. And how much of that amount represented an order that Levinsohn had given you upon Lewis for material; how much of that amount?

A. All of it — $1615.00.

Q. And what was the date of that?

A. The 8th of December.

Q. You have said that that payment of December 8th was $1,000, and that it was $1600.00; which was it?

A. The $1,000 was in cash, paid by check; and the other one was deducted from the bill, was given credit on that bill.

Q. $1600 more?

A. Yes, sir.

Q. So that on the 8th of December there would appear on your books credit to the amount of $2600?

A. Yes, sir.

Q. $1,000 of which represented the order on Lewis, and $1600 represented cash payments by Levinsohn to you?

A. No, sir, that is not right; it was $1,000 in cash, and $1615.00 was a bill paid up to Lewis, and we gave credit to Levinsohn for $2600, made up of those two items

Q. Now, were there any payments between the 8th of December and the 19th of December?

A. No, sir.

MR. WILSON: We ought to put on the record here, I presume, to save confusion, that that order of $1600 of Levinsohn on Lewis, honored by Lewis, ought not, in this computation, to be counted twice; since the proof already in from Lewis is, that the item of $1600.00 appears in his statement as representing moneys advanced on account of this building prior to the dates which we deem important. I only say that in frankness to the Court and counsel; it seems to me that otherwise it would be counting it twice.

MR. FOSTER: We would like to ask this witness a question as our own witness, later on.

CROSS-EXAMINATION BY MR. FOSTER:

Q. When did you first begin the mason work on this building?

MR. WILSON: One moment, if your Honor please, I object to that as not cross-examination.

MR. FOSTER: I don't suppose it is.

MR. WILSON: I am willing to have you ask him the question as your own witness.

ARCHIBALD WOLVERTON, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Did you have a contract for the mason work on this Levinsohn building?

A. Sub-contract.

Q. And had you received payments on account of your work from Mr. Levinsohn?

A. From Traub Brothers.

Q. And what had you received, if anything, prior to the 14th of November?

MR. SNEDEKER: I object to that; this is a sub-contractor; Mr. Traub was the last witness on the witness stand; he swore to all that has been paid by this defendant to him on account of this contract; now, whatever he may have paid to that sub-contractor is immaterial to this issue.

THE COURT: What is the object of that?

ISAAC TRAUB recalled.

DIRECT EXAMINATION BY MR. WILSON:

Q. Mr. Traub, were moneys paid to this contractor, paid by you on account of your contract?

A. Yes, sir.

Q. And no payments were made to him direct by Levinsohn; have you given Levinsohn credit for these payments made by you direct to this man in this statement that you have given us?

A. Yes, sir.

Q. On your books?

A. Yes, sir.

Q. And did you give him credit in the totals which you have testified to here on the witness stand?

A. I certainly did.

Q. And this man received nothing from you?

A. Oh, yes.

Q. Had Levinsohn paid him anything that you did not give Levinsohn credit for?

A. No, sir.

Q. Were any of the payments that he had paid to this man, prior to the 19th of December?

A. I could not remember exactly, without looking into it.

Q. Suppose you look into it.

MR. FOSTER: It would seem to me, your Honor, that this testimony is wholly immaterial; it is a mere duplication.

THE COURT: It would seem so. All right, you may withdraw.

ARCHIBALD WOLVERTON resumes the witness stand.

CROSS-EXAMINATION BY MR. FOSTER:

Q. When did you begin your mason work?

MR. WILSON: Objected to, unless you make him your own witness.

THE COURT: Objection overruled.

Q. When did you begin the work?

A. We started to clean off ——

Q. When?

A. The 21st of October.

Q. Clean off what?

A. The lot; I started the excavation at that time.

Q. That was part of your contract?

A. Yes, sir.

Q. When did you actually start to lay any brick or other mason material?

A. I started to lay brick, or to put in concrete rather, on the week of November 8th or November 10th.

Archibald Wolverton — Cross

MR. WILSON: I offer this letter from Mr. Hudnut, who was subpoenaed, and the certificate of Dr. Williams, explaining Mr. Hudnut's inability to be present.

Marked "Exhibits C. F. 4 and C. F. 5."

MR. WILSON: The record shows that when Mr. Hudnut was formerly upon the witness stand, he had been brought here under subpoena, with a duces tecum attached, and had been asked to bring with him all maps of the borough in any way relating to Tenth Avenue. When he appeared upon the witness stand he brought no such maps with him, but said there were such maps, one or more, but that he did not bring them; my recollections are, that he said he did not understand what he was to bring; he may have said that he looked and did not find — at any rate, the record shows that he promised to make further search and let us know the result. We were inquiring especially for an assessment map, and also a grade map. Now, in order that there should not be any doubts about it, and in order to remind him of his duty, we served him again with a subpoena duces tecum. He is not here, and his absence is abundantly explained by his own letter and the doctor's certificate; the map brought to us by the borough is not the map, or one of the maps, that we are informed is in possession of the borough, made by the borough; and I, therefore, merely wish to reserve the right within a reasonable time to examine Mr. Hudnut further in respect to this matter, and with a view, if possible, of having the map to which I have referred — map or maps, presented and offered. It may

ance here would not be safe or proper, and yet I assume that he is not so ill as that he might, and with propriety, be examined before the stenographer here, if your Honor will so direct, by consent of the parties, or, as Judge Foster suggests, the taking of his deposition in the most informal way. With that qualification, we rest.

There is one thing that I introduced in the record; your Honor will recall that we had a very animated but good-humored contest over the production of a certain map by the County Clerk, and after strenuous effort we got the map and got it in evidence. The original was removed, of course, on account of the County Clerk; he undertook to furnish us with a copy of it. He has not yet done so; and I think that it would be entirely proper if our adversary's consent, that that copy, when furnished, should be received in evidence, as though it were the original. I think that the map is useful, and I do not believe that your Honor would be able to carry in his mind exactly what that map shows.

MR. SNEDEKER: There was a difference between the copy and the original filed; that is where the trouble came in.

THE COURT: What is the difference?

MR. SNEDEKER: This copy was a copy made by a real estate agent, and we showed to your Honor the difference between that and the original; that is why the copy could not be used.

MR. WILSON: Now, if your Honor please, I

know that counsel would not misinform the Court, but in order that the Court's mind may be clarified, let me say that this map — that after strenuous effort we got it in — there is not anything about the map on its back or front, or anywhere else, that is suggestive that it is a copy of anything. The map produced before this Court was entitled "Map of Belmar, formerly Ocean Beach, New Jersey, 1895; scale 400 feet to the inch. J. H. Whittaker;" and then followed the names of the directors, with their addresses (reading). The point I wish to make is, further, that the map was signed in autograph by Mr. Joseph Yard, whose signature, as the President of the Ocean Beach Association, according to the record now made in this case, was known to Mr. McDermott and testified to.

THE COURT: Now, you want to use the copy, do you?

MR. WILSON: We consent to the County Clerk's certified copy of the original, making a certified copy of the original and using that.

MR. SNEDEKER: They ask the Borough Clerk to produce a map; the Borough Clerk has sent this map, which I want to offer in evidence, which is filed. Will you admit that part of it? He asked the Clerk to produce the maps from the file in the Clerk's office, and the Clerk has sent here this map.

THE COURT: The maps of what?

MR. FOSTER: The maps of the Borough of Belmar.

Archibald Wolverton — Cross

MR. SNEDEKER: Mr. Wilson has stated that he had subpoenaed Mr. Hudnut to produce the maps from his office.

MR. WILSON: I said I asked you to produce maps — assessments — grade, and other maps, showing Tenth Avenue.

MR. SNEDEKER: Now this map is produced, and I want to offer it in evidence as a map that is on file with the Borough Clerk; it was called for in their subpoena for all maps, and this is the only one the Clerk has found.

MR. WILSON: I have already looked at it, and I have already addressed myself to the Court, stating that what we asked for, and what we expected to get was a grade map, and an assessment map, showing Tenth Avenue; that this map, which is produced, is not the map or maps, one of the maps, that we had in mind, and I have reserved the right to further interrogate Mr. Hudnut. Now, we have rested. Now, the gentleman proposes to offer this map.

THE COURT: He cannot do it.

MR. WILSON: It does not seem to me to be rebuttal.

MR. SNEDEKER: I offer in evidence a map taken from the files.

THE COURT: Do you offer it on your own behalf now?

MR. SNEDEKER: Yes, sir; taken from the files

of the Clerk of the Borough of Belmar; the title of it is, "Sectional Plan of the City of Belmar, surveyed and drawn under the authority of the City Council, by A. P. Irons, 1889-90."

THE COURT: Showing what; does it show this locality, the locus in quo?

MR. SNEDEKER: Yes, sir. That is page 6 of this map that shows Tenth Avenue from F Street, West to River Avenue, and I show page 5, which shows Tenth Avenue East of F Street.

MR. WILSON: Now, we object because it is not rebuttal; they have made out their affirmative case; they have offered their maps. They put maps in that they thought suited their theory of the case, but keep out a map which I thought helped our theory of the case.

THE COURT: We try to allow in everything that is at all material to the issue, but if we do let it in, it opens up the case, I suppose, for your further examination as to this map, etc. You are entitled to examine on it and find out — I am inclined to sustain it as not rebuttal, but I certainly would allow it, if you want to open the case again.

MR. FOSTER: Suppose we withhold it now.

MR. SNEDEKER: May this not be rebuttal as to the maps which they have offered in defence. They have attempted to show that the City of Belmar had in some way some control over the foot of Tenth Avenue. Now, we

want to show by the filed map that they do not exercise any control over it at all, and that it is rebuttal in that respect.

MR. WILSON: Their case in chief was to deal with that very question; upon the theory presented there would be no end of rebuttal and sur-rebuttal, but it seems to me that the suggestion of Judge Foster, which is one of watchful waiting, disposes of the entire matter; he says, "Let us wait now."

THE COURT: For the purpose of getting in all the necessary records of the case, so that the Court may be thoroughly enlightened, I will open the case for that purpose and allow you to put it in. I think it is proof which should have been offered in putting in your primary case. What other maps have you put in, in your case in chief?

MR. SNEDEKER: We put in the original map of 1875 of the Ocean Beach Association. That was a map which we relied on in regard to our easements. Now, they come forward and they try to show, on the theory of estoppel, that by a map, this borough was in some way estopped. Now, it does seem to be clearly rebuttal to show that the map which the Borough is working on, is not what they contend for. In other words, they try to show—I don't they have done it, but they tried to show

---

THE COURT: You mean the map that you were working on?

MR. SNEDEKER: On the theory of estoppel, on the theory that the borough was estopped because they had infringed themselves; in order to bolster that up, they offered in evidence a map, and by that they intend to argue, undoubtedly, that Tenth Avenue, which extends to River Avenue, as is the true fact, but extends out beyond River Avenue and across it. Now, it does seem to be clearly rebuttal to that testimony to show that the map of the city itself shows that they never have taken possession of any part of Tenth Avenue or River Avenue; and it is in rebuttal of that testimony that this map is put in. We have no reason for the map for our original case; it is only because of rebuttal that we desire to put it in. (Further argument.)

MR. WILSON: In the interrogating of Mr. Hudnut, and as a part of our reservation, we want the privilege of bringing here and offering in evidence the contracts of the city with Buhler and Carpenter and others, in respect of the rental from the city of that portion of Tenth Avenue lying West of River Street, upon which this pavilion is located; but now we ask Mr. Hudnut, in his subpoena, to bring those contracts with him. The minutes show, which we have already in evidence, that such contracts were entered into.

THE COURT: I am inclined to admit the offer as rebuttal.

MR. SNEDEKER: I said on the record, that this map shows on page 6, that Tenth Avenue does not extend West of the East side of River Avenue.

MR. WILSON: I would say that you put in what the eye discovers when it looks at the map.

MR. SNEDEKER: Will you consent that we may use a certified copy of these two pages?

MR. WILSON: If you make copies and say they are true copies, that will entirely satisfy me.

DEFENDANT RESTS

REBUTTAL

ROBERT G. POOLE, recalled in Rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. COOPER:

Q. Mr. Levinsohn testified that you did not make a statement to him that if he went over with his building it would mean a fight; what did you state to him at that time?

MR. WILSON: Are you endeavoring to contradict Mr. Levinsohn?

MR. POOLE: Yes.

MR. WILSON: I submit that that is not the proper way to secure the contradiction; if the witness is offered for the purpose of contradicting something said by Mr. Levinsohn, the rule, as I understand it, is, that he must ask this witness — did you say so and so to Mr. Levinsohn.

Robert G. Poole Recalled — Direct

THE COURT: Change the form of the question.

MR. WILSON: What page are you reading from?

MR. SNEDEKER: Page 578.

BY MR. COOPER:

Q. Mr. Poole, did you say to Mr. Levinsohn, that if he built over the line, it would mean a fight for him (page 578, bottom of the page)?

A. I did.

MR. WILSON: I move to strike that out as not being a contradiction, and, therefore, no rebuttal.

MR. COOPER: Mr. Levinsohn testified at the last hearing that Mr. Poole did not say that.

MR. WILSON: How is it relevant to ask Mr. Levinsohn this question — only upon the theory that Mr. Poole had already gone upon the witness stand and sworn that he had made that statement to Mr. Levinsohn; and Mr. Levinsohn goes upon the witness stand, and he is asked — did Mr. Poole say so and so, and Mr. Levinsohn says "He did not." Now, the gentleman proposes to recall Mr. Poole for the purpose of having Mr. Poole repeat the words that Mr. Levinsohn has already noted that Mr. Poole said to him. No rule of evidence will permit that. If that were true, then we could recall Mr. Levinsohn again.

MR. COOPER: We agree with you; that is all stricken out.

Robert G. Poole Recalled — Direct

THE COURT: Are you referring to Mr. Levinsohn, senior?

MR. COOPER: Yes, sir.

Q. Mr. Poole, the defendant in this action was a witness and testified that he had a conversation with you (page 579) in his place of business in Belmar in regard to this building in question, and he swore that he told you — he testified then as follows: "In regard to the building, I heard them say that I could not build over 30 feet, and I said, "If that is the case, I cannot have what I want to have, what I need to have,' and I said that if he would stand for my going over the building line, I would put the building there; otherwise, I would not build it at all, because if I could not have what I wanted, it would be no use for me to spend any money and not have what I wanted; and he said, 'Yes, it is a very nice picture of the building that you are going to have,' and he said, 'I think it is really just what you say, and I don't care myself where you put up your building.'" Did you or didn't you say to Mr. Levinsohn, what he has testified that you said in this conversation?

A. I did not say it.

Q. Did you say to him that you did not care where he put the building?

A. I did not.

Q. He also testified (page 579) as follows: "Ques. What did he have to say to you? Ans. He said to me that for himself he did not care at all." Did you use such language?

A. I did not.

Q. Mr. Poole, Mr. Levinsohn, the defendant in this action, testified that he was a depositor in the bank of which you are the cashier, and that you and he are not friendly, for the reason that you refused, in your bank, to honor a check drawn by him when his fund was $20.00 short; did any such transaction happen in the bank of which you were cashier?

Robert G. Poole Recalled — Direct

A. I don't recall it at this time; we had some trouble over the line of discount which the gentleman wished, and our directors decided to have the notes paid.

Q. Whether such a transaction did or did not occur, and keeping in consideration that you had trouble with your demands, is there any trouble between you and the defendant in this action?

A. Nothing whatever; I have done business with him from that time until the starting of this suit.

Q. Do you recall the meeting of the City Council at which the question of restraining Mr. Levinsohn from erecting the building was discussed?

A. I do.

Q. Do you recall whether or not Mr. Levinsohn's son was present at that meeting?

A. He was present, yes, sir.

Q. Do you remember when that meeting was held?

A. It was sometime after October 11th — the date of the conversation which I had with Mr. Levinsohn in his store — between that time and the serving of the papers in the Heyniger case, which was, I think, on November 14th.

Q. But you don't recall just when between those two dates this meeting was held?

A. No, sir, I reported to Council the fact that I had had such a conversation with Mr. Levinsohn — that it was his intention to go over the building line; and I think it was at the following meeting that Mr. Levinsohn, Jr., appeared before Council and made the assertion that they dared not fight him in the case, that if he did, he would have him indicted. At that time there was a question as to what right the borough would have in the equity case.

MR. WILSON: I object to this as not rebuttal.

THE COURT: This part of it is not rebuttal.

MR. COOPER: No, but we are contradicting this evidence, if your Honor please.

Robert G. Poole Recalled — Cross

Q. At this meeting of this Council of the Borough of Belmar where the defendant's son was present, did the defendant's son say, that if the Council took action they would have them indicted, or words to that effect?

A. Yes, sir.

MR. WILSON: That ought not to be received, because it is not a contradiction of anything.

THE COURT: The young man said upon the witness stand this morning, that he did say that.

MR. COOPER: And we are trying to show that he did; that is just the point; we are attacking the credibility of this witness.

THE COURT: I shall allow him to answer.

Q. (Question read.)

A. Yes, sir.

Q. Did the defendant's son defy the Council to take action?

A. Yes, sir, he did.

CROSS-EXAMINATION BY MR. WILSON:

Q. Now, when did that occur?

A. At a meeting of Council between the 11th of October and the 14th of November.

Q. Cannot you fix the date of that meeting?

A. No, sir, I cannot.

Q. Do you know, in point of fact, how many meetings there were of the Council between those dates?

A. I cannot tell.

Q. How often was the Council in the habit of meeting?

A. Every week or every two weeks.

Q. I suppose the minutes would show what meetings there were between those two dates?

A. Yes, sir.

Q. Now, at this meeting, who first brought the matter up for attention?

A. I called the attention of the Council to the fact that Mr. Levinsohn had indicated to me his intention to build over the building line.

Q. Was Mr. Levinsohn, Jr., there?

A. Yes, sir.

Q. And how long before that was it that Mr. Levinsohn had intimated to you the purpose of building over the line?

A. He intimated his intention on the 11th of October.

Q. Where was he when he gave you that intimation?

A. In his store.

Q. Was that the occasion when he showed you the picture of the building?

A. Yes, sir.

Q. Your attention was directed by examining counsel to your alleged statement to Mr. Levinsohn, in which Mr. Levinsohn said that he told you that he had heard them say that he could not build over 30 feet, and that he said to you, "If that is the case, I cannot have what I want to have and what I need to have," etc.; that was the occasion to which you were referring when you were there in his store?

A. Yes, sir.

Q. And it was then that he showed you the picture?

A. Yes, sir.

Q. And did you say anything to him about the picture?

A. I complimented him on the fact that he was going to build such a nice building on the corner.

Q. And he did tell you that he wanted to build over the line?

A. He said "The only thing is, I have to go over the building line;" and then I said, "You are in wrong now."

Q. He told you that; and did you say to him that it was a very nice picture?

A. Yes, sir.

Q. "A very nice picture of the building you are going to have?"

A. Yes, sir, I said that to him in substance.

Q. And in speaking about this building line, did you say anything about your own personal feelings about it?

A. I stated to him that I had lived in a town where there was no building line.

Q. That is not responsive; did you say to him how you felt personally about it?

A. Yes, sir.

Q. And what did you say to him?

A. I said I was very strongly in favor of maintaining a building line at any cost.

Q. You were friendly to Levinsohn at that time?

A. Yes, sir.

Q. And before that you knew that he had this building in contemplation, didn't you?

A. That was the first intimation that I had of it.

Q. Hadn't you had the city surveyor go and survey and ascertain the building line on that lot before that time?

A. No, sir.

Q. You were Mayor of the city at that time?

A. Yes, sir.

Q. And I suppose at this meeting of October 11th, you told the Council?

A. There was no meeting of the Council

Q. The meeting that followed October 11th.

A. The meeting following it, yes, sir.

Q. You told the Council everything that you had learned about the matter from Mr. Levinsohn?

A. Yes, sir.

Q. And you had this survey made by which the stakes were fixed under your own direction, even before Council met?

A. Yes, sir.

Q. So that was, probably, within a day or two after October 11th?

A. I would say within a week.

Q. Now, in point of fact, the old gentleman does not have any account at your bank and never has had since you were there, has he — Mr. Levinsohn, I mean?

A. He continued the account for sometime after I went there; just how long I cannot state; the son has had —

Q. (BY THE COURT): You gave me the impression that you stated on your rebuttal examination, that the the old gentleman here, Mr. Levinsohn, had an account in the bank up to the time of the starting of this suit?

A. No; I dealt with him; I dealt with Mr. Levinsohn, not he with me.

FURTHER CROSS, BY MR. WILSON:

Q. As a matter of fact, Mr. Poole, Mr. Levinsohn has not had an account in your bank in years, has he?

A. Not an active account.

Q. Has he had any account?

A. He might have a few cents balance.

Q. But not an active account?

A. No, sir.

Q. Do I understand you to say, that Mr. Levinsohn, Jr., had an account in your bank?

A. Yes, sir.

Q. And has had since you have been cashier?

A. Yes, sir.

Q. At the present time, does he carry an active account?

A. No, sir, not since the starting of this suit.

Q. Did I understand you to say that you had the kindest sort of feeling towards Mr. Levinsohn?

A. I have no hard feelings towards either of them.

Q. They had a contract with the borough to supply rubber boots to the men who were working on the sewer contract, didn't they, at one time?

A. There was no contract at any time.

Q. Well, they did supply rubber boots, didn't they?

A. They supplied rubber boots to the contractor, not to the borough.

Q. But the borough paid for them, didn't it?

A. The borough took over a defaulting contract and completed it, and it was through that process that boots were purchased from different storekeepers in town.

Q. And that was at the time when Price was completing the sewer contract as the servant of the borough?

A. Yes, sir.

Q. And Mr. Price, as the agent of the borough, was buying rubber boots of these people, wasn't he?

A. Yes, sir.

Q. And the borough was paying for them?

A. Yes, sir.

Q. And after this suit was commenced, the purchase of those rubber boots by Mr. Price, from the Levinsohns, stopped, didn't it?

A. I don't know if that is so; Mr. Price had entire control of that.

Q. To make it more explicit, did not Mr. Price stop buying those boots from the Levinsohns because you told him?

A. No, sir, Mr. Price had the entire power in the contract.

Q. You did not know that he had stopped?

A. No, sir, I knew nothing about that.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Mr. Levinsohn, the defendant, has testified that you did not tell him that if he went over the restricted line he would have trouble ——

A. I did tell him right from the start; there was no question of where I stood on the building line question.

Q. You say you did tell him?

A. I did.

Isaac Traub Recalled — Direct

ISAAC TRAUB recalled.

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Have you ever built any houses in Belmar, or any other buildings than that which you constructed for this defendant?

A. Yes, sir.

Q. How many others?

A. Before this one?

Q. Well, before or since this one; how many have you built on Tenth Avenue; how many buildings have you erected on Tenth Avenue?

A. Three new ones, and we remodeled one.

Q. Since when?

A. On Tenth Avenue.

Q. Since when?

A. I could not remember.

THE COURT: Are you opening up the case?

MR. WILSON: We want to object to any line of inquiry from this witness which the last question has fairly suggested; what he may have done in construction on Tenth Avenue, it seems to me is not rebuttal; it is a reopening of the entire case.

Q. What was the character of the buildings that you erected on Tenth Avenue?

A. All dwellings except the Levinsohn ——

BY MR. SNEDEKER:

Q. Were they all built within the restricted line?

A. I think so.

Isaac Traub Recalled — Cross — Re-direct

CROSS-EXAMINATION BY MR. WILSON:

Q. When were they built; did I understand you to say you built three new houses and remodeled one in addition?

A. Yes, sir.

Q. Now, when did you build those three new houses?

A. I could not remember the time; I should think it was about five years ago; we built one of them between Railroad Avenue and River Avenue, and last year we built one at A Street and Tenth Avenue.

Q. When did you build the third?

A. And Levinsohn's was the third.

Q. So that you really located only two new buildings besides the Levinsohn's?

A. Yes, sir, at Tenth Avenue.

Q. And whether they were inside of or outside of that building line, you really don't know?

A. No, sir.

RE-DIRECT EXAMINATION BY MR. FOSTER:

Q. Why don't you know?

A. Because we were setting these houses on a line with the other houses.

Q. With the exception of Levinsohn's house, you did not intentionally attempt to get over the building line, did you?

MR. WILSON: Objected to.

THE COURT: The objection will be sustained.

Q. In the construction of these other houses, aside from the Levinsohns', did you or didn't you, attempt to keep within the building restriction?

MR. WILSON: That is wholly immaterial, what he attempted to do.

THE COURT: The objection is sustained.

BY THE COURT:

Q. Did you know about this building line?
A. Yes, sir.

FURTHER RE-DIRECT, BY MR. FOSTER:

Q. Did you keep within it or didn't you, when you built these houses?
A. We kept within it, because we were positive there was plenty of room; we kept within it.
Q. What were the numbers of these houses, the street numbers, the house number?
A. One of them was 200 Tenth Avenue.
Q. What was the other one?
A. The others I don't know.
Q. Whose house was it?
A. The other one belonged to Samuel Michaelson.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. Now, what did you understand to be the building line, how far back from the curb?
A. Well, I heard people saying 40 feet from the curb to the main house.
Q. Now, you kept the main house, then, back of 40 feet?
A. Well, about.
Q. That is, in building the two new houses to which you have referred?
A. The first house we built for Samuel Michaelson: that was the first house we built in Belmar, and we did not know anything about the building line, and that was six years ago, and Michaelson did the laying out himself.
Q. And six years ago when he laid it out, you did not know anything about the building line?

A. I did not know anything about it.

Q. And is the Michaelson the one No. 200?

A. No, sir.

Q. Now, directing your attention to No. 200, whose house is that?

A. A fellow by the name of Frank Smith, from Newark, New Jersey.

Q. Did you get the main body of that house back from this building line or about on the building line?

A. Yes, sir, because the mason was right there, and he helped us measure back and lay out the foundations; he practically laid out all the measurements.

Q. Now, in front of the main body of the house, there was a porch, wasn't there?

A. Yes, sir.

Q. And that porch extended beyond the building line and out towards the street?

MR. SNEDEKER: Same objection.

A. Yes, sir, a matter of nine or ten feet, a ten foot porch.

A. It was supported by piers and a lattice between those piers.

Q. And was the porch enclosed?

A. No, sir, only by a rail between columns.

Q. And your effort was in the building of this house to get the face of the foundation as near as you could to the 40 foot line?

A. Yes, sir.

Q. Now, did the eaves of this house extend further out towards the street than the face of the foundation line?

MR. FOSTER: Same objection.

THE COURT: The objection is overruled.

A. Yes, sir.

Isaac Traub Recalled — Re-cross

Q. How much beyond the face of the foundation?

A. Three feet six inches.

Q. Were there any bay windows in the upper part of this house?

A. No, sir.

Q. Was the piazza one story or two stories?

A. One story on Tenth Avenue.

Q. I am going to appeal to your Honor's grace as to this question: I will ask you, did you attend a meeting of the Council about the time, or just before this building was started, at which Mr. Levinsohn's son was present?

MR. FOSTER: Objected to; it is not cross-examination; it is going into a subject we have not touched upon.

MR. WILSON: I want to make him my own witness for this question.

A. I was there when Charlie Levinsohn was there at that meeting.

Q. Now, I want to ask this question: whether at that meeting Mr. Charlie Levinsohn told the Council if they bothered with him that he would get them indicted?

A. (No answer.)

BY THE COURT:

Q. When was the meeting that you saw Charlie Levinsohn there?

A. I could not remember.

Q. What time in the year?

A. It was at the time when we had just started the building.

FURTHER RE-CROSS, BY MR. WILSON:

Q. And was the building talked of at that time in the Council?

A. Yes, sir.

Q. Did Mr. Charlie Levinsohn say to them that if they bothered him about the building, that he would have them indicted?

MR. SNEDEKER: Objected to as not proper cross-examination.

THE COURT: That is conceded, that it is not.

MR. SNEDEKER: Then we object to it on the ground that he has not sufficiently fixed the time to know that it was at the same meeting that we have been talking about.

THE COURT: I will sustain the objection on that ground.

Q. Did you attend more than one meeting at which Mr. Charles Levinsohn was present?

MR. SNEDEKER: I object to that as immaterial.

A. Yes, sir, I did.

Q. Did you attend two meetings at which Charles Levinsohn was present, or one meeting?

A. Just one meeting; I used to go to Council meetings once in a while.

BY THE COURT:

Q. Do you know whether Mr. Levinsohn was present or not when you attended these meetings once in a while?

A. Very seldom he went down there.

Q. How many people were present generally, when you went there?

A. Ten or twelve or fifteen.

FURTHER RE-CROSS:

Q. Have you seen Charlie Levinsohn there at more than one meeting?

A. No, sir.

Q. Was that at a meeting just about the time the building was begun, and at which this building was discussed in the Council?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. FOSTER:

Q. How long did you stay at the meeting?

A. Until the meeting adjourned.

Q. What time did you get in?

A. I think before they started.

Q. Who was in when you went in?

A. I could not remember.

Q. Was the Mayor there?

A. Yes, sir.

Q. When you got in there?

A. Yes, sir.

Q. How many of the Council were there?

A. I think there were five or six Councilmen.

Q. Were there any people, any citizens sitting around there?

A. Yes, sir, quite a few; I could not remember now.

Q. Could you hear all that was said that night by the Mayor and Councilmen and others; how far were you from Mr. Levinsohn?

A. I was about two seats from him.

Q. Did he get up on his feet and make a speech?

A. Yes, sir, he did.

MR. WILSON: I withdraw the witness for a moment, for the cross examination, — just step down.

Walter K. Potter — Direct

CHARLES LEVINSOHN, JR., recalled.

MR. FOSTER: We have not finished our case yet; you are breaking in on our case.

ISAAC TRAUB resumes the witness stand.

MR. SNEDEKER: I think we ought to be orderly. Now, we are through with that witness, and we will call our next witness.

(Witness retires.)

WALTER K. POTTER, sworn in Rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. What is your business?
A. Civil engineer and surveyor.
Q. How long have you been a civil engineer and surveyor?
A. Since 1906.
Q. And your place of business is where?
A. Manasquan, New Jersey.
Q. And how near is that to Belmar?
A. About five miles.
Q. Have you made surveys in the Borough of Belmar?
A. Yes, sir.
Q. Many of them?
A. Quite a few.

MR. SNEDEKER: Do you want me to qualify this witness further, Mr. Rhome?

MR. RHOME: I don't know him.

Q. Are you a graduate of some school?
A. I took a two years' special course in Rensaeller Polytechnic Institute.

Q. Did you graduate?

A. I finished my two years in that course; there was no diploma and no degree given with that course; that was in 1904.

Q. Have you followed your profession ever since?

A. Yes, sir.

Q. And have you been continuously acting in the capacity of a surveyor since that time?

A. Yes, sir.

Q. How many surveys do you suppose you have made in that time?

A. I should judge 100 a year.

Q. Have you surveyed the houses, or rather the buildings on Tenth Avenue in the Borough of Belmar?

A. Yes, sir.

Q. When did you survey them?

A. A year ago last winter; I can tell better by referring to my notes. (Witness steps down and goes to get his notes.) The exact dates I cannot give you at the present time; I kept them in my day book and that is at home.

Q. But it was in December?

A. I think it was.

Q. A year ago?

A. Yes, sir.

Q. That is December, 1914?

A. I don't know that it was in December, but it was in the winter of a year ago; I have the exact dates at home.

Q. Will you state how you made these surveys; did you use a registered tape or standard tape?

A. I used a registered tape.

Q. And that is a tape that has been sent to Washington and has been registered?

A. Yes, sir.

Q. How many buildings did you find on Tenth Avenue?

A. 99 houses.

Q. Did you survey all the houses, every one of them?

A. Every house on Tenth Avenue.

Walter K. Potter — Direct

Q. Will you look at your notes as to house No. 103?

MR. WILSON: My impression is, that these gentlemen introduced a large number of witnesses who swore that there was a building line that had been recognized, and the buildings had been erected in conformity with it; that was a part of their affirmative case — that was one of the fundamental principles upon which their equities rested. It seems to me, that in that posture of their affirmative case, that they are obliged to exhaust themselves on testimony of this character; I am now objecting to the general line of the examination. Their equity must, of necessity, be predicated, in part, upon the theory, first, that there was a building line, and second, that there had been a general conformity to that building line. Now, it is a perfectly legitimate defence for us to say there was no general conformation of this building line. That is our answer to their affirmative case; and, in order to establish it, we put upon the witness stand witnesses and surveyors, and when we have reached that posture — having met their issue — when we have reached that posture, having their testimony, now, in response to their affirmative case, these gentlemen ask the Court to permit them to reopen their case in chief. (Continues argument.)

THE COURT: I will only allow it insofar as it is contradictory of your surveyor's evidence offered as to the observations of this building line on Tenth Avenue, that is all; I won't let it go any further.

MR. WILSON: My objection is, that our testi-

mony became relevant in this case merely as meeting their case in chief, and you are permitting them, in effect, to reopen their case.

THE COURT: I will allow that testimony to be taken on that point, and you may note an objection to this line of testimony.

MR. WILSON: I think it is a situation where your Honor's discretion is final.

Q. Now, will you look at your notes on No. 103, street number 103; Mr. Allen, the surveyor, testified that the foundation was 4/100 feet over the line; what do you say?

A. I found it clear of the line on both the West and the East corner.

Q. And you measured both corners of the house?

A. Yes, sir.

Q. Will you look at your notes, No. 105 — Mr. Emlen testified that the foundation was over one inch — extended over one inch; and Mr. Allen testified that the foundation extended over 12 1/100 of an inch; what do you say it was?

A. The West corner of the house extends over the line one-half an inch; the East corner, one inch.

Q. Now, is that measuring from the house line or from the curb line?

A. That was measuring from the line of the monuments.

Q. Did you measure also from the curb line?

A. I did, yes, sir, the West end.

Q. How did you find it as to the curb?

A. The West corner of the house was exactly 40 feet from the curb; and the East end was 40½ inches.

Q. So that measuring it from the curb, it was within the restriction, is that correct?

A. It would be clear.

MR. WILSON: I object to that question.

THE COURT: Objection overruled.

Q. No. 503, Mr. Emlen testified the foundation was over 1⅛ of an inch; Mr. Allen testified that it extended over 21/100 of an inch — Mr. Allen's testimony was that it was 20/100 of a foot over the building line. What do you say about it?

A. The East side of that house is 1¼ inches clear of the line, and the West side is 1¼ inches over the line.

Q. Did you measure that from the curb?

A. From the curb it is all clear; the West side is 40 feet 1¼ inch; and the East side 40 feet 3 inches.

Q. No. 511 — Mr. Emlen says the foundation is over 5 inches; Mr. Allen says the foundation is over 51/100 of a foot?

A. The West corner of the house is over 6¾ inches; the East corner is over 6 inches from the line.

Q. What do you mean by that?

A. Back from the restricted line.

Q. And the other was 6 inches over?

A. Yes, sir.

Q. Now, measuring from the curb, how far back is the line from the curb — the foundation wall, from the curb?

A. In measuring from the curb the West side of the house measures 40 feet exactly; the East side 40 feet 2 inches.

Q. No. 603 — Mr. Emlen testified that the foundation was 3 inches over; Mr. Allen testified that it was 22/100 feet over; what do you say about it?

A. The West side of that building is 4¾ of an inch over the line; the East side is 4½ inches.

Q. That is measuring from where?

A. From the line.

Q. From the building line?

A. Yes, sir.
Q. Measuring from the curb?
A. Measuring from the curb, the Westerly side is 1¼ inches over; the Easterly side is 1¼ inches clear.
Q. So that the house is not parallel with the street?
A. No, sir.

RECESS TO 2 P. M.

AFTER RECESS

WALTER K. POTTER resumes the witness stand.

MR. FOSTER: There is a class of testimony that we contemplate offering to-morrow, and that is, as to the feasibility and expense of either removing this building back on the three feet more of land that Mr. Levinsohn owns; and that is the only line that we need occupy your Honor's attention with to-morrow.

MR. WILSON: We are striving now to save the Court time.

THE COURT: I don't care to take the evidence on the question of the feasibility of the scheme at present.

MR. WILSON: I wish to withdraw this witness for the present.

THE COURT: All right.

WILLIAM B. BAMFORD, sworn in Rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. You know the defendant in this action?

A. I do, yes, sir.

Q. He was, at one time, a tenant of your property at the corner of F Street and Tenth Avenue in the Borough of Belmar?

A. Yes, sir.

Q. And during the time that he was a tenant in that property, did you have any conversation with him in regard to your building out your building on the Tenth Avenue side; and who brought that to your attention; did you suggest it, or did he suggest it, if there was such a conversation?

MR. WILSON: Objected to as being immaterial, incompetent and irrelevant.

BY THE COURT:

Q. When was the conversation; can you fix about the time when there was such a conversation?

A. Well, there were several conversations of the same general character.

Q. What year?

A. There was one within a year of the time that he moved, 1913; within at least a year or two before that, there was more than one.

Q. Mr. Levinsohn has testified here to-day, that he never had any conversation with you or any member of your family in regard thereto.

MR. WILSON: He has not given any such testimony.

THE COURT: Reframe the question.

William B. Bamford — Cross — Re-direct

Q. Did the defendant in this action, Mr. Levinsohn, request you to extend the Tenth Avenue side of your building beyond the building line?

A. He did, yes, sir.

Q. How many times?

MR. WILSON: Our objection goes to all this line of testimony as immaterial.

Q. How many times did he make such a request?

A. Several — at least three.

CROSS-EXAMINATION BY MR. WILSON:

Q. Was he asking to have a show window put in there; was that what he wanted?

A. He asked both to have a show window and to have a larger extension from 15 feet to 20 feet.

Q. Did he want to have the show window on F Street also?

A. The show window that I was referring to, was on Tenth Avenue.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. When he made this request, was there any conversation between you and the defendant in regard to this building line?

MR. WILSON: Objected to as not having any foundation laid for it.

THE COURT: I think that is so.

Q. How close to the building line was your building on Tenth Avenue?

A. I should say it was approximately on the building line.

Q. And the 15 or 20 feet extension of that side which he asked you to make was beyond the building line?

A. Yes, sir.

RE-CROSS, BY MR. WILSON:

Q. What is your number on Tenth Avenue?

A. The structure itself is on the corner of F Street and Tenth Avenue.

Q. Hasn't it a number on Tenth Avenue?

A. Our house, which is directly behind the store, is No. 614; so that the number, whatever it would be, would be from 600 to 614; it is the corner.

Q. Now, Mr. Bamford, you are a member of the Council?

A. At the present time, yes, sir.

Q. And you are not here, I presume, under subpoena?

A. I am, yes, sir; I received $2.00 this morning.

Q. You are a member of the Council at the present time?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. FOSTER:

Q. You were not a member of the Council in October or November, 1913?

A. No, sir, I have only been a member since July.

Q. And you were not at this meeting at which Mr. Levinsohn, Jr., attended?

A. I was not here this morning.

Q. You say your building is approximately on the building line on Tenth Avenue; whether it is or not you don't know, I suppose?

A. Well, I have had it surveyed four times in the last six years; the concessus of opinion is, that it is on or back; one of the recent surveys assumed that it might be two inches over; that is why I used the word "approximately."

Q. So that, in the four surveys, we are left in doubt as to whether you are two inches over or four inches behind?

A. Yes, sir.

Q. And I suppose you don't know whether those measurements were made with a standard or registered tape?

A. (No answer.)

RE-CROSS EXAMINATION BY MR. WILSON:

Q. But why did you have it measured four times?

A. There were special reasons; in one case we had it measured when Mr. Weinstein built the store adjoining it on F Street; there was a question of line on F Street, and at that time I had it surveyed by Mr. Shafto to check a survey that he had made a number of years previous to that.

Q. How far is your place that you have been testirying to, how far is it away from their new store?

A. It is on the opposite corner — on the same side of the street.

Q. It does not really cut off your view up and down the street, does it?

MR. FOSTER: Objected to; this is not cross-examination.

THE COURT: It is not cross-examination.

MR. WILSON: I am not so sure of that; this gentleman says his building is approximately on the line; now, according as it is or is not, it might or might not cut off his view.

THE WITNESS: We are on the other side of the street, directly across; we are on the other side.

Q. You are not catacornered across?

A. No, sir.

Q. If that is true, and the Levinsohn place were over the line nearer the street than it ought to be, it would cut off the view of your place, wouldn't it?

A. No, sir.

Q. Are you not both on the same side of the street?

A. We are on the same side of F Street, but on opposite sides of Tenth Avenue.

WALTER K. POTTER resumes the witness stand.

FURTHER DIRECT EXAMINATION BY MR. SNEDEKER:

Q. I was asking you about No. 603; did you give your answer?

A. Yes, sir.

THE COURT: Why not put general questions to this witness; it will shorten it; will Mr. Wilson object to that?

MR. WILSON: I assume that this witness' attention is being directed merely to those measurements of Allen and Emlen which he found to be incorrect; he did not find all of them to be incorrect as his story appears, but here and there one, and I do not see how else the witness could be examined.

Q. Mr. Potter, you say that on Tenth Avenue, there were 99 buildings, and that you surveyed all of them; how many did you find of that 99 that were over the restricted line?

A. I found ten that were wholly over the line, and five that were partly over with regard to their front wall facing Tenth Avenue, ten wholly over and five partly over.

Walter K. Potter — Direct

Q. When you have said " wholly over," what do you mean by " wholly over? "

A. No part of the front of the building but what projected across the line.

Q. When you said " partly over " what did you mean?

A. One portion of the front wall would be clear, and another portion of it might be slightly over.

Q. Now, in that number of buildings, did you include the Levinsohn's building, which is in question here?

A. Yes, sir.

Q. You included that as one of the buildings that was wholly over?

A. Yes, sir.

Q. And in that number that you have stated of ten being wholly over and five partly over, did you include No. 608?

A. Yes, sir, it is very much over.

Q. You did include No. 608 in this number?

A. Yes, sir.

MR. WILSON: Mr. Emlen showed that it was nine inches.

Q. Now, will you state which were the ten that you found that were just over the line?

A. 26, 28, 210, 214, 218, 318, 516, 608, the Levinsohn building, the Osborne House, making a total of ten.

Q. As to the five that were partly over, what numbers were those?

A. 110, 216, 603, 609, 613.

Q. Now, No. 110, how did you find the East corner of the foundation wall?

A. The East wall was clear from the curb.

Q. What about the West wall?

A. 1¼ inches over from the curb.

Q. 603; how did you find the East wall there?

A. 603 — that is clear from the curb.

Q. How about the West wall?

A. That is 1¼ inches over.

Q. No. 609, what about the East wall?

A. It is clear from the curb; and the West wall is 1¼ inches over.

THE COURT: None of these cases are *res adjudicata* as to the facts; and, of course, Vice-Chancellor Howell and Vice-Chancellor Emery have both passed on this building line. I am inclined to think I shall take the evidence. I think the evidence is competent.

MR. WILSON: This witness now is giving testimony, and it is received upon the theory that it is rebuttal. I wish to call attention to the fact that the testimony of the surveyors offered by the defendant, were measurements back from the street awnings, which fixed the street line; and there cannot be any rebuttal of that testimony unless this witness does what he says he is able to do — give us his measurements from the street line; he is now proceeding to give measurements merely from the curb line, and you are going to put the record in such confusion that it does not stand as a contradiction at all. His measurements either do or do not approximately correspond with the evidence given by the other surveyors. If they do correspond, then why examine him as to that?

MR. SNEDEKER: I will tell you frankly. The only substantial difference is a slight difference between all these surveyors; the only substantial difference is the question of curb line, to a large extent. Now, when a man comes along there to put up his house, a contractor does not go and get a survey, in a

town of that size — very seldom; they measure right back from the curb, assuming it to be right; and when the house is put back clear within the curb, it shows an intention to keep within the restriction.

MR. WILSON: You are arguing your case.

THE COURT: Proceed, Mr. Snedeker.

Q. Will you look at your notes on No. 605, curb and street; on No. 605 Mr. Emlen testified that the foundation was 2½ inches out; Mr. Allen testified it was 37/100 feet out. Now, what do you say, giving your measurements from the monument line and the curb line?

A. The West corner of the house is three inches over the line; when I refer to the line, I refer to the restricted line, but clear from the curb line.

Q. How about the East side?

A. The East is 4¾ of an inch over the line — clear from the curb — it practically corresponds with the last surveyor, Mr. Allen ——

Q. No. 607, Mr. Emlen testified that that was 3¾ of an inch out; and Mr. Allen testified it was 35/100 feet out; now, what do you say, measuring both sides from the line and the curb?

A. Both the East and the West corner are exactly 4½ inches over the line, clear from the curb.

Q. Now, from the other line?

A. Both lines the same, East and West.

Q. No. 609, Mr. Emlen testified it was 4 inches over, and Mr. Allen testified 43/100 of a foot; what do you say as to both the East and the West line?

A. The West line is 4½ inches over from the line, and 1¼ inches over from the curb. The East line is 5½ inches over from the line, but clear from the curb.

Q. No. 613, Mr. Emlen testified was within the line; Mr. Allen, however, said that the foundation was 81/100

of a foot over the line; what do you say as to both the East and West corners of the house?

A. That is a house that has a door on the West corner; the fact of the foundation of the door is 2 feet 9 inches over the line; and 2 feet 4 inches over the restricted area, measured from the curb.

Q. What do you say as to the main foundation wall?

A. That is clear, in both instances.

Q. Mr. Emlen testified that the American House—No. 615, was 2¼ inches over. Mr. Allen testified it was 8/100 feet over; what do you testify?

A. The West corner is 2 inches over the line, and clear from the curb; the East corner is 2¼ inches over and clear from the curb.

MR. WILSON: I am willing to do this, gentlemen, if it will facilitate things any: I am willing that this witness shall tabulate the results of his measurements and sign it, and attach his affidavit to it, or even without that, and let it go in as his statement. We can save time that way.

BY MR. WILSON:

Q. You measured the porches, didn't you, in every case?

A. Only bay windows.

Q. You did not measure the porches?

A. No, sir.

THE COURT: How many more buildings have you got?

MR. SNEDEKER: 15 or 20.

FURTHER DIRECT, BY MR. SNEDEKER:

Q. The moving picture place, Mr. Emlen testified was

clear; Mr. Allen testified it was 8/100 feet over; what do you say?

A. The West corner from the line is over 3½ inches, clear from the curb; the East corner is 2½ inches over, but clear from the curb.

Q. No. 102, Mr. Emlen testified was one inch over; Mr. Allen testified it was 11/100 feet over; what do you say to that?

A. No. 102 — the West corner is clear from the line; also clear from the curb; the East corner is 2½ inches over from the line, but clear from the curb.

Q. No. 110, Mr. Emlen testified was clear; Mr. Allen testified it was 29/100 feet over; what do you say?

A. No. 110, the first corner is 3½ inches over from the line, and 1¼ over from the curb; the East corner is ¾ of an inch over from the line, clear from the curb.

Q. No. 206, Mr. Emlen testified that it was over 2 feet and 1 inch. Mr. Allen testified it was over 2 feet and 5/100 feet; what do you say?

A. The West corner is 2 feet over from the line; the East corner is 2 feet and ½ an inch over the line; and in both instances measures 1 foot and 9½ inches over from the curb.

Q. No. 208, Mr. Emlen testified was 2 feet over; Mr. Allen testified that it was 2 feet 8/100 feet; what do you say?

A. The West corner is 2 feet over from the line; the East corner is 1 foot and 11¾ inches over from the line; from the curb is 1 foot 8¼ inches. In this case, where the building line was apparently very much from the curb, I made one measurement simply as a check.

Q. No. 210; Mr. Emlen testified it was 2 feet 2 inches over, and Mr. Allen testified it was 2 feet and 17/100 feet; what is your statement?

A. The West corner is 2 feet 2½ inches over from the line; the East corner is 2 feet 2¼ inches; and 1 foot 2¼ inches over from the curb.

Q. No. 214, Mr. Emlen testified was 1 foot over; Mr. Allen testified it was 1 foot and 18/100 of a foot; what do you say?

A. The West corner is 1 foot 1¼ inches over from the line; the East corner is 1 foot 1¼ inches over from the line, and no feet 9½ inches over from the curb.

Q. No. 216, Mr. Emlen testified was 1 foot 1 inch over; Mr. Allen testified it was 1 foot and 5/100 feet over?

A. The West corner is 1 foot over the line, and the East corner was clear; they had a house with quite a jog in the front, making one portion clear of the line, and the West corner was 8½ inches over from the curb.

Q. What about the East corner?

A. Well, the East corner had a jog and was clear from the line and the curb as well.

Q. No. 218, Mr. Emlen testified that it was 1 foot and 15/100 feet over; what do you say?

A. The West corner, 1 foot over from the line; the East corner 1 foot 1½ inches over from the line; and 8¾ inches over from the curb.

Q. No. 302, Mr. Emlen says that it is 5¼ inches over; Mr. Allen says that it is 33/100 of a foot over; what do you say?

A. The West corner is 4¾ of an inch over from the line and clear from the curb; the East corner is 3¾ of an inch over the line, but clear from the curb.

Q. 304, Mr. Emlen testified it was 5⅜ of an inch over, and Mr. Allen testified that it is 45/100 of a foot over; what do you say?

A. The West side is 6½ inches over from the line, clear from the curb; the East side is 5½ inches over from the line, but clear from the curb.

Q. No. 318, Mr. Emlen testified was 7¼ inches; Mr. Allen testified that it was 66/100 of a foot over; what do you say?

A. The West corner is 7¾ of an inch over from the line and 2 inches over from the curb; the East corner is

7¼ inches over from the line, and 2 inches over from the curb.

Q. No. 400, Mr. Emlen testified is 4¾ of an inch over; and Mr. Allen testified it is 38/100 of a foot over; what do you say?

A. The West corner is 3 inches over from the line, but clear from the curb; the East corner is 5¼ inches over from the line, clear from the curb.

Q. No. 416, Mr. Emlen testified was clear, and Mr. Allen testified it was 13/100 of a foot over; what do you say?

A. The West corner is clear from the line and clear from the curb; the East corner is 1 inch over from the line, but clear from the curb.

Q. No. 418, Mr. Emlen testified was 2 inches over; Mr. Allen testified that it was 20/100 of a foot over; what do you say?

A. The West corner is 3 inches over from the line and clear from the curb; the East corner is 1¼ inches over from the line, but clear from the curb.

Q. No. 502, Mr. Emlen testified was 1 inch over; Mr. Allen testified that it was 7/100 of a foot; what do you say?

A. It is entirely clear in both instances.

Q. Both the line and the curb?

A. Yes, sir.

Q. No. 516, Mr. Emlen testified was 6 inches over; Mr. Allen testified that it was 5 7/100 of a foot over?

A. The West corner is 7 inches over from the line and 7½ inches over from the curb; the East corner is 3 inches over from the line and 1¼ inches over from the curb.

Q. No. 604, Mr. Emlen testified was 3 inches over; Mr. Allen testified that it was 41/100 of a foot over; what do you say?

A. The West corner is 1¼ inches over from the line and clear from the curb; the East corner is 6½ inches over from the line, but clear from the curb.

Q. No. 612, Mr. Emlen testified was clear; Mr. Allen that it was 44/100 of a foot over; what do you say?

A. The West corner is 5½ inches over from the line, but clear from the curb; the East corner is 5½ inches over from the line, clear from the curb.

Q. No. 614, Mr. Emlen testified was 3 inches over on the West side; 3⅜ of an inch over on the East side; Mr. Allen testified that it was 36/100 of a foot over on the East side, and 12/100 of a foot on the West side; what do you say?

A. The West side is 3 inches over from the line, clear from the curb; the East side is 5 inches over from the line, clear from the curb.

Q. Mr. Allen testified to the property that is occupied as a drug store; do you know what property that is?

A. I think that is the post office building; I have it down as the post office building, and also as No. 700; that would be the corner property.

Q. Mr. Allen testified — or Mr. Emlen testified, I mean, that that was free and clear; and Mr. Allen testified the East side was 49/100 of a foot over, and the West side 26/100 of a foot over.

A. The West side is 2½ inches over from the line and clear from the curb. The East side is 5¾ of an inch over from the line and clear from the curb.

Q. Do you know Mr. T. B. and J. Newman's property?

A. I don't recall it by name.

Q. Did you notice the character of the buildings No. 206, 208, 210, 212, 214, 216 and 218, as to whether they were old or new buildings?

A. They looked like very old buildings.

Q. What, in your opinion, were they?

A. They were, they had been erected quite a while.

Q. About how many years, approximately?

MR. WILSON: No one can tell with any degree of accuracy.

BY THE COURT:

Q. What do you mean by "very old buildings"?
A. At least 25 years old.

FURTHER DIRECT:

Q. Now, in making this survey of Tenth Avenue, did you discover whether or not Tenth Avenue is open beyond River Avenue.
A. It is not.
Q. How deep is that embankment?
A. So deep that a vehicle could not go up and down.
Q. How many feet do you think it drops there?
A. At least ten feet.
Q. And is broken off quite sharp?
A. Yes, sir.
Q. There has been testimony in regard to monuments being set on diagonal corners of the streets. Do you know what the exact measurement should be from one of those monuments — diagonally across to the other?
A. What do you mean?
Q. Do you know what the correct measurements of those monuments is?
A. Yes, sir, they should measure 91 feet 7¼ inches.
Q. Did you measure the monuments at A Street?
A. Yes, sir.
Q. And what did you find the distance to be between those monuments at A Street?
A. 92 feet 2¾ of an inch.
Q. Did you measure the distance between the monuments at B Street?
A. Yes, sir.
Q. What did you find the distance to be?

MR. WILSON: That is objected to as incompetent, irrelevant and immaterial.

THE COURT: What is the object of the testimony?

MR. SNEDEKER: The object is this: here is Mr. Allen, an out-of-town surveyor, comes down there, and he relies on these monuments, and if we find them out of alignment, of course, the surveys are all out of alignment.

Q. What did you find the distance between the monuments on Tenth Avenue at B Street?

A. At B Street, the distance measured 92 feet 3¾ inches.

Q. What did you find the distance to be between the monuments on Tenth Avenue at D Street?

A. 92 feet 2¼ inches.

Q. Did you measure the distance between the monuments at F Street?

A. I only found one monument at F Street, on the Northwest corner of the intersection of F Street and Tenth Avenue.

Q. How far away are these houses that are numbered 206 to 218, from the defendant's property?

A. In actual feet, do you mean?

Q. Just approximately; get as close to it as you can, approximately.

A. Somewhere in the vicinity of half a mile.

Q. How many blocks away?

A. Those houses in question lay between A and B Street, while the house in question lies at the corner of F and Tenth Avenue, making three blocks intervening.

BY MR. WILSON:

Q. Blocks about 500 feet apart?

A. I think they are 500 feet.

Q. Won't you look at your notes and see if you have

not the measurement of some of the blocks there — if you will look at your summary?

A. Yes, sir, the blocks are 500 feet.

Q. And they are three blocks away, these numbers?

A. Two intervening blocks; they are between A and B — three intervening blocks.

MR. WILSON: That would be 1500 feet.

FURTHER DIRECT:

Q. How wide are the streets — the alphabetical streets, A, B, C, D and E?

A. 60 feet.

Q. Then, even commencing at the Westerly side of B Street, from there to the Westerly side of C Street, would be 560 feet, wouldn't it?

A. Yes, sir, exactly.

Q. And to the Westerly side of D Street would be 560 feet more?

A. Yes, sir.

Q. And to the Easterly side of F Street would be 500 feet more?

A. Yes, sir.

CROSS-EXAMINATION BY MR. WILSON:

Q. Mr. Potter, how long have you been a surveyor?

A. Since 1906.

Q. Where did you get your professional education?

A. At the Renssaeler Polytechnic Institute, and I worked with Mr. Sagom, of Point Pleasant.

Q. How long were you in the Polytechnic Institute?

A. Two years.

Q. Are you the Borough Surveyor?

A. Which borough?

Q. Of Belmar.

A. I have been acting in that capacity.

Q. And you are acting in that capacity now?

A. Yes, sir.

Q. You succeeded Mr. Emlen as the borough surveyor?

A. Only just as I was called upon to do work; I am not officially appointed.

Q. When you made these measurements, did you have anyone help you?

A. Yes, sir.

Q. And who helped you?

A. A boy by the name of Edward R. Emmons, and a man named Joseph Emmons, brothers.

Q. How old are they?

A. I could not say positively, between 20 and 25 years of age.

Q. And what part did they play in the measurements?

A. Assisted me in measuring, holding the rod.

Q. Did they hold the tape?

A. At one end.

Q. Which end did they hold?

A. The forward end — the end with the ring on.

Q. That was the end that you measured from?

A. I read the tape in every instance.

Q. And the accuracy of your measurement would depend somewhat on the accuracy of their work at their end of the line?

A. Exactly.

Q. And you could not very well be at both ends at once?

A. No, sir.

Q. And are these young men here?

A. They are not here to-day.

Q. And these monuments that are set in the streets there to establish straight lines, you said, I think, that they should be a certain distance apart; how far did you say they should be apart?

A. 91 feet 7¼ inches.

Q. Where do you get that data from?

A. By figuring the hypotenuse of a right angled triangle.

Q. So that you having figured the hypotenuse of a right angle triangle, and having thus determined how far apart these monuments should be, you found them on the ground, put there presumptively by the borough authorities, and standing there for years as monuments; and yet you are of the opinion, because you worked out this problem on the hypotenuse of a right angle triangle, that they had been incorrectly placed; is that right?

A. With the understanding that the streets were 80 feet wide, they certainly were incorrectly placed.

Q. Where did you get the understanding?

A. Information I received from the borough officials.

Q. Interested in this litigation?

A. I don't know about that; I inquired of Mr. Hudnut.

Q. You have assumed that in every instance these monuments, according to your theory, were improperly placed?

MR. FOSTER: I object to that.

Q. Well, the three streets that you testified in respect to, you have assumed that those monuments were incorrectly placed, for the reasons that you have given.

MR. SNEDEKER: I object; he has not assumed anything; he testified to facts.

A. I testified as to what I found.

BY THE COURT:

Q. You have stated they were incorrectly placed, have you?

A. I don't recollect doing so; I say they are incorrectly placed if they are supposed to be placed on the lines of an 80 foot street.

FURTHER CROSS:

Q. Now, why, having determined on the street line, why did you measure from the curb as well?

A. I had made measurements to determine the curb line.

Q. That is not the question; the question is, why, having measured from the street line as fixed by the monument, why did you also measure from the curb line?

A. I wanted to see how the main foundations of the building tallied with the curb line.

Q. Did you think that that would give a more favorable showing to the city than the other measurement; is that the reason why you did it?

A. I did it as a test.

Q. You knew, as a matter of fact, that the curb line — don't your enlarged measurements show that the curb line is not uniform along that street?

A. Exactly.

Q. And probably never placed uniformly?

A. Yes, sir.

Q. And notwithstanding that, you took your measurements from the curb line; who told you to do that?

A. I believe I drew the attention of the borough officials.

Q. Who told you to do it?

A. I drew the attention of some of the borough officials?

Q. Who told you, I say?

A. I don't recollect; probably it was Mr. Cooper.

Q. How old are you?

A. I am 31 years old.

Q. Have you ever done work of this kind before?

A. Yes, sir.

Q. Where?

A. In the Borough of Manasquan.

Q. Where else?

A. Oh, Bayhead, Point Pleasant, Seaside Park.

BY THE COURT:

Q. It is customary to measure from measurements, is it?

A. Yes, sir.

FURTHER CROSS:

Q. Mr. Potter, you were asked to say whether Tenth Avenue was open down to the river, down to the water; you said it was not, didn't you?

A. Yes, sir.

Q. Now, was not the thing that prevented the street from being extended down to the water, the fact that there was a structure there known as Buhler's Pavilion, that cut the street off in whole or in part?

A. I don't know whether that prevented the construction of it; that I don't know; there is a building there.

Q. So that if you were on Tenth Avenue you could not walk into the water, because the building would stand in the way?

A. I think you could walk down into the water on one side of the building.

Q. Did you take a measurement of the front of the building?

A. No, sir.

Q. Does it extend the width of the street, would you say?

A. I think from memory that it extended out, probably, the South corner, somewhere in the vicinity of the center line of Tenth Avenue, produced Westerly.

Q. Tenth Avenue runs East and West?

A. Yes, sir.

BY THE COURT:

Q. What do you mean?

A. The center line, if continued West, would strike the house.

Q. It would strike at what part of the house?
A. About the southernly edge of the house.
Q. Then it does not extend across the entire street?
A. I don't think so.

FURTHER CROSS:

Q. You think it does extend at least half way across?
A. Yes, sir.
Q. What is the width of Tenth Avenue?
A. 80 feet, and there it extends about 40 feet, out into Tenth Avenue.
Q. That is only an approximation?

MR. FOSTER: I object to that question.

A. Approximately, yes, sir.
Q. The building would extend out about to the center of Tenth Avenue, if we assume that the center line of Tenth Avenue is projected Westerly into the river; that would be so, wouldn't it? That is what he said before.
Q. Does the building extend half-way across the street, according to a measurement from observation?
A. Approximately.
Q. Let me put it this way; if a man were on Tenth Avenue and traveling Westerly, that is, towards the river, would anything prevent him from pursuing his journey along Tenth Avenue, and passing from Tenth Avenue, would anything obstruct his journey in passing from Tenth Avenue into the water, unless it were this building to which you have referred?

MR. FOSTER: Objected to; it is not cross-examination and it is immaterial.

THE COURT: I think I will allow that question; you may answer it.

A. I cannot really state whether there would be any obstruction or not; at time when I worked there, there were days along the river shore I think you could walk down to the river, if you did not take up too much room.

Q. You mean, if the traveler did not take up too much room?

A. Exactly.

Q. Do you know anybody around there that could fill up an 80 foot street?

A. No, sir, not unless he was intoxicated.

THE COURT: Strike that question and answer out.

Q. Mr. Potter, you say there were ten of these buildings on Tenth Avenue that were wholly over; you mean by that, I think you said, where the foundation walls were wholly over?

A. Yes, sir.

Q. And you found five, I think you said, that were partly over?

A. Yes, sir.

Q. And you meant again, foundation walls?

A. Yes, sir.

Q. And did you make any measurement with a view of determining how many porches there were that extended out into this restricted area?

A. No, sir, I did not.

Q. Why didn't you?

A. I was not asked to.

Q. And did you make any measurements with a view of determining how many bay windows extended out into this restricted area?

A. I took the count of all bay windows in my notes.

Q. How many did you find extended into this restricted area?

MR. SNEDEKER: Objected to.

New Jersey State Library

THE COURT: The objection is overruled.

A. I have not made any count; I did not count them up; I have them all here.

Q. I want to ask you to state and count them now. Won't you count them some time?

A. Yes, sir.

Q. Did you make any measurement with a view of determining how many extensions of a permanent character on the second story of these various buildings — second stories above the first stories — extended into the restricted area; did you?

A. I have nearly every case where there are any extensions on the second story extending beyond the building line.

Q. Did you make such a measurement as I have last directed your attention to in respect to No. 306?

A. Yes, sir, there is an over-shot upstairs.

Q. Do you mean a solid room?

A. Yes, sir.

Q. And how far did that come out beyond the building line?

A. That measured from the building line 12 feet 4 inches; that would be the difference.

Q. And how much would that bring it inside the building line?

A. 7 feet 6 inches.

Q. Now, did you make any measurements, Mr. Potter, with a view of determining how much the land of these houses, in any case, encroached upon the building line?

A. No, sir.

Q. Did you make any measurements in cases where bay windows extended into the building lines and were made to rest upon a solid foundation?

A. I made measurements to all bay windows.

Q. And did you in your measurements discriminate between those that had solid foundations and those that did not?

A. I measured them all and made references as to whether they had a solid foundation or whether they did not.

RE-DIRECT EXAMINATION BY MR. SNEDEKER:

Q. When the young man had the line, one end of it, you had hold of the other end of the line?

A. Yes, sir.

Q. Did you, in each instance, see whether the young men, in holding the line, was holding it in the proper way?

A. I went to the house and designated the house that I wished him to hold the tape on, and the tape is so arranged that when butted up against the building, it registers the distance, so that by following that way, I could tell whether he was solidly against the building or not, and whether his hand moved. When he gave me the word that he was ready, I knew he was ready, and I dropped my plumb bob over my point in each instance.

RE-CROSS EXAMINATION BY MR. WILSON:

Q. Is that one of those registered tapes?

A. Yes, sir.

Q. And when he held this end of it against the side of the house, you took the tape out to the curb?

A. The street line, as the case might be, and read the tape out there.

Q. And I suppose every time before you read it, you would give it a little jerk like that, to see if he was against the building?

A. Quite a space before I did.

Q. And then you would give it a little jerk to see whether he was holding it tight or not?

A. Yes, sir.

Q. And where did he hold it, against what part of the building?

A. The main foundation.

Q. And did you find any instance where the wood structure on the foundation was extended beyond the brick foundation?

A. Yes, sir.

Q. That was so in almost every instance, wasn't it?

A. Oh, the wooden foundation extended over.

Q. Quite frequently, and extended over anywhere from four to nine inches?

A. No, sir, in the bulk of cases it extended about from 1½ inch to 3 inches.

Q. And if you had measured from the woodwork at the foundation, you would have been just that much nearer the building line, wouldn't you?

A. Yes, sir.

Q. And did you measure from the brick rather than the woodwork, so as to make the most satisfactory showing to your clients and employers?

A. I measured as I was instructed.

Q. And you had been instructed by Mr. Cooper to measure main foundations?

A. Yes, sir.

Q. Now, at whose suggestion was it that you should measure from each corner of the house, from the two corners of the house?

A. That was purely my own.

Q. You did not measure from the center of the house in any case?

A. Only where there was an outcropping of the building.

Q. A measurement from the center of the house would have given a better notion of the average of the encroachment than the method that you pursued, wouldn't it?

A. Well, in lots of places it was impossible to measure the center of the foundation; I would have had to have a pick and shovel and to have burrowed under the porches to get to the foundation, and to have knocked the lattice work out.

W. K. Potter — Re-cross C. Levinsohn Recalled — Direct

Q. There were occasions where you could have done it?

A. Very few, if any; I don't know of any.

COMPLAINANT RESTS, ON REBUTTAL

MR. FOSTER: We rest, with the reservation of the right to offer the certified copy of the map that Mr. Snedeker referred to this morning; and whatever exhibits we do not offer, we are willing to offer.

SUR-REBUTTAL

CHARLES LEVINSOHN, recalled on sur-rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Directing your attention to the occasion when you were present before the Borough Council, when it is said that you defied the Council and told them if they continued to be active, you would have them indicted; was Mr. Traub in the Council meeting on the only occasion when you ever addressed the Council in respect to the matter of your building?

A. Yes, sir.

Q. And when was that?

A. In the early part of October.

Q. And did you, on that occasion, address the Council in respect to this matter?

A. Yes, sir.

Q. And that is the only time you ever did address them?

A. Yes, sir.

Isaac Traub Recalled — Direct

ISAAC TRAUB, recalled in sur-rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q. Were you before the Council meeting sometime in October, early in October, when Mr. Charles Levinsohn was there, and when he addressed the Council or spoke to the Council about the building?

A. Yes, sir.

Q. Did you hear Mr. Charles Levinsohn speak to the Council at the Council meeting in October just about the time this building was started, about the building?

A. Yes, sir.

Q. Now, did you hear him say on that occasion that he would have them indicted if they continued to be active, and defied them?

A. I don't remember hearing that.

Q. You were there where you could have heard it?

A. Yes, sir; he said this — he said while he was willing to put up such a nice building the borough should not bother him in that way.

Q. Can you remember what he said?

A. He said that the borough should not bother him on account that he was building such a nice building, and he did not think the borough would.

[redacted]

BY THE COURT:

Q. How long was he on his feet, about, talking?

A. I could not remember; maybe two or three minutes.

FURTHER DIRECT:

Q. Did he say anything else?

A. Yes, sir, but I don't remember it.

Isaac Traub Recalled — Cross

Q. You don't remember whether he said that he would have them indicted?

A. I don't remember hearing anything like that; I don't remember; I could not swear either way; there are certain things a man can remember and certain things he cannot.

Q. Is this one of the things you cannot remember?

A. I think if he had said it, I should have heard it.

Q. You don't remember having heard it?

A. I remember I heard him talking, but that thing I did not hear him say — that he would indict the Council.

Q. That you did not hear?

A. No, sir.

CROSS-EXAMINATION BY MR. FOSTER:

Q. Do you remember whether you did or did not hear it?

A. I remember what I did hear, and I don't remember his saying that.

BY THE COURT:

Q. Do you remember how he commenced?

A. No, sir.

DEFENDANT RESTS

MR. SNEDEKER: May it please the Court, I neglected to ask Mr. Potter one question when he was on the witness stand; I wish to recall him.

Walter K. Potter Recalled — Direct

WALTER K. POTTER recalled.

DIRECT EXAMINATION BY MR. SNEDEKER:

Q. Between the defendant's building, which is in question in this suit, and the building immediately South thereof, on F Street, is there an alleyway?

A. Yes, sir.

Q. Did you measure the distance between those two houses?

A. Yes, sir.

Q. What is that distance?

A. From foundation to foundation, 3 feet 9 inches.

Q. Did you measure the distance that Levinsohn's building is over the building line? I am referring now to the building in this suit.

A. Yes, sir.

Q. And what is that distance?

A. From the face of the pilaster, it is 3 feet 10 inches over the restricted line.

Q. What is the distance over the foundation wall?

A. The pilaster recess is 3¾ of an inch; it would be the difference between that; that would be 3 feet 6¼ inches.

CROSS-EXAMINATION BY MR. WILSON:

Q. How much did Mr. Emlen make it?

A. I don't recollect.

Q. Now, in getting that measurement, did you measure from the curb line?

A. Yes, sir, this is from the building line.

Q. What is it over?

A. 3 feet 10 inches to the face of the pilaster, and the pilaster is recessed 3¾ inches; that would make the face of the main building 3 feet 6¼ inches over the line.

Q. Now, there is quite a number of places where buildings on that street at Tenth Avenue have pilasters, is there not?

A. I don't recollect of any, it may be; if I had measured any, they would have been over the line.

Q. And you don't now recall that there were four or five such buildings, do you?

A. No, sir, I do not.

Q. And you do not recall having measured to them, do you?

A. I say I don't recall the buildings.

Q. Did you measure Borough Hall?

MR. COOPER: Objected to; that is on Ninth Avenue.

Q. How far away from Tenth Avenue is it?

A. One block.

Q. Do you say you did measure it — the Borough Hall?

THE COURT: I think it is immaterial.

BY MR. SNEDEKER:

Q. Is there any building on Tenth Avenue that has a pilaster except this defendant's building?

A. I don't think there is; I have no recollection of it.

MR. SNEDEKER: We rest.

THE COURT: What is the situation, gentlemen?

Stipulation

STIPULATION

MR. WILSON: It is stipulated and agreed that leases in pursuance of the terms of the resolutions and minutes which appear here in the record at pages 514, 515 and 516, were executed, and the tenants therein named enjoyed the rights and privileges under said leases intended to be conferred by the resolutions which appear in the pages of the minutes just referred to.

MR. FOSTER: This stipulation is entered into by reason of the claim that the leases have been lost, and it is also entered into, reserving the objections heretofore made by the complainants to the admissibility of any evidence relating to the leases, the resolutions or the minuts.

MR. WILSON: Yes. And may I not say, that it is further stipulated that the above stipulation shall have the same force and effect as though the original leases therein referred to had been produced, proved and properly offered in evidence.

MR. FOSTER: And it may be subject to the objection stated.

MR. WILSON: All this, however, subject to the objections interposed by the complainants.

MR. COOPER: Also, that the act of the Borough Council in making these leases or passing these resolutions in ultra vires on the part of the Borough Council, and is not binding on the Borough nor on its co-complainants, and neither is it binding on the complainant, George H. Heyniger, the complainant in the other case.

On Bill — Final Decree

IN CHANCERY OF NEW JERSEY

Between GEORGE H. HEYNIGER, Complainant, and ABRAHAM LEVINSOHN, Defendant.	On Bill. Final Decree.

This cause coming on to be heard at the Chancery Chambers in the City of Jersey City, in the presence of Harry R. Cooper and H. H. Snedeker, of counsel with the complainant, and Patterson & Rhome, Edmund Wilson and Durand, Ivins & Carton, of counsel with the defendant, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and it appearing to the Court that the complainant is entitled to the relief sought and prayed for by him in his Bill of Complaint:

It is, on this 27th day of November, One thousand, nine hundred and sixteen, by Edwin Robert Walker, Esq., 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, doth hereby Order, Adjudge and Decree that the defendant Abraham Levinsohn, or his heirs, executors, agents, servants and employees, forthwith remove so much of the building now erected on lot number 2931 on a plan of lots of the Ocean Beach Association, and hereinafter more particularly described, as projects, extends, or is north of a line drawn twenty feet south of the south line of Tenth Avenue, and parallel therewith, so that no portion of said building shall be nearer than twenty feet to the south line of said Tenth Avenue; and that the said

defendant Abraham Levinsohn, his heirs, executors, agents, servants, representatives and employees, be and they hereby are perpetually enjoined from maintaining or permitting any portion of said building to be or remain nearer to the south line of said Tenth Avenue than twenty feet; and that the said Abraham Levinsohn, his heirs, executors, agents, servants, representatives and employees be, and they are forever hereafter perpetually enjoined from erecting or causing to be erected, and from maintaining or causing to be maintained on that portion of said premises as is north of a line drawn parallel with Tenth Avenue and twenty feet south of the south line of Tenth Avenue, any building or structure or part or portion of any building or structure.

The following is a description of the property:

ALL that certain piece or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Belmar in the County of Monmouth and State of New Jersey, described as follows:

BEGINNING at a point at the intersection of the easterly side or line of F Street with the southerly side or line of Tenth Avenue; thence (1) Southerly, along said easterly side or line of F Street, fifty (50) feet; thence (2) Easterly, at a right angle to first course, one hundred and fifty (150) feet; thence (3) Northerly, parallel with first course, fifty (50) feet to the said southerly side or line of Tenth Avenue; thence (4) Westerly, along said southerly side or line of Tenth Avenue, one hundred and fifty (150) feet to the point or place of Beginning.

And it is further Ordered and Decreed that the defendant pay to the complainant the costs of this suit to be taxed, and that execution issue therefor according to the practice of this court.

E. R. WALKER, C.

Respectfully Advised,

VIVIAN M. LEWIS, V. C.

A true copy.

ROBERT M. McADAMS, Clerk.

NOTICE OF APPEAL

The defendant hereby appeals from the Final Decree made in the above stated cause, November 27th, 1916, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, December 27th, 1916.

PATTERSON & RHOME,
Solicitors of Defendant.

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

FRANK DURAND,
Of Counsel with Defendant.

On Appeal — Petition

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

GEORGE H. HEYNIGER,
Complainant-Respondent,

and

ABRAHAM LEVINSOHN,
Defendant-Appellant.

On Appeal.
Petition.

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

The petition of Abraham Levinsohn, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by a Final Decree made in the Court of Chancery, by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 27th day of November, 1916, wherein the said George H. Heyniger was complainant, and the said Abraham Levinsohn was defendant, in this respect, to wit:

That the said decree adjudges that the defendant Abraham Levinsohn, or his heirs, executors, agents, servants and employees forthwith remove so much of the building now erected on lot No. 2931 on a Plan of Lots of the Ocean Beach Association, and hereinafter more particularly described, as projects, extends, or is north of a line drawn twenty feet south of the south line of Tenth Avenue, and parallel therewith, so that no portion of said building shall be nearer than twenty feet to the south line of said Tenth Avenue; and that the said defendant, Abraham Levinsohn, his heirs, executors, agents, servants, representatives and employees, be and they hereby are perpetually enjoined from maintaining or permitting any portion of said building to be or remain nearer to the south line of said Tenth Avenue than twenty feet; and that the said Abraham Levinsohn,

his heirs, executors, agents, servants, representatives and employees, be and they hereby are forever hereafter perpetually enjoined from erecting or causing to be erected, and from maintaining or causing to be maintained on that portion of said premises as is north of a line drawn parallel with Tenth Avenue and twenty feet south of the south line of Tenth Avenue, any building or structure, or part or portion of any building or structure.

The following is a description of the property:

ALL that certain piece or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Belmar in the County of Monmouth and State of New Jersey, described as follows: BEGINNING at a point at the intersection of the easterly side or line of F Street with the southerly side or line of Tenth Avenue; thence (1) southerly, along said easterly side or line of F Street, fifty (50) feet; thence (2) easterly, at a right angle to first course, one hundred and fifty (150) feet; thence (3) northerly, parallel with first course, fifty (50) feet to the said southerly side or line of Tenth Avenue; thence (4) westerly, along said southerly side or line of Tenth Avenue, one hundred and fifty (150) feet to the point or place of beginning.

That the said decree adjudges that the said defendant pay to the complainant the costs of said suit to be taxed, and that execution issue therefor according to the practice of this court.

And your petitioner humbly appeals from the whole and every part of said decree, upon the ground that the same is erroneous, for that the same should have been in favor of this appellant, instead of in favor of the respondent.

Your petitioner therefore prays that the decree of the said Chancellor may be reversed, set aside, and for nothing holden.

And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

PATTERSON & RHOME, Solicitors of Appellant.

FRANK DURAND, Of Counsel with Appellant.

Answer to Petition on Appeal

ANSWER TO PETITION OF APPEAL

George H. Heyniger, complainant-respondent, by Harry R. Cooper, his attorney, comes into Court and says that there is no error either in the record and proceeding aforesaid, or in the making of the decree aforesaid, and he prays here that the Court may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned as the grounds of appeal, and that the decree aforesaid, in manner aforesaid made, may in all things be affirmed, etc.

HARRY R. COOPER,
Attorney for and of Counsel with Complainant.

The decree, notice of appeal, petition of appeal and answer, in the case of Borough of Belmar, et als, vs. Levinson are in the same form.

New Jersey Court of Errors and Appeals

George H. Heyniger, Complainant-Respondent, v. Abraham Levinsohn, Defendant-Appellant. The Borough of Belmar, et als., Complainants-Respondents, v. Abraham Levinsohn, Defendant-Appellant.	On Appeal.

Opinion and Exhibits

EDMUND WILSON,
PATTERSON AND RHOME,
DURAND, IVINS AND CARTON,
Counsel for Appellant.

HARRY R. COOPER,
H. H. SNEDEKER,
Counsel for Respondents.

Schuyler Press. Asbury Park, N. J.

Opinion

IN CHANCERY OF NEW JERSEY

Between
GEORGE H. HEYNIGER,
Complainant,
and
ABRAHAM LEVINSOHN,
Defendant.

On Bill, etc.
Memoranda.

HENRY H. SNEDEKER, Esq., and
HARRY R. COOPER, Esq.,
For the Complainant.

PATTERSON & RHOME, Esquires, and
DURAND, IVINS & CARTON, Esquires,
For the Defendant.

LEWIS, V-C:

The complainants in these cases ask that a mandatory injunction be granted, compelling the defendant to tear down or remove so much of his building as is erected nearer the line of 10th avenue than twenty feet. Both actions were heard together.

The Borough of Belmar includes all of the property originally owned by the Ocean Beach Association. The property of this Association is located south of Shark River and west of the Atlantic Ocean. The Association laid out

the property in building lots, with streets running north and south, and avenues running east and west. The Association also caused a map of its property to be made and filed in the office of the Monmouth County Clerk. The streets and avenues on the map are the same to-day in Belmar.

The Ocean Beach Association is now out of existence. It was incorporated on March the 13th, 1873 (P. L., 1873, p. 1089). It was authorized to purchase and sell lands, and was especially empowered to require any grantee from it to make and maintain such style and character of improvements on the land conveyed, or on the streets fronting thereon, as might seem most expedient for securing a uniform system of development and improvement.

The Association, on June the 9th, 1873, passed a resolution as follows:

> RESOLVED, That it is highly important to maintain uniformity in the line of buildings on the main avenues of this Association, and for securing said object that no building be erected on said avenues nearer the line of the same than twenty feet.

The Association executed and delivered 740 deeds, each of which, with the exception of those about to be referred to, contain this covenant:

> Subject, nevertheless, to the covenants, conditions, and restrictions contained in the aforesaid act, entitled "An Act to Incorporate Ocean Beach Association"; and the said party of the second part, for himself, his heirs, and assigns, does covenant and agree to and with the said Ocean Beach Association, their successors and assigns, that the said party of the second part, his heirs and assigns, shall not sell, or suffer to be sold, on the said premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in the said act of incorporation, bylaws,

rules, or regulations made by the said Association at any time.

The only deeds in which the covenant in the above form do not appear are:

Two to the Mayor and Council of Belmar, for property for public parks;

Three on land not included in the map of the Ocean Beach property;

Two are deeds made in accordance with a decree in Chancery; — one of the property along the Ocean, between Tenth and Eleventh avenues, for bathing purposes, and one a deed by the Sheriff, pursuant to a judgment in an action in which the Ocean Beach Association is party defendant;

One in which the covenant was omitted, but a prior deed in the chain of title contained it;

One where the covenant appears, and also an additional covenant in regard to the removal of a building;

One where the word "rules" was omitted; and

Two of property for railroad purposes.

Tenth Avenue is one of the principal avenues included in the resolution of the Ocean Beach Association. However, all of the avenues have been construed to be main avenues, and the restriction applies to all of them. The general plan to obtain and compel uniformity in the building line for the benefit of every person to whom the said Ocean Beach Association sold a lot, has been maintained. The testimony clearly shows this. It is established that most of the houses were erected with the main body of the building located with reference to the building line. That the restrictive covenant does not apply to open porches, bay windows, and eaves is a construction put upon it by those in authority and the contractors in the Borough of Belmar. The late Vice-Chancellor Emery, in Morrow vs. Hasselman (69 N. J. Eq., 612) held that immaterial violations of the restrictions, not showing an intention to abandon the plan, are no defense to an action. In other words, that slight and immaterial violations of the restrictive covenant would not be considered, unless they went to the extent of

showing a general abandonment of the restrictions by the owners of the property along the line of the thoroughfare. I do not find from the evidence before me that there has been an abandonment. It is apparent that the original grantor who first imposed the restrictions upon the property has done nothing which would indicate an intention upon its part to disregard the covenant.

The evidence clearly discloses that the defendant knew of the building restriction. The express covenant in his deed in itself would be sufficient to give him notice; and his testimony shows that before he commenced the erection of his building he had full knowledge of the building-line restriction. He says in one part of his evidence, that he asked the Mayor, Mr. Poole, what he thought about his going over the building line in erecting his structure, and, further, if he would stand for it he would put it up in that way. He then claims that he obtained permission from the Mayor to do so; but this is expressly denied by Mr. Poole. And the fact that he (Poole) immediately had a surveyor place stakes on the lot would seem to negative any consent. The defendant was thoroughly informed about the situation before he began operations on his ground. In fact, he states that he knew of the restrictions before he bought the land, and was familiar with the case of Newberry vs. Barklow (75 N. J. Eq. p. 128), in which the late Vice-Chancellor Howell had the same building-line restriction under consideration and upheld the right to enforce it. The testimony of other witnesses also shows the defendant's knowledge of the restriction.

I do not think the complainants have been guilty of laches, for steps seem to have been taken by them to enforce the restriction immediately upon discovery of the violation by the defendant. The defendant proceeded at his peril, in an apparent disregard of all other's rights. He took his chances on the effect of his conduct, with knowledge of the decision in the Newberry case.

It does not appear, although many new buildings that have been erected on Tenth Avenue since the Newberry

case, that any of them have been located with the main foundation wall projecting beyond the building line. Barring the erection of these new buildings, the conditions remain about the same as at the time the Newberry case was decided. I cannot find that the complainants are estopped by the erection of the Buhler pavilion. The evidence noes not appear to disclose that it is located on Tenth Avenue; but if it was, and the act of the Council in this operated as a bar to the municipality, it could not estop its co-complainants Wildman and Newman, and the complainant Heyniger.

There has been shown a general intention on the part of the Borough and of the parties owning land along the avenues to keep alive and observe the building-line restriction, and the Newberry case is binding upon me.

The decree, therefore, will be for the complainant.

Exhibits

EXHIBIT C 1

Deed from Abner Bitner Jr. and wife to Ocean Beach Association, dated June 27, 1873, recorded in office of Clerk of County of Monmouth in Book 253 of Deeds, page 151, conveying a part of what was formerly Ocean Beach and now Borough of Belmar.

EXHIBIT C 2

Deed from Joseph B. Yard and wife to Ocean Beach Association, dated May 26, 1873, recorded in office of Clerk of County of Monmouth in Book 253 of Deeds, page 147, conveying what was formerly Ocean Beach and now included in Borough of Belmar that was not conveyed by Exhibit C 1. This deed includes the premises owned by the defendant and the subject of this suit, and also includes the premises owned by the complainants.

EXHIBIT C 3

Resolution of Borough of Belmar passed December 9, 1913, authorizing the bringing of this suit in the name of the Borough.

EXHIBIT C 4

Deed from Ocean Beach Association to Theresa C. M. Boone, dated November 10, 1873, recorded in office of Clerk of County of Monmouth in Book 257 of Deeds, page 317, conveying lot No. 2931 on map of Ocean Beach Association and being the premises which are the subject of this suit now owned by the defendant. This deed is made expressly subject to the following: "Subject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act entitled 'An Act to incorporate the Ocean Beach Association,' and the said party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said Ocean Beach Association, their successors and assigns, that she, the said party of the second

part, her heirs and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said Association at any time."

EXHIBIT C 5

Deed from Theresa C. M. Boone and husband to Calvin C. Cooper, dated July 6, 1889, recorded in office of Clerk of County of Monmouth in Book 451 of Deeds, page 283, conveying lot No. 2931 on map of Ocean Beach Association and being the premises which are the subject of this suit now owned by the defendant. This deed refers to the conveyance of the same premises by the Ocean Beach Association to Theresa C. M. Boone, dated November 10, 1873, and recorded in Book 257 of Deeds, page 317, and this conveyance is made expressly subject and the deed so recites that it is subject to all the conditions and restrictions contained in that deed.

EXHIBIT C 5½

Deed from Calvin C. Cooper and wife to Samuel L. Gillen, dated April 20, 1891, recorded in office of Clerk of County of Monmouth in Book 499 of Deeds, page 156, conveying lot No. 2931 on map of Ocean Beach Association and being the premises which are the subject of this suit now owned by the defendant. This deed is made expressly subject to the following: "Subject, however, to all covenants, conditions and restrictions contained in the deed of the Ocean Beach Association originally conveying the property.

EXHIBIT C 6

Deed Samuel Gillen and wife to James S. Huyler, dated April 23, 1892, recorded in office of Clerk of County of Monmouth in Book 496 of Deeds, page 475, conveying

lot No. 2931 on map of Ocean Beach Association and being the premises which are the subject of this suit now owned by the defendant. This deed is made expressly subject to the following: "Subject, however, to all covenants, conditions and restrictions contained in the deed of the Ocean Beach Association, originally conveying this property."

EXHIBIT C 6½

Deed John E. Miller and wife to the defendant Abraham Levinsohn, dated November 22, 1905, recorded in office of Clerk of County of Monmouth in Book 762 of Deeds, page 433, conveying, with other property, lot No. 2931 on map of Ocean Beach Association and being the premises which are the subject of this suit now owned by the defendant and conveyed by the following description:

Beginning at a point at the intersection of the easterly side or line of F Street with the southerly side or line of Tenth Avenue; thence (1) southerly along said easterly side or line of F Street fifty feet; thence (2) easterly at a right angle to first course one hundred and fifty feet; thence (3) northerly parallel with first course fifty feet to the said southerly side or line of Tenth Avenue; thence (4) westerly along said southerly side or line of Tenth Avenue one hundred and fifty feet to the point or place of beginning.

This deed is made expressly subject to the following: "Subject to all covenants, conditions and restrictions contained in the deed of the Ocean Beach Association originally conveying this property."

EXHIBIT C 7½

Map of Ocean Beach Association made May 9, 1873, and filed in the office of the Clerk of the County of Monmouth October 4, 1873, showing lot No. 2931 to be as described in Exhibit C 6½, and also showing the complainants' properties to be as described in the complaint,

and that Tenth Avenue does not extend West beyond River Avenue.

EXHIBIT C 8½

To Abraham Levinsohn, Owner.

Sir:

You are hereby notified that the building being erected by you on the southeast corner of Tenth Avenue and F Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean Beach Association.

You will also please to take notice that in my official capacity as Mayor of the said Borough of Belmar, I have received requests from a majority of the property owners in said Borough to take such steps as may be necessary and proper to preserve and maintain the said building line, and to prevent your encroaching thereon.

I shall accordingly lay the matter before the Borough Council at the next regular meeting of that body, which will be held on Tuesday evening, December 9, 1913.

I, therefore deem it my duty to give you this notice, in order that you may govern your actions accordingly, and that in the meantime, you may know, that if you proceed with the erection of the Tenth Avenue wall of your said building you do so at your peril.

Dated, December 3, 1913.

Yours &c.

R. G. POOLE,
Mayor of the Borough of Belmar.

Exhibits C 9½, 10½, 11½ and 12½ are photographs of the building in question.

Exhibits

EXHIBIT C 13

Deed Ocean Beach Association to Jeremiah M. Newman dated September 23, 1881, recorded in the office of the Clerk of the County of Monmouth in Book 355 of Deeds, page 39, conveying lot No. 1843 on map of Ocean Beach Association, and being the premises owned by the complainant Newman. This deed is made expressly subject to the same covenant of restriction and in the same language as contained in Exhibit C 4.

EXHIBIT C 14

Deed Jeremiah M. Newman and wife to Jacob Newman dated April 2, 1884, recorded in the office of the Clerk of the County of Monmouth in Book 437 of Deeds, page 160, conveying lot No. 1843 on map of Ocean Beach Association, and being the premises owned by the complainant Newman. This deed is made expressly subject to the same covenant of restriction and in the same language as contained in Exhibit C 4.

EXHIBIT C 15

Deed Carrie C. McGronigal, single woman, to Charlotte Wildman, dated April 2, 1907, recorded in the office of the Clerk of the County of Monmouth in Book 840 of Deeds page 138, conveying lot No. 1846 on map of Ocean Beach Association, and being the premises owned by the complainant Wildman. This deed is made expressly subject to the following: "Subject, nevertheless, to all the covenants, conditions and restrictions contained in former deeds for the same premises."

EXHIBIT C 16

Deed Ocean Beach Association to the Seaside Ice Company, dated September 7, 1889, recorded in the office of the Clerk of the County of Monmouth in Book 453 of Deeds, page 15, conveying lot No. 1846 on map of Ocean Beach Association, and being the premises owned by the com-

plainant Wildman. This deed is made expressly subject to the same covenant of restriction and in the same language as contained in Exhibit C 4.

EXHIBIT C A 1

Deed Ocean Beach Association to David H. Wilson, dated December 20, 1873, recorded in the office of the Clerk of the County of Monmouth in Book 356 of Deeds, page 351, conveying lot No. 1944 on map of Ocean Beach Association, and being the premises owned by the complainant Heyniger. This deed is made expressly subject to the same covenant of restriction and in the same language as contained in Exhibit C 4.

EXHIBIT C A 2

Deed Alfred J. Wildman and others to George H. Heyniger, dated December 22, 1908, recorded in the office of the Clerk of the County of Monmouth in Book 842 of Deeds, page 490, conveying lot No. 1944 on map of Ocean Beach Association, and being the premises owned by the complainant Heyniger. This deed is made expressly subject to the following: "Subject, nevertheless, to all the covenants, conditions and restrictions contained in former deeds for the same premises."

EXHIBIT C A 3

To Abraham Levinson, Owner,
Or
Traub Brothers, Contractors.
Archibald K. Wolverton, Sub-Contractor.

Sirs:

You are hereby notified that the building being erected by you on the south-east corner of Tenth Avenue and F Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean

Exhibits

Beach Association, and that unless you forthwith move back the foundation wall on the Tenth Avenue side of said building to a point within the said building line, I shall make application for an injunction restraining you from proceeding with the further erection of said building and compelling you to remove and set back the said foundation wall on or within the said building line.

Dated, November 14, 1913.

Yours &c.,

GEORGE H. HEYNIGER,
HARRY R. COOPER,
Attorney.

EXHIBIT C A 4

To Abraham Levinsohn, Owner,
Or
Traub Brothers, Contractors.

Sir:

You are hereby notified that the building being erected by you on the southeast corner of Tenth Avenue and F Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean Beach Association, and that unless you forthwith move back the foundation wall on the Tenth Avenue side of said building to a point within the said building line, I shall make application for an injunction restraining you from proceeding with the further erection of said building, and compelling you to remove and set back the said foundation wall on or within the said building line.

Dated, December 6, 1913.

Yours etc.,

CHARLOTTE WILDMAN,
HARRY R. COOPER,
Attorney.

Exhibits

EXHIBIT C A 5

To Abraham Levinsohn, Owner,
Or
Traub Brothers, Contractors.

Sir:

You are hereby notified that the building being erected by you on the southeast corner of Tenth Avenue and F Street in the Borough of Belmar, New Jersey, encroaches three feet nine inches on Tenth Avenue beyond the building line established by the rules and regulations of the Ocean Beach Association, and that unless you forthwith move back the foundation wall on the Tenth Avenue side of said building to a point within the said building line, I shall make application for an injunction restraining you from proceeding with the further erection of said building, and compelling you to remove and set back the said foundation wall on or within the said building line.

Dated, December 6, 1913.

Yours etc.,

JACOB NEWMAN,
HARRY R. COOPER,
Attorney.

EXHIBIT D 1

Photograph of building.

EXHIBIT D B 1

Minute Book of the Borough of Belmar, entitled "Records of No. 7 Borough of Belmar 1912." Portion of contents was read into the minutes.

EXHIBIT D A B 1

Map of Belmar filed in the office of the Clerk of the County of Monmouth on December 9, 1896.

Exhibits

EXHIBIT D A B 2

Minute from Record Book 1901 of Borough of Belmar under date October 28, 1902, and read into the minutes.

EXHIBIT D A B 3

Minute from Record Book 4 Borough of Belmar at page 207 and read into the minutes.

EXHIBIT D A B 4

Minute from Record Book 6 Borough of Belmar under date October 4, 1910, and read into the minutes.

EXHIBIT D F 1

Contract for building in question.

EXHIBIT D F 2

Contract for heating in same building.

EXHIBIT D F 3

Contract for plumbing in same building.

EXHIBITS D F 4 and D F 5

Letter from Mr. Hudnut informing physical inability to attend, and certificate of doctor.

Complainants' Exhibit offered under stipulation under date of December 1, 1915, and just before Defendant rested.

Map from "Belmar Borough Atlas of 1889-90" showing that Tenth Avenue does not extend West beyond River Avenue.

New Jersey Court of Errors and Appeals.

GEORGE H. HEYNIGER, Complainant-Respondent, *v.* ABRAHAM LEVINSOHN, Defendant-Appellant.	On Appeal.
THE BOROUGH OF BELMAR *et al.*, Complainants-Respondents, *v.* ABRAHAM LEVINSOHN, Defendant-Appellant.	

BRIEF FOR COMPLAINANTS-RESPONDENTS.

I.

Statement of Facts.

A bill was filed with the Clerk of the Court of Chancery on November 19th, 1913, by the respondent George H. Heyniger, praying for an injunction restraining the appellant, his agents, servants and employees from erecting any structure on his lot at the southeast corner of Tenth Avenue and F Street in the Borough of Belmar, County of Monmouth, within twenty feet of the line of said avenue, and compelling him to remove any wall or structure already erected within twenty feet of the said line of Tenth Avenue.

On December 22nd, 1913, a bill was filed by the respondents the Borough of Belmar, Charlotte Wildman and Jacob Newman, praying substantially the same relief. Both actions came on to be heard together before his Honor, Vivian M. Lewis, a Vice-Chancellor of the State of New Jersey, and resulted in a decree in favor of the complainants-respondents. The Borough of Belmar in area includes all the property originally owned by the Ocean Beach Association and additional property. The Ocean Beach Association was incorporated under the laws of the State of New Jersey, on March 13th, 1873. The act of incorporation provided among other things:

> "7. And be it enacted, that for the purpose of restricting nuisances and of compelling a uniform system of improvements of said settlement, the said company are hereby authorized and invested with power to incorporate into any deed of conveyance made by them, whether in fee simple or otherwise, a clause or condition * * * to require any grantee of said company to make and maintain such style and character of improvement on said lots so conveyed, or on the streets fronting thereon, as to the said company may seem most expedient for securing a uniform system of development and improvement" (p. 47). (Chapter 231 of the Session Laws of 1873, p. 1089.)

The property of the Ocean Beach Association is located in Monmouth County, south of Shark River on the Atlantic Ocean and is described in Exhibits C1 and C2 (p. 48). The association laid out the property in building lots with streets running north and south (p. 53), and avenues running east and west (p. 53). The streets are lettered commencing with "A" after Ocean Avenue, and then "B," "C," etc., going west

(p. 52). The most northerly avenue is "First," then "Second," "Third," etc., going south (p. 53). All the avenues are 80 feet wide (p. 83). The streets are 60 feet wide (p. 83), the blocks from street to street are 500 feet. The odd numbers of the houses are on the south side of the avenues, and the even numbers on the north side (p. 287). The association caused a map of its property, dated May 9th, 1873, to be made and filed in the office of the Clerk of the County of Monmouth (Ex. C7½, p. 69). The streets and avenues as on the map are the same to-day in Belmar (p. 52). The Ocean Beach Association is now out of existence (p. 20). On June 9th, 1873, the Ocean Beach Association passed a resolution which was entered upon the minutes of the Association as follows:

> "Resolved, that it is highly important to maintain uniformity in the line of buildings on the main avenues of this Association, and for securing said object, that no building be erected on said avenues nearer the line of the same than twenty feet" (p. 49).

The association executed and delivered 740 deeds (p. 132, line 28), each of which, with the exception of those conveying property for rairoad purpose, bathing grounds, public parks, etc., contained this covenant (pp. 137 and 138):

> "Subject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act, entitled 'An Act to incorporate the Ocean Beach Association'; and the said party of the second part, for himself, his heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that he, the said party of the second part, his heirs and assigns, shall not sell or suffer to he sold

> on the said premises hereby conveyed, any spirituous or intoxicating liquors, nor violate any of the provisions contained in the said act of incorporation, by-laws, rules or regulations made by the said association, at any time."

The appellant purchased his property, the subject of these suits and being lot No. 2931, expressly subject to the restrictive covenant, and each conveyance in his chain of title is made subject thereto (Exhibit C4, p. 63 and p. 8 of Exhibits; C5, p. 64 and p. 9 of Exhibits; C5½, p. 64 and p. 9 of Exhibits; C6, p. 65 and p. 9 of Exhibits; C6½, p. 65 and p. 10 of Exhibits). The respondents also purchased their properties subject to the restrictive covenant (Exhibits CA1, p. 142, and p. 13 of Exhibits; CA2, p. 142 and p. 13 of Exhibits; C13, p. 111 and p. 12 of Exhibits; C16, p. 120 and p. 12 of Exhibits; C14, p. 112 and p. 12 of Exhibits; C15, p. 119 and p. 12 of Exhibits). The general scheme and plan to obtain and compel uniformity in the building line for the benefit of every person, their heirs and assigns, to whom said Ocean Beach Association sold a lot, has been maintained and is now recognized and adhered to (pp. 71, 54, 199, 214, 215 and 434, lines 31 to 34). All the contractors in Belmar know of the restriction and recognize it (pp. 194, 210, 206, 204, 122, 147 and 199). All the porches or piazzas of the houses on Tenth Avenue are open (p. 521). The testimony shows many houses erected with the main body of the building located with reference to the building line, and with open porches, bay windows and eaves extending over the line. This measurably indicates a popular interpretation of the restriction to that effect. That the restrictive covenant does not apply to open porches, bay

windows and eaves is the construction put upon it by those in authority and the contractors in the Borough of Belmar (pp. 77, 86, 116, 208, 127 and 196). When the first bill was filed (November 19, 1913) the appellant had just commenced the erection of his building (p. 560). The foundation-wall of appellant's building extends over the restricted line 3 feet 10 inches (p. 618). The foundation of complainants' buildings are all within the restriction (pp. 111, 112, 116, 120, 141, 160 and 246). Authority for the Borough of Belmar to bring suit was obtained (Exhibit C3, p. 57 and p. 8 of Exhibits). The maintenance of the restrictive building line is a great benefit and advantage to the community, and the attractiveness, welfare and prosperity of the Borough of Belmar (p. 54).

II.

Every deed in the appellant's chain of title is expressly subject to the restriction.

The deed from the original grantor is expressly

> "subject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act entitled 'An Act to incorporate the Ocean Beach Association,' and the party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said Ocean Beach Association, their successors and assigns, that she, the said party of the second part, her heirs and assigns, shall not * * * violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said Association at any time" (pp. 62 and 63, and p. 8 of Exhibits).

The mesne conveyances were each subject to the same restriction (pp. 64 and 65, and pp 9 and 10 of Exhibits). *The deed to the appellant is expressly "subject to all covenants, conditions and restrictions contained in the deed of the Ocean Beach Association originally conveying this property"* (p. 65 and p. 10 of Exhibits). The appellant had lived in Belmar 24 years (p. 524), and knew of the restriction when he bought the lot in question (p. 531); years before he bought he knew of the case of Newbery *v.* Barkalow (75 N. J. Eq., 128), and knew "that Mr. Barkalow, as the outcome of that, was obliged to move his building back to the building line" (p. 535). This case affected property on the same avenue and near the property in question. The appellant's own testimony is that before he had put a shovel in the ground to excavate any part of the lot (pp. 536 and 537); he showed the Mayor the plans of the proposed building "and I said if he would stand for my going over the building line, I would put the building there" (p. 528). The Mayor denies that he gave any permission to go over the line (pp. 72, 73 and 570), and his action in having the surveyor set stakes would seem to confirm this. However, had such a permission been given, it would not be binding on any of the respondents—surely not on the individual complainants. This conversation with the Mayor which the appellant has testified to, of itself shows his actual knowledge of the restriction and in addition to this and the other facts showing knowledge of the restriction on the part of the appellant, we have his conversation with Samuel Michelson, in the course of which the appellant asked Michelson "not to go against him if he built over the line" (p. 107). (Hayes

v. Waverly & Passaic R. R. Co., 51 N. J. Eq., 345; DeGray *v.* The Monmouth Beach Club House Co., 50 N. J. Eq., 329; Morrow *v.* Hasselman, 69 N. J. Eq., 612; Barton *v.* Slifer, 72 N. J. Eq., 812; Newbery *v.* Barkalow, 75 N. J. Eq., 128.)

> "It is settled by adjudication in this State, as a general rule, that where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee, whatever may be its form, whether covenant, condition, reservation or exception, which restricts the enjoyment of the portion of the land which is conveyed, in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, whether it runs with the land and is binding at law or not, it will be enforced in equity against the grantee and any one subsequently acquiring title to the land with notice of it, at the instance of the grantor or the subsequent owner or owners of parts of the remaining land, when its violation results in material detriment to the portion of the remaining land, which the complainant in the suit holds" (Hayes *v.* Waverly & Passaic R. R. Co., 51 N. J. Eq., 345).

In Newbery *v.* Barkalow, *supra,* Vice-Chancellor Howell said:

> "There was evidence tending to show that all the deeds of conveyance made by the Ocean Beach Association for lands covered by their maps contained the same covenant that appears in the deed to Mrs. Harvey. And it likewise appears that the corporation did formulate and lay out a general plan for the uniform improvement of all the property which it owned at that point. Both complainant and defendant must be charged with notice of these facts for the reason that they are specifically referred to in both their deeds.

Such was the determination of this Court in the case of Hayes *v.* Waverly & Passaic Railroad, 51 N. J. Eq. (6 Dick.), 345; and my conclusion is that the lands of the complainant and the defendant were bound by the resolution of June 9th, 1873, although it only appears in its complete form in the minute book of the private corporation which owned the land. This must be the only conclusion that can be reached, because the first deed in the title refers to the by-laws, the rules and the regulations made by the grantor upon the first transfer of the title."

III.

The covenant of restriction is in force.

In an endeavor to show variations the appellant had every building on the avenue surveyed by two surveyors and the respondents also had them surveyed. These surveys cannot be relied on. A tabulation of the measurements shows that not only do the surveyors not agree on the measurements of any house, but the surveyors for the appellant do not agree with each other. At most the surveys show only slight variations and these prove the intention to comply with the restriction. The houses numbered 206, 208, 210, 214, 216 and 218, and referred to in the appellant's brief, are the most flagrant violations; these buildings are a half mile from appellant's property (p. 604), and were erected over 25 years ago (pp. 602 and 603), and as there was no building on Tenth Avenue 30 years ago (p. 346), they were probably the first houses built on Tenth Avenue and at that time the building line may not have been made apparent to builders by monuments or otherwise. "The stakes

were placed 40 feet back from the gutter line; there was no curbing then" (p. 113). The cause of the variations was mistake and not intention; "that was aways understood among the builders, to keep back 40 feet from the curb line, with the main building" (p. 206). "What did you go by?" A. "By the curb—40 feet back from the curb" (p. 144). The custom to measure from the curb is shown by the testimony of the other contractors (pp. 183, 191, 204 and 579). The appellant's surveyor Emlen testified to places where the curb was pushed in or pushed out (p. 318). This custom to measure from the curb is responsible for probably all the variations. It may not have been the correct thing to do, but it certainly does not show any intention to violate the restriction. Not only has the land scheme *not* been abandoned, but in recent years it has been more closely observed. On pages 398 and 399 is a list made by appellant's witness, of all the buildings erected on Tenth Avenue since the Newbery-Barkalow case. In this list of 25 houses the greatest encroachment found by any of the three surveyors is three inches, and every one of these 25 buildings are either on or back of the line when measured from the curb (the popular manner of measuring). While the appellant may not be bound by the facts in the Newbery case, yet it would seem that he is bound by the law of that case as applied to the same facts; *i. e.,* where the facts are the same the law is the same. Emlen, a surveyor and a witness for the appellant in this case, was also a witness in the Newbery case (p. 267); he measured every building for both cases and used the same method in both cases of establishing the infringements (p. 285). Having had the law

fixed as to every house erected at the time of the Newbery case, it would seem to be only necessary to consider the houses erected since. The Buhler pavilion is not and cannot be an encroachment. It is West of River Avenue. The official maps show that Tenth Avenue does not extend west beyond River Avenue (Exhibit C7½, p. 10 of Exhibits and lines 32 to 34, p. 16 of Exhibits). It has never been opened west of River Avenue (p. 603). The land on which it stands was conveyed by the Riparian Commissioners to the Borough of Belmar and was necessarily outside the land scheme of the Ocean Beach Association and not covered by any covenant. Moreover, estoppel against one complainant, even if shown, is not sufficient to bind the others.

The appellant intentionally violated the building restriction. The Mayor designated the building line by having a surveyor place stakes (p. 73). The mason who did the work also set the stakes correctly. "I set my stakes 40 feet" (p. 183). "I told Mr. Levinsohn that that was the building line." "What did Levinsohn say to you?" A. "He said, 'Move them over'" (p. 184). "How far north of the line of stakes, as you reset them, approximately, was the building erected?" A. "About 3 feet 9 inches from the original stake." Q. "Now, how did you come to erect that building so much further north of the building line than you originally staked it out?" A. "According to Mr. Levinsohn's instructions." "Then Mr. Levinsohn told you where he wanted the stakes of that building set, and where he wanted you to commence and build a foundation?" A. "Yes, sir" (p. 185). "Did you call Mr. Levinsohn's attention to the fact that he was going over the building line?" A. "Yes, sir."

"Did you call his attention to the fact that by going over that line he might get into trouble?" A. "I said they might serve an injunction on him." "Didn't you have some question in your mind as to whether you might not be responsible?" A. "He said he would take the responsibility" (p. 186).

It is difficult to understand how the character of the neighborhood is relevant to this issue. We are not considering a restriction against business. The testimony shows that many buildings *west* of F Street are used for business and it was shown by appellant's own witnesses that there is no business *east* of F Street (pp. 340 and 345), the property in question is east. Moreover, as business is done on Tenth Avenue, west of F Street in buildings that conform to the restriction, where is the necessity for changing the building line if business should be done east of F Street? (Newbery *v.* Barkalow, 75 N. J. Eq., 128; Morrow *v.* Hasselman, 69 N. J. Eq., 612; Winslow *v.* Newcomb, 100 Atl. Rep., 613; Brigham *v.* H. G. Mulock Co., 74 N. J. Eq., 287; Sanford *v.* Keer, 80 N. J. Eq., 240.)

> "In some of the houses there are round towers, bays or projections on the second story, two or three feet beyond the line. * * * As against the present complainant they have no force as indicating a waiver or abandonment on her part of the entire benefit of the covenants, when necessary to protect her own house" (Morrow *v.* Hasselman, 69 N. J. Eq., 612, 617).

> "One of the objections to her position as a complainant is that she has violated the covenant herself and therefore ought not to be heard to complain of violations by others. It is true that the piazza in front of the complainant's house extends within the re-

stricted area, but it is an open piazza and is no obstruction to the view from the defendants' property, and is within the ruling of Vice-Chancellor Emery in Morrow *v.* Hasselman" (Newbery *v.* Barkalow, *supra*).

"In my view of the covenant the violation is so slight and immaterial, for present purposes, as to be no bar to relief" (Morrow *v.* Hasselman, *supra,* at p. 618).

"Quite a number of dwellings have overhanging open porches and some have bay windows extending into the prohibited area, which it is contended are in violation of the building regulation and relieve the defendant from an observance of the restriction. The few bay windows do not evince an abandonment (Righter *v.* Winters, 68 N. J. Eq., 252, 59 Atl., 770; Morrow *v.* Hasselman, 69 N. J. Eq., 612, 61 Atl., 369), and as, in the formulation of the building scheme, open porches were doubtlessly contemplated, and inasmuch as the restriction has been thus almost universally interpreted and acted upon, they cannot be regarded as infringements (Ocean City Land Co. *v.* Weber, 83 N. J. Eq., 476; 91 Atl., 600; *id.,* 84 N. J. Eq., 505, 94 Atl., 1102)." (Winslow *v.* Newcomb, 100 Atl., 613 [N. J. Chan., March 28, 1917, Atl. Rep. Advance Sheets, May 24, 1917].)

"The covenants in question provided that no building shall be erected within twenty feet of the front property line of any street. * * * The affidavits also disclose that a large number of buildings have been erected with open porches, and some with bay windows, extending over the twenty foot restriction line. The building which defendant is about to erect is of that nature. I entertain grave doubts whether the covenants in question were intended to apply to open porches and bay windows not extending to the ground. The fact that so many buildings have been

erected with the main body of the building located with reference to the building line and with open porches and bay windows extending over the line, measurably indicates a popular interpretation of the restriction to that effect. As is said in Morrow *v.* Hasselman, 69 N. J. Eq. (3 Robb.), 612, 617, if these porches have been erected under an erroneous construction of the covenant, that fact is no evidence of an abandonment of the general scheme. I will advise a decree enjoining defendant from building the *main body* of his house nearer to either Arctic or Chelsea Avenues than twenty feet" (Brigham *v.* H. G. Mulock Co., *supra*).

"Where restrictions imposed on land in pursuance of a general scheme have been modified to some extent by the elimination of some of their prohibitive provisions, either by general consent or acquiescence therein by the interested parties, and where such modification is not of such a nature as to destroy or impair the mutual benefit to the lot owners of the essential general scheme upon the protection of which they relied, such modification will not prevent the enforcement of the remaining provisions of the restrictions" (Sanford *v.* Keer, 80 N. J. Eq., 240, Court of Errors and Appeals, 1912).

"Slight and immaterial violations of the restrictive covenant would not be considered unless they went to the extent of showing a general abandonment of the restrictions by the owners of the property along the line of the street. It is clear that the original grantor who first imposed the restrictions upon the property, and with whom the contractural relation originally existed concerning the house line, has done nothing which would indicate an intention upon its part to disregard or abandon the covenant. Nothing short of general acquiescence in the viola-

tion of the covenant would be sufficient, in my opinion, to raise the presumption of abandonment" (Barton *v.* Slifer, 72 N. J. Eq., 812).

"The mere fact that a number of houses have been erected in violation of a building restriction imposed on all of the lots in a subdivision, does not show a general abandonment of the scheme of improvement, nor constitute such a change in the neighborhood as will release a grantee of one of the lots so restricted from the duty to observe such restriction" (Waters *v.* Collins, 70 Atlantic, 984).

In Stewart *v.* Finkelstone, 206 Mass., 28, the Court said:

"It is strongly urged that a mandatory injunction ought not to issue, for the reason that it would operate oppressively and inequitably, and impose on the defendant a loss disproportionate to the good it can accomplish, and that the plaintiffs ought to be relegated to financial compensation by way of damages. This remedy is a drastic one, and ought to be applied with caution, but in cases proper for its exercise, it ought not to be withheld merely for the reason that it will cause pecuniary loss. It has been found that the defendant with full knowledge of the restrictions 'deliberately attempted' to override them, and thus to deprive the district of the character given it by the restrictions. He took his chances as to the effect of his conduct with eyes open to the results which might ensue. It has been the practice of courts to issue mandatory injunctions upon similar facts. * * * Entrenchment behind considerable expenditures of money cannot shield premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity."

"If with notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court: 'You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right'—of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision" (Krehl *v.* Burrell, 7 Ch. Div., 551 [1878]).

"A building which he has erected under such circumstances ought to be at once pulled down, on the ground that the erection of it was an attempt to anticipate the order of the Court. To vary the order under appeal would hold out an encouragement to other people to hurry on their buildings in the hope that when they were once up the Court might decline to order them pulled down" (Kay L. J. in Daniel *v.* Ferguson, 2 Ch. Div., 27 [1891]).

"But it is contended that the restriction agreement ought not in this case to be enforced, because most of the lots in the block between 42nd and 43rd Streets and Madison Avenue and Vanderbilt Avenue are no longer occupied for residences, and are devoted to business purposes, and the counsel for the appellant cites as an authority on this point our decision in the case of Columbia College *v.* Thacher. The principles of that case are not applicable to the facts of this. There it appeared that the contract which the plaintiff sought to enforce was no longer of any value to it, and that its enforcement would result in great damage to the defendant without any benefit to anyone. Here the plain-

tiff has the right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement. She has never violated the agreement herself, or consented to or authorized or encouraged its violation by others. In order to have the benefit of the agreement, she is not obliged to sue all its violators at once. She may proceed against them *seriatim*, or she may take no notice of the violations of the agreement by business carried on remotely from her residence, and enforce it against a business specially offensive to her by its proximity. This is not a case where the defendants can ask for immunity in an equitable forum, because others are in a greater or less degree also violators of the agreement" (Rowland *v.* Miller, 139 N. Y., 93).

"In the last case (Trustees of Columbia College *v.* Thacher) the Court refused to enforce the specific performance of a covenant running with the land and restricting the use thereof for the purpose of private residence or prohibiting the erection of certain specified structures, for the reason that the character of the neighborhood had materially changed from what it was at the time the covenant was executed. This is familiar doctrine. But we cannot see any applicability of the principle to the covenant now under consideration. It is not a covenant against a particular class of buildings suitable to a neighborhood, but a covenant that a condition should be maintained which is just as valuable for a business as for a residential neighborhood. * * * At all events, the plaintiff obtained an easement to light and air and unobstructed view; and with this easement a court of equity will not interfere or permit interference by others who are not privies to the covenant" (Zipp *v.* Barker, 40 N. Y. A. D., 1, affirmed without opinion in 166 N. Y., 621).

In Morrow *v.* Hasselman, 69 N. J. Eq., 612, at page 616, Vice-Chancellor Emery said:

> "The materiality of the violation is to be determined by the circumstances of each case, and the question seems to be whether they are such as to indicate an abandonment of the original general plan and make its enforcement inequitable because of the changed condition of the property under restriction."

And, after citing Trustees of Columbia College *v.* Thacher, 87 N. Y., 311, and other cases of similar import:

> "These are cases where the use of the property was restricted. Where the restriction relates to the character or location of the building itself, the passive acquiescence of a purchaser in breaches of the covenant, by which he sustains no particular injury, has been held not to deprive him of his equity to protection, where the breach immediately affects his enjoyment of his own house." (Citing Western *v.* McDermott, L. R., 2 Ch. App., 75 [1867], and Payson *v.* Burnham, 141 Mass., 547.)

IV.

The evidence offered to prove an alleged abandonment of the restriction on F Street was properly excluded, as the restriction does not apply to streets.

The restriction refers to the main *avenues.* All the avenues have been construed to be main, but however that may be, it is not questioned that Tenth Avenue is a main avenue. No *streets* were restricted either in language or interpretation by action. The statements on page 20 of appellant's brief are hardly

borne out by the evidence. Exhibit C7½ (p. 10 of Exhibits) shows a map dated May 9, 1873, and the streets and avenues are the same to-day as on that map (p. 52). (Newbery *v.* Barkalow, 75 N. J. Eq., 128.)

> "The first map of the Ocean Beach property appears to have been made on May 9th, 1873, and to have been filed in the office of the County Clerk of Monmouth County on October 4th of that year. The map was consequently made before the passage of the restrictive resolution. The map appears upon inspection to have distinguished between the two classes of the highways laid out upon it, calling one class streets and the other class avenues. * * * The covenant was intended to apply not to the streets at all, but to apply to each and all of the avenues" (Newbery *v.* Barkalow, *supra*, at page 133).

V.

Respondents are justified in bringing their suits.

The respondent, Borough of Belmar, is particularly interested in seeing to it that the general land scheme is upheld. The other respondents reside on the same avenue and within a little over a block from the appellant's property. To have the width of Tenth Avenue at its entrance from F Street (the main thoroughfare) made nearly four feet narrower, by the appellant's building, is a serious injury to all the respondents. How the respondents might be damaged is thus tersely stated by one of them:

> "Because on one side of me there is an empty lot; on the other side of me, I think it is the third lot, that is an empty lot, and

there are about four empty lots in there; now, I did not know but that at any time someone might come along and buy that property and put up a house and go right on out to the lot line" (p. 160).

(Zipp *v.* Barker, 40 N. Y. A. D., 1; Rowland *v.* Miller, 139 N. Y., 93; Tipping *v.* Eckersley, 2 K. & J., 264; Brigham *v.* H. G. Mulock Co., 74 N. J. Eq., 287; Kirkpatrick *v.* Peshine, 24 N. J. Eq., 206; Lignott *v.* Jaekle, 72 N. J. Eq., 233; Goater *v.* Ely, 80 N. J. Eq., 40; Henderson *v.* Champion, 83 N. J. Eq., 554).

"If the defendant relies upon an allegation that the complainants will not be damaged by the defendant's deliberate disregard of the restriction, he must make it clear beyond the possibility of doubt that the complainants cannot be damaged" (Goater *v.* Ely, 80 N. J. Eq., 40).

"There may be cases in which the damage to arise from the breach of the covenant, would be inapplicable, and in which the Court would refuse to interfere. But the case must be free from all possibility of doubt. It must be clear that there is no appreciable, or at all events no substantial damage, before the Court will, upon the ground of smallness of damage, withhold its hand from enforcing the execution. The mere fact that a breach of the covenant is intended, is a sufficient ground for the interference of the Court by injunction. A covenantee has the right to have the actual enjoyment of the property, *modo et forma,* as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept, as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has

been done. It being established that the acts of the defendant are a violation of the contract, the Court will protect the complainant in the enjoyment of the right he has purchased" (Kirkpatrick *v.* Peshine, 24 N. J. Eq., 206).

"The remaining point is that the complainants are not damaged. In support of this, it is contended that facing the defendant's houses on, and erecting them four feet from, North Street obstructs neither the light, air nor view to the complainant's premises which are on Bay Road, *'around the corner'"* (italics ours) "from the defendant's premises. The answer to this is that the interdependent covenant of the defendant casts an equitable burden on his land, or raises an equity, in favor of each of the owners of lots on the tract, and this, *no matter how remote may be his location."* (Italics ours.) "And in this instance there is a very cogent reason for the application of this doctrine. Ocean City Gardens is essentially residential, and broad avenues, from house line to house line, inviting, if not insuring, floral decorations in front of homes, are obviously important factors in its exploitation, the advantage of which redounds to the whole community, especially in the advancement of lands within its limits. Can it then be said that a lot owner, however distinctly situate, is not materially injured by an infraction of this feature of the general scheme? Equity Courts will not refuse relief in cases of this kind unless it clearly appears that the violation complained of will be so harmless that the maxim *de minimis* applies" (Henderson *v.* Champion, 83 N. J. Eq., 554).

"The right to enforce building restrictions and restrictions upon the use of property is now so clearly settled and so generally recognized, especially as to urban and suburban property, that the whole system of such re-

strictions would be put in jeopardy if the right to enforce them depended upon the decision of the Court in each case as to the amount of damage or injury. *A purchaser deliberately and intentionally disregarding the restriction should make it clear 'beyond the possibility of doubt' that the complainant cannot be damaged.*" (Italics ours.) "This has not been done here, and the defendant, having proceeded at his peril with the erection, after notice of complainant's rights and her intention to enforce them, must bear the penalty" (Cornish *v.* Wiessman, 56 N. J. Eq., 610).

"The defendant further contends that the projections are not of sufficient importance to warrant a mandatory injunction or order for their removal. This argument would be of more weight in a case where a defendant had erected a building with unauthorized projections, in ignorance that they were deemed to be unauthorized, and where he was not aware that his right to do so was disputed. Without considering what should be done in such a case, it is enough to say that such is not the case here. If the defendant, after deliberately proceeding in the face of the remonstrances of the officers of the commonwealth to erect projections which are now determined to be unwarranted, can yet be heard to urge that after all no order for their removal should be passed, it would gain something not much short of a right by stoutly asserting an invalid claim. The space was reserved for reasons affecting not only neighboring owners, but the public at large. Compensation to the commonwealth for such an intrusion into the reserved space would be an unsuitable remedy. The injury is one not easily measurable by money. It is then a question whether the defendant shall be allowed to retain his unauthorized projections, or shall be compelled to make such alterations as will bring them within the provi-

sions of the deeds. We cannot say, under the circumstances as they appear, that the injury is trifling or unsubstantial. If one such instrument into the reserved space is allowed to pass, others must be" (Attorney General *v.* Algonquin Club, 153 Mass., 447).

VI.

Not only were the respondents not guilty of laches, but they were expeditious.

The statement on page 24 of the appellant's brief, that work was commenced on the 13th of October, is hardly correct. The contractor started to clean off the lot at that time, but started to put in concrete "the week of November 8th or November 10th" (p. 560). The Heyniger bill was filed November 19th, and a rule to show cause with a temporary stay was obtained. The first intimation that Mayor Poole had that the defendant intended erecting the building in question was when he and the defendant had a conversation in regard thereto, October 11th (p. 72). The Mayor did not have knowledge that the building would be erected over the line until he caused a resurvey to be made "after ground had been broken and the walls located" (p. 82). The respondent Heyniger saw the plans, but they did not show the location on the property of the building (p. 189), and he first knew that the building was being erected over the building line when the walls were about level with the ground (p. 157); this was two or three days before he had served his notice of November 13th (pp. 160 and 161). As the Heyniger suit was commenced on November 19th, and as the other respondents simply awaited the outcome of the application

for a temporary injunction (pp. 81, 114 and 128), and then immediately filed their bill, there would seem to be no ground for laches and this his Honor, the Vice-Chancellor, to whom all the applications were made, so found.

The appellant attempts to show expenditures of large sums of money, which are not supported by the builder and materialman. It is claimed that on November 14th, $3,700 had been paid (p. 484), the total amount was $1,070.38 (pp. 523 and 556); and that on November 19th, $5,000 had been paid (p. 485), the total amount was $1,693.20. Moreover, the Heyniger notice was served November 14th and at that time the foundation was level with the ground (p. 482). The bill was filed five days thereafter. The appellant owned sufficient ground to the south (pp. 530 and 618) to have erected his building of the same size without extending over the building line; even if he were justified in his earlier actions (which is not admitted) the cost, on November 14th, when the notice was served, or on November 19th, when the bill was filed, of placing the foundation 3 feet 9 inches further south would have been very small.

The facts in the case of Smith *v.* Spencer (11 Buch., 389), which seems to be relied on by the appellant are clearly distinguishable from the facts in this case. There the defendant began the erection of his building in *August,* 1911, and the bill was not filed until the *18th of December.* In the case at bar the mason did not start to put in concrete until "the week of November 8th or November 10th." The Heyniger bill was filed November 19th, 9 days thereafter, and the Heyniger notice apprising the appellant that legal action would follow his infringement was served as early

as November 14th. A case where greater diligence was exercised would be indeed hard to find.

Before the doctrine of laches can be successfully invoked against them, it must appear that respondents had knowledge of appellant's violation, and that after obtaining such knowledge they delayed for an unreasonable time to proceed against the said appellant; and that by reason of such delay, the appellant reasonably and in good faith changed his position to his injury, relying on the fact that the respondents would not disturb him. The appellant must not only show the spending of money or incurring of obligations, but must show his innocence in doing so. He cannot take the defiant position assumed by him from the beginning of this controversy, and then successfully plead laches. The cases on this point are clear and convincng (Morrow *v.* Hasselman, 69 N. J. Eq., 612; Howland *v.* Andrus, 80 N. J. Eq., 276; Attorney General *v.* Algonquin Club, 153 Mass., 447; Stewart *v.* Finkelstone, 206 Mass., 28).

In Morrow *v.* Hasselman, *supra,* complainant gave notice to defendant as soon as it appeared that the second story of defendant's house would project beyond the line:

> "Notwithstanding the notice, Hasselman proceeded with the erection, and it was completed after the suit was commenced. The excavation for the foundation walls of his house was begun about November 25th, 1903, and was entirely within the line. On December 5th, Hasselman began the erection of the frame of the house. Complainant discovered, about December 10th, that the building would project beyond the line, and on the 11th of December gave the notice in writing. The bill was filed on December 26th, 1903, and the building completed after the suit. The

allegations in the bill being defective, it was amended after demurrer, and the amended bill was filed June 4th, 1904. The completion of the building under these circumstances must be considered to have been at the defendant's risk, and complainant is entitled to a mandatory injunction to enforce the covenant."

"And inasmuch as it appears from Mr. Andrus' evidence that the defendant had decided to proceed with the erection of the dwelling on the line proposed, solely on the ground that it was within their rights, and therefore declined to make any agreement, *there can be no claim that defendant relied on complainant's delay,* or was so injured thereby as to make it a bar to relief. * * * Relying on this claim of right, and not on any encouragement by complainant's laches, she proceeded with the building at her risk. This circumstance differentiates the case from the cases cited where laches was held to be a bar to an injunction" (Howland *v.* Andrus, *supra*).

"There is no hard and fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims or if knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word, silence or conduct of the plaintiff that there was no objection

to his operations. Diligence is an essential prerequisite to equitable relief of this nature. Quiescence will be a bar where good faith requires vigilance. But so long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches. Upon the discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means of relief. *On the other hand, one who openly defies known rights, in the absence of anything to mislead him or to indicate assent or abandonment of intent to oppose on the part of others, is not in a position to urge as a bar failure to make the most instant conceivable resort to the courts.* After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for early enforcement of demands as exists before conditions have become fixed" (Stewart *v.* Finkelstone, 206 Mass., 28).

VII.

The allegation of bad faith is unjustifiable and such an allegation is always a sign of weakness.

To charge the Mayor with bad faith when he is upholding his City is too serious a matter to consider, collaterally, on briefs. The protest of a $400 check of a business man for a 20 cent shortage is too absurd to require consideration. The Mayor and the appellant continued friendly (p. 571). That the Mayor in his actions has been supported by the City Council is sufficient,

and if the citizens have aided with a popular subscription, it shows his backing, and the popular resentment of so drastic an action of the appellant.

The protection of this restriction for the benefit of the public is analogous to the duty of a Municipal Council to regulate and control the streets of the City for the benefit of the public, and it surely cannot be successfully contended that it would not be the duty of the Council to compel the removal of a permanent encroachment on one of the public streets of the Borough. (The People *v.* Harris, 203 Ill., 272; City of Chicago *v.* Pooley, 112 Ill. App., 343; Burlington *v.* Pennsylvania R. R. Co., 56 N. J. Eq., 259.)

> "The authorities of a municipal corporation hold and control the streets and public ways of the city in trust for the use of the public" (Dillon on Mun. Corporation, Sec. 1176).
>
> "A permanent encroachment upon public streets for a private use is a purpresture, and is in law a nuisance" (The People *v.* Harris, 203 Ill., 272, at p. 282).
>
> "A municipal government invested with the ordinary power to regulate streets, is a trustee for the public" (Burlington *v.* Pennsylvania R. R. Co., 56 N. J. Eq., 259, 261).
>
> "When a general plan has been laid out in behalf of the Commonwealth for the improvement of land, and the construction of a broad avenue for the benfit of all purchasers of lots upon it and of the public at large, with specific restrictions requiring conformity thereto inserted in the deeds, it is of importance that architects and builders should understand that the Commonwealth has a right to insist that its rules and regulations must be observed; and a violation so considerable as

> is shown in the present case, when made in the face of distinct notice and prohibition from the public authorities cannot be entitled to indulgence" (Attorney General *v.* Algonquin Club, 153 Mass., 447).

It is respectfully submitted that the situation, as shown by the testimony in this case, discloses no abandonment of, or a disposition to abandon, the building line. That whatever violations there are (all of which are slight) indicate mistake; that the appellant alone has shown intention. He proceeded in defiance of all rights; he took his chances on the effect of his conduct with his eyes open to the results which might ensue, and with knowledge of a former decision of our Court, affecting a property on the same avenue and near him, against him. If now he will be put to the expense of moving the building on the vacant 3 feet and 9 inches that he owns, that is a result that he should have considered earlier. That where a general land scheme exists any purchaser has a right to enforce the covenant. That whatever other violations there have been, they are too insignificant in extent and in number to justify the Court in inferring a general abandonment of the covenant. That acquiescence in a trivial breach of such a covenant does not conclude a complainant from relief in respect of a more important character. That nothing short of general acquiescence in the violation of the covenant will be sufficient to raise the presumption of abandonment. That the decree should be affirmed.

Respectfully submitted,

HARRY R. COOPER,
H. H. SNEDEKER,
Counsel for Respondents.

New Jersey Court of Errors and Appeals.

GEORGE H. HEYNIGER,
Complainant-Respondent,
v.
ABRAHAM LEVINSOHN,
Defendant-Appellant.

THE BOROUGH OF BELMAR, ET ALS.,
Complainants-Respondents,
v.
ABRAHAM LEVINSOHN,
Defendant-Appellant.

On Appeal.

POINTS AND BRIEF FOR DEFENDANT-APPELLANT.

I.

Preliminary Statement.

The complainant, George H. Heyniger, filed his bill of complaint in the Court of Chancery on the 19th of November, 1913, praying for an injunction restraining the defendant from continuing the construction of a certain store building on a lot owned by him (the defendant), located on the southeast corner of Tenth avenue and F street in the Borough of Belmar, Monmouth county. The bill alleged that the building was being constructed within the build-

ing line fixed by a certain restrictive covenant that regulated all structures on that avenue and which was embodied in the defendant's deed. Later, and on the 22d of December, 1913, the complainant, the Borough of Belmar, Charlotte Wildman and Jacob Newman jointly filed a second bill of complaint in which they sought similar relief. The two actions were consolidated and accordingly heard together. They are here argued for convenience as though they embodied but one action.

After final hearing, the Court of Chancery on the 27th of November, 1916, made a decree by which the defendant was enjoined from maintaining any portion of his building nearer to the line of Tenth avenue than 20 feet.

From this decree, in due course, an appeal was taken, and the whole matter is now before this Court for argument.

The relief sought is predicated upon the theory that the defendant, Levinsohn, took title to the land in question by a deed which contained a restrictive covenant according to the terms of which he was not permitted to build on his lot at a point nearer than 20 feet to the line of Tenth avenue.

The decree is resisted upon several distinct grounds which will now be separately discussed.

II.

The Alleged Restrictive Covenant in Respect to Building Line Was Not Contained in the Deed Given by the Original Owner Nor in the Deed of the Defendant Nor in the Deeds from Intermediary Holders of the Title. Accordingly it is Insisted That the Alleged Covenant Was Not Enforceable for Certain Reasons Hereafter Presented.

The lot in question was a part of a tract of land

at one time owned by the Ocean Beach Association. This Association was incorporated by an act entitled, "An Act to Incorporate the Ocean Beach Association," approved March 13, 1873 (see Pamphlet Laws of 1873, page 1089). By virtue of the authority thus conferred, the Association purchased a large tract of land fronting on the Atlantic Ocean and Shark River for development purposes. It was laid out in blocks and lots, across which were superimposed intersecting streets. Those running easterly and westerly and generally at right angles to the ocean front were designated upon a map as "avenues," and those running north and south were denominated "streets." The avenues had a width of 80 feet and the streets a width of 60 feet. This act of incorporation (which it will be noted was not a public act but a private act) should be carefully examined. Sections 5 and 7 we regard as important and controlling. Accordingly they are quoted at length:

> "Section 5. And be it enacted, That a majority of the directors for the time being shall form a board for the transaction of the business of the said corporation and shall have power to make such by-laws, ordinances and regulations as shall seem necessary and convenient for the management or disposition of the stock, effects and concerns of the said corporation; provided that the same are not contrary to the laws or constitution of the United States, or of this state."
>
> "Section 7. And be it enacted, That for the purpose of restricting nuisances and of compelling a uniform system of improvements of said settlement, the said company are hereby authorized and invested with power to incorporate into any deed of conveyance made by them, whether in fee simple or otherwise, a clause or condition forbidding the sale upon the premises so conveyed by said company, of any intoxicating or spirituous liquors, and to require any grantee of said company to make and maintain such style and character of im-

> provement on said lots so conveyed, or on the streets fronting thereon, as to the said company may seem most expedient for securing a uniform system of development and improvement throughout the said settlement, and the board of directors of said company shall have the power to appoint such peace officers as they may deem necessary for the purpose of keeping order on the premises of the company, which officers shall be paid by said company, and they shall have the same power, authority and immunities when on duty, as constables and other peace officers under the laws of this state, and they shall have power to enforce obedience to any rule or regulation of said company, for the preservation of quiet and good order on the premises of the said company and their grantees."

The general plan of development thus authorized appears to have been promptly entered upon. The deeds made by the Association generally contained the following covenant:

> "And the said party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said The Ocean Beach Association, their successors and assigns, that the said party of the second part, her heirs and assigns, shall not sell or suffer to be sold on the premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said Act of Incorporation, by-laws, rules or regulations made by the said Association at any time."

The defendant acquired title to the land in question by a conveyance from John E. Miller and wife, dated November 22, 1905, and recorded in the Clerk's Office of Monmouth county, December 1st, 1905 The deed did not contain the alleged restrictive language which was inserted in the various deeds made by the Association. It did, however, contain the following recital: "subject to the covenants. conditions and restrictions as in deeds by

Ocean Beach Association for said property." See page 12, at line 4. See also page 65, at line 23. See also original deed. The conveyance to Levinsohn contained covenants of seizin, of right to convey, of quiet enjoyment, and of general warranty. The deed made by the Association conveying the same property contained like covenants.

It is this covenant which is said to embody the building restriction sought to be enforced against the defendant. It will be observed that the restriction is not expressed in explicit terms. There is no specific deliverance as to the character and details which shall regulate buildings or define the building line. It is insisted, however, that the building restriction now sought to be enforcd was comprehended in the expression "by-laws, rules or regulations made by the said Association at any time." These words are found in the original deed of the Association. It is further insisted that the recital in the defendant's deed just quoted relegated by reference his title and estate to the qualifying language of the original deed made by the Association. We think this is true. Accordingly we must now consider the effect of the words "by-laws, rules or regulations," etc. The complainants endeavored to prove affirmatively in support of their contention that on the 9th of June, 1873, the Association adopted the following resolution:

> "Resolved, That it is highly important to maintain uniformity in the line of buildings on the main avenues of the Association, and for securing said object, that no building be erected on said avenues nearer to the line of the same than twenty feet."

It is said that this resolution is effectively embodied in the deed and thus becomes by legal intendment a restrictive covenant because the deed imposed upon the grantee compliance with "by-laws, rules or regulations made by the said Association

at any time." The soundness of this contention is challenged. A consideration of this matter must return to the very language of the private act by which the Association acquired its corporate powers By Section 5 the Association was given power to adopt "such by-laws, ordinances and regulations as shall seem necessary and convenient," etc. Section 7, however, in express terms recites that certain powers, if exercised, should be incorporated "into any deed of conveyance made by them, whether in fee simple or otherwise." Among the powers thus enumerated in Section 7 are those which have regard to restricting nuisances and compelling "a uniform system of improvement," etc. The method of exercising these powers is then more particularly described. The section recites that the deed should contain "*a clause or condition* forbidding the sale * * * of any intoxicating liquors and to require any grantee of said company to make and maintain such style and character of improvement on said lots so conveyed or on the streets fronting thereon as to the said company may seem most expedient for securing a uniform system of development," etc. It is obvious that this private act conferred the power to control the style, character and location of improvements on the lots; but it is also clear, we think, that if this power is exercised, it must be exercised (if done in conformity with the charter) by inserting the provisions as "a clause or condition" in the deeds by which the lots are conveyed. Any restriction to be imposed upon the lots must be imposed by an appropriate clause in the instrument by which the conveyance was made. The importance of this duty was manifestly recognized by the Association, for each deed recited in terms that the grantee "shall not sell or suffer to be sold on the premises hereby conveyed any spirituous or intoxicating liquors." A building restriction might have been imposed by an appropriate clause similarly inserted in the conveyances, but no such

clause appears. We are asked to conclude that a restrictive covenant such as is here sought to be enforced was appropriately embodied by the covenant of the grantee to refrain from violating "by-laws, rules and regulations" adopted from time to time by the Association. We think that the language of the deed was ineffectual to accomplish such a purpose

Let us see how the matter stood. It is doubtful whether at the time the corporation was formed there was any statute in the State of New Jersey which permitted the organization of a land company. Certainly there was no act which authorized an organization with powers and functions such as the Ocean Beach Association sought to enjoy. In this posture (and within the limits of the Constitution as it then was) a private act was presented to the Legislature, and the adoption of this act marked the beginning of the Association's corporate life. The powers thus created, if enjoyed by the Association, must have been enjoyed by the means and in the manner prescribed by the act of incorporation. It had the power to create a restrictive covenant. The means and manner of creating it were prescribed in the statute. The Association ineffectually sought to exercise that power by a different method and in a different way. Such an attempt we insist was *ultra vires*. Even though we assume that a restrictive covenant was remotely suggested by reference to "by-laws, rules and regulations" found in the deed, yet we insist that this fell short of the duty to exercise the granted power in the manner and by the means imposed by the Legislature. The reference in the deed to by-laws, rules and regulations by no fair intendment is suggestive of a restrictive covenant of the character we are considering. The terms employed (and the connection in which they appear) in the statute are all probative of the fact that they related to details of corporate management and general provisions of

police regulation which from time to time the directors might see fit to adopt. The expression in the deed, "at any time," is made to qualify "by-laws, rules and regulations." Can it be argued that one who took a deed from the Association when no restrictive covenant was in operation or even contemplated could be required thereafter to conform to a restrictive covenant afterwards imposed and which would seek to regulate the character of his building and its location upon the lot? We think this inquiry must be answered in the negative. No title could thus be clouded and no ownership could thus be circumscribed. Such an attempt would be in violation of all the covenants contained in the deeds which the Association gave, and which were also contained in the deed of the defendant. It would violate the covenant of warranty and quiet enjoyment, and leave the title guaranteed by the deed practically worthless. The deed contained covenants of seizin, of right to convey, of quiet enjoyment, and of general warranty against encumbrances. The possession, dominion and rights of the grantee would be in perpetual jeopardy. This would lead to a result inconsistent with the underlying principle that all matters which relate to limitations upon title should be certain, definite, and not left in substantial doubt. This is an important consideration and is in further confirmation of the suggestion that by fair interpretation the expression "by-laws, rules and regulations" was intended to relate merely to details of management and police control rather than restrictions which qualify the right of possession and enjoyment of the estate granted. It follows, we think, that the restrictive covenant relied upon was not embodied in the deed, and was therefore unenforceable. It is no answer to suggest that the owner of land at common law by an independent understanding with all his grantees and which they in turn maintained with each other might impose a restrictive building obliga-

tion upon lands granted merely as an incident of his dominion and ownership. If we assume that this were possible without a full recital of the restriction being incorporated in the deed (which is denied) we are still met with the difficulty that we are here dealing, not with a natural person, but with a corporation which derived all its powers and functions by grace of the soverign state. If powers were granted by the Legislature, those powers may be exercised, and if the means and manner by and in which they were to be exercised are prescribed in the act of incorporation, they must be exercised in that way and not otherwise. An attempted exercise of these powers, except in conformity with the authority conferred, becomes ineffective and *ultra vires*.

It may be that the Legislature by general act could have conferred general powers upon a land corporation which would have permitted the corporation to impose restrictions in its deeds by a method less formal and precise than that which is found in the act incorporating the Ocean Beach Association. It may be also that such a general act by appropriate terms could have been made to apply to all private corporations. If this had been done it would have answered, perhaps, our present contention at least in part. The difficulty, however, is that no such general enabling act appears. If there be such a statute which in terms or by implication confers such additional powers upon a private corporation, we have been unable to find it and our attention has not been directed to such legislation. We conclude, therefore, that the powers of the Ocean Beach Association must be found in the act of incorporation, and that these powers have not been altered, changed or enlarged by any other legislation.

It is well settled that restrictive covenants of this character must be strictly construed, and this for the benefit of the grantee. We venture to assert

that no reported case will be found where a court of equity has loaned its aid in support of an alleged restrictive covenant, where the very terms and scope of it did not appear in writing and with certainty either in the deed itself or by some agreement in writing between the parties. The case of De Gray v. Monmouth Beach Club House Co. (5 Dick. 329), presents a careful and thorough study of this whole topic. In the numerous cases there cited it appears that restrictions were thus created and not otherwise. The restriction in each instance was reduced to writing, and its terms were never vague, uncertain, or left to inference.

It may be true (as was held in Kirkpatrick v. Peshine, 24 Eq. 204, and Wootton & Dynes v. Seltzer, 83 Eq., 163) that a restriction is enforceable though not incorporated in the deed, but if that condition obtain, as was distinctly held in the cases just cited, there must be a definite and certain agreement in writing touching the matter which would be binding between the parties seeking relief and the party attacked.

In Meaney v. Stork, 80 Equity, 65, Vice Chancellor Garrison said: "It should be recalled that courts of equity do not aid one to restrict another in the uses to which the latter may lawfully put his property unless the right of the former to such aid is clear; that restrictive covenants are strictly construed against the person claiming the right to enforce them, and that such covenants must not be vague or uncertain. Where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, his right to such relief must be denied.

"Fortesque v. Carrol (Court of Errors and Appeals, 1910), 76 N. J., Eq. (6 Buch.) 583.

"Goater v. Ely (Vice Chancellor Garrison, 1912), 82 Atl. Rep. 611."

In Belmar v. Prior, 52 Vr., p. 254, the expression "rule or regulation" as found in the deeds given by the Ocean Beach Association was construed. It was held that the words "rule or regulation" could not be extended to cover a minute or resolution passed by the directors of the Ocean Beach Association which had relation to the avowed purpose to dedicate a certain block of land for park purposes.

Accordingly we insist that the alleged restrictive covenant was not incorporated in the deed; that the means and method by which it is said to have been incorporated (if ordinarily effectual for that purpose) was not the means and method prescribed by the statute; that any different attempt to reach this result was *ultra vires;* that the deed in an attempted limitation of the grantee's estate must be strictly construed for his benefit, and that no encumbrance or limitation under the theory which obtains in a court of equity should be imposed upon his title or dominion unless the right to do so is clear and free from doubt.

Nor is this emergency met by the suggestion that the defendant took with full notice of this alleged restrictive covenant, and with notice that the language of his deed by common interpretation was accepted as comprehending a restriction in respect to a building line. If the original restriction alleged to have been initiated by the Association was *ultra vires* (as we insist), notice and knowledge in legal contemplation rose no higher than notice and knowledge of an attempted unlawful act. The prevailing interpretation of the clause in the deed to which we have already referred is likewise inconsequential for two reasons: first, because by-laws, rules and regulations, as we have already argued, could not comprehend within their terms a restrictive covenant such as we are considering; and second, because in any aspect of the matter, the attempt upon the part of the Association to impose such a restriction by a mere reference to by-laws,

rules and regulations, was *ultra vires,* since a serious limitation upon the estate was attempted by means and by a method not authorized by the statute. Moreover, popular interpretation may be wholly disregarded if the language thus interpreted cannot by fair intendment suggest or embody the interpretation placed upon them. In other words, popular interpretation cannot enlarge beyond the necessary intendment of the language employed, and thus read into the language a meaning which the words do not import; nor can popular interpretation transform *ultra vires* into a lawful exercise of corporate powers.

III.

Assuming That Such a Covenant Was Created It Was Not Enforceable.

Assuming, but not admitting, that there was a restrictive covenant in respect to a building line, the proofs establish that such covenant, as a part of an alleged land scheme, was abandoned, and that the character of the neighborhood had so changed as to defeat the purpose of the covenant and thus render its enforcement unreasonable. For law which controls in considering this detail, see:

Duke of Bedford v. Trustees, 2 Myl. & K. 552;
Sayers v. Collyer, 28 Ch. D. 103;
Trustees v. Thacher, 87 N. Y. 311;
Ammerman v. Deane, N. Y. Ct. App. 30 N. E. Rep. 741;
Page v. Murray, 1 Dick. Ch. Rep. 325;
Roper v. Williams, Turn. & R. 18;
Peek v. Matthews, L. R. (3 Eq. Cas.) 515.
See German v. Chapman, 7 Ch. D. 271.
Sanford vs. Keer, 10 Buch., 240.

The building in question is located at the southeast corner of Tenth avenue and F street. The en

croachment is said to be on the building line as applied to Tenth avenue. The extent of the encroachment is alleged to be 3 feet, 9 inches. The structure is a two-story brick building, sightly and imposing in appearance, and used for the purpose of a department store. We think it may be fairly said that, though not pretentious, it is the most imposing store building in the Borough of Belmar. A great mass of testimony was offered upon both sides with a view of establishing what encroachments had been maintained on Tenth avenue by other lot owners. The accurate measurements will be found in the testimony of the three surveyors, Emlen, Allen and Potter. See pages 230, 584, 492. It is indubitably established that the business section of Belmar occupied that portion of Tenth avenue which was in the immediate neighborhood of the defendant's property, and also F street, near its intersection with Tenth avenue. The defendant's building was located in the center of this business locality. The store building, as already indicated, was erected at the corner of Tenth avenue and F street. It appears from the testimony that the total number of structures on Tenth avenue was as follows: on the north side, 53; on the south side, 46; total, 99.

The presence of a bay window or a piazza within the restricted area we insist is an encroachment. In Kirkpatrick v. Peshine, 9 C. E. Gr., page 207, it was held that

> "The erection of a bay window one story high, built up from the foundation wall and extending beyond the line of twelve feet (the restricted area) is a violation of the agreement and will be restrained."

The case also held that the erection of a stone stoop or steps occupying the whole width of twelve feet was not an infringement of the agreement. This conclusion, however, was predicated upon the special wording of the agreement. The agreement,

which served the purpose of a restrictive covenant, recited "that the main front wall of the house should be twelve feet" from the line of a certain street. The Court held that the stone stoop was not a part of "the main front wall," and accordingly did not violate the agreement.

In Righter v. Winter, 2 Robb. 254, it was held "that a bay window built up from the foundation wall must be considered as 'the house' within the building restrictive covenant."

The complainants rely upon Morrow v. Hasselman, 3 Robb., page 612. The case would seem to have no pertinency for the reason that the restrictive covenant relied upon recited in terms what sort of a bay window and piazza might be built, and the court found as a fact that the structure complained of was built in conformity with the terms of that particular restrictive covenant.

The encroachments on Tenth avenue, including porches, bay windows, and foundation walls, according to the testimony of Allen, were 96 in number If, however, we exclude bay windows and porches, the encroachments shown by the main body of the building, according to his measurements, were 36 in number. These latter encroachments ranged from a fraction of an inch to 8 feet and upwards. Many of these encroachments involving the main body of the buildings were not trifling, but substantial. Here are some of them:

206,	house	encroachment,	2 5-100 ft.
208	"	"	2 8-100 ft.
210	"	"	2 17-100 ft.
214	"	"	1 18-100 ft.
216	"	"	1 5-100 ft.
218	"	"	1 15-100 ft.
613,	American	House,	8 1-100 ft.

See evidence of Allen, beginning at page 499.

NEW JERSEY COURT OF ERRORS AND AP

GEORGE H. HEYNIGER,
Complainant-Respondent,

v.

ABRAHAM LEVINSOHN,
Defendant-Appellant.

On Appeal.

THE BOROUGH OF BELMAR, et al.,
Complainants-Respondents,

v.

ABRAHAM LEVINSOHN,
Defendant-Appellant.

MEMORANDUM FILED BY DEFENDANT-APPELLANT WITH ORIGINAL BRIE AND TO BE READ IN CONNECTION WITH PAGE 15 OF THE ORIGINAL BRIEF.

The original map referred to in the testimony of Joseph McDermott, the Clerk of the County of Monmouth (see pages 461 to 469 inclusive) was produced for the inspectio of the Court. The true copy which the witness promised to furnish accompanies the exhibits offered by the defendant-appellant, and has attached thereto a certificate of the County Clerk, setting forth that the copy is in fact a tru copy of the original map to which his attention was direct at the time he was examined as a witness. This map shows Tenth Avenue extending across River Street to and into Sha River, and thence further extended to the Commissioners' exterior line for solid filling. The original grant to th Borough made by the Riparian Commissioners was received in evidence, and a certified copy was retained by the Court. See page 467, line 10; page 469, top. By this deed lands under water lying at the foot of Tenth Avenue were conveye to the Borough, and since that conveyance the testimony shows that the Borough exercised dominion over the land, a excluded, by reason of the maintenance of the Buhler Pavil and other means, all public access to the river at the foo of Tenth Avenue. The minutes of the governing body of the Borough, which were offered in evidence by the defendant-appellant, show conclusively that the Buhler Pavilion encroached upon Tenth Avenue and shut off access to the rive They further show that the Borough exercised property righ and dominant control over lands lying in Tenth Avenue both above and below high water mark in Shark River. As early October 28th, 1902, a minute of the Council indicates that "Dr. Thompson called attention of the Council to the obstruction at the west end of Tenth Avenue caused by the erection of Buhler's Pavilion on Borough property." The min further recites: "On motion that the matter be referred to the Highway Committee for investigation and report, was so ordered." See page 474, top. Subsequent minutes indicate that the Borough treated this portion of Tenth Avenue as though it were property to be used for private occupancy, leasing the same and reciting in its resolution of October 4th, 1910, that "The westerly end of Tenth Avenue is now o cupied by John A. Buhler" and further reciting that the pr perty so occupied in Tenth Avenue "be leased to the said John A. Buhler for the term of two years from October 1st, 1910" upon a consideration therein expressed. See page 47

It also appeared that some of the porches were on solid foundations, and that most of the bay windows were built up from a solid foundation similar to that which the house occupied. See evidence of Allen, page 504, and pages following. There was, however, a still more substantial encroachment, namely, the structure known as Buhler's pavilion. Tenth avenue as laid out extended to Shark River. The defendant offered in evidence a map filed in the County Clerk's Office on the 9th of December, 1896. See page 461, at line 20. The legend upon the map indicated that it was a map "of Belmar, formerly Ocean Beach" and the names of the directors of the Ocean Beach Association all appeared thereon. See pages 446 and 464. The map itself was signed in the proper handwriting (as testified to by Mr. McDermott, the County Clerk), of H. H. Yard, the President of the Association. It appeared that this map was one which was ordinarily used for searching purposes in the Clerk's office (page 466); that Tenth avenue was shown upon the map extending to Shark River; that at a distance beyond the shore a red line was drawn which indicated the limit for exterior filling under riparian grant. See page 465. It was further shown that the Borough of Belmar took from the Riparian Commissioners a grant for the lands lying at the foot of Tenth avenue. Across the foot of Tenth avenue was constructed Buhler's Pavilion. It extended nearly across the avenue, and shut off access to Shark River from the avenue. See page ..... The building for many years has been owned by the Borough and maintained by the Borough. It was formerly leased to one Buhler, and at the time of the trial was leased to one Carpenter. See pages 472 to 476. This encroachment long maintained by the Borough was substantial and perpetual. It was maintained through a series of years and is still being maintained by the Borough, one of the complainants in this very proceeding. Its maintenance

prevents not only public access to the river but also to the major part of the highway.

We have referred above particularly to the measurements of Allen. The results reached by Emlen and Potter were not substantially different.

We think that these encroachments were sufficient to indicate that the original plan, assuming that it comprehended a restrictive building covenant, had been abandoned without dissent. In any aspect of the matter, the proof in this regard leaves the present right to enforce the alleged restrictive covenant at least doubtful.

The rule of equity which governs in such a posture was thus stated by the Court of Errors and Appeals in Fortescue v. Carroll, 76 Eq., 584: "It is well settled in cases where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, to doubt is to deny." This would seem to be a general principle underlying all equitable relief of an injunctive character.

But again, the evidence is plenary that the neighborhood had so changed as to defeat the purpose of the covenant and thus render its enforcement unreasonable. The underlying principle is stated in Page v. Murray, 1 Dick., at page 332. The Court referred to what was said by Lord Eldon in the case of The Duke of Bedford v. the Trustees of the British Museum, 2 Myl. & K., 552, and then added:

> "It was (there) held that a court of equity would not enforce the covenant where subsequent acts of the grantor, or those claiming under him, so altered the character and condition of the adjoining lands that the restriction of the covenant ceased to be applicable according to the intent and spirit of the contract, but that under such circumstances it would leave the parties to their remedy at law."

In Sanford v. Keer, 10 Buch., 240 (Court of Errors and Appeals) it was held that:

> "Where by reason of a change of the character of a neighborhood the enforcement of a restrictive covenant would be a burden upon the restricted property without conferring any benefit upon the property of the covenantee, equity will refuse relief, but where the change does not conflict with the essential purpose of the covenant and the benefit therefrom remains unimpaired, a violation will be enjoined."

Pomeroy (6 Pom. Eq. Jur. 1316) thus states the rule:

> "Specific performance not being an absolute right, the fact that enforcement would be of little or no benefit to the complainant, and a burden upon the defendant, is sufficient to constitute performance oppressive, and it will not be given."

It was established without contradiction that Tenth avenue in the immediate region of the defendant's building and F street, near its intersection with Tenth avenue, comprehended the active business zone of the Borough. Within this compass practically the entire business activity of the town was confined. Since the trial of Newbery v. Barkalow (infra) there had been a marked change in this respect. Tenth avenue in the location now in question had ceased to be a residential part of the Borough. It is now one of the main business arteries, and this circumstance alone is sufficient to render uncontrolling what was determined in the Barkalow case. See evidence of numerous witnesses with specific reference to the following pages: 329 line 28, 341, 347, 364 bottom, 365 top, 387, 421 top, 433 bottom, and 441.

That region is no longer devoted to residential purposes. The exigencies of growth had rendered this impossible and undesirable. *The evidence offered by the defendant in support of this proposition stands uncontradicted in the case,* and it is

difficult to see how, in view of this proven fact, the Court may now find upon a review of all the testimony that there has not been such a change in the character of the neighborhood as to defeat the purpose of the covenant and render its enforcement unreasonable.

The case seems to have been tried by the complainants upon the assumption that the parties were practically concluded by what was held by Vice Chancellor Howell in Newbery v. Barkalow, 5 Buch., 129. The Court had before it the enforcement of this alleged restrictive covenant, but the controlling facts in that case can have no relevancy to the present controversy. What was there said cannot be here construed as *res adjudicata*, because there was no unity of parties and no identity of subject matter. The case was heard and determined nine or ten years ago. At that time there were only 79 structures on Tenth avenue. On the south side the Court ascertained that nine were built over the restrictive line "from one inch to 4½ inches," and on the north side, 18 were built over the line "from 2 inches to a little over 2 feet." The ascertainment of fact was that of the 79 houses erected 52 were in conformity with the alleged restrictive covenant. We are not bound by this finding of fact. It may be that the measurements offered were inaccurate, or it may be that the defendant was negligent or inefficient in presenting his case. Whatever the explanation may be, this Court must be concluded by the evidence now before it. Without reviewing what has already been said in respect to the encroachments established in the present case, it is clear that the encroachments now proven are greater in number and greater in extent. Moreover, the encroachments proven in the present case do not appear to be trivial in character, but are substantial and grave. There is another comment which seems proper in considering the Barkalow case. It appears that since evidence was taken in that case,

many business places have been erected and opened; according to the testimony of Job Barkalow, 19 in all, including hotels, boarding houses, fish markets, a public library, business offices, drug store, tailor shop, dry goods store, moving picture place, milk depot, express company, restaurant, etc. See page 385. See also in same connection evidence of C. Levinsohn, page 448; Daniel A. Conover, page 434; Louis Tafunsky, page 415; Thomas F. Dillon, page 329, and others. There have been many new structures also, most of which present some element of encroachment. See evidence of Barkalow, page 398.

The proof now presented seems wholly convincing upon the proposition that the character of the neighborhood had changed, and that the locality is now wholly devoted to business purposes. If this phase of the controversy were presented in the Barkalow case it appears to have received no consideration from the court. The proven facts as to this change in local conditions under the authorities cited, should defeat the present effort of the complainants, for it renders the enforcement of the alleged covenant inequitable and unreasonable.

IV.

Legal Evidence in Respect to Abandonment of Alleged Restriction and Change in Character of Neighborhood Unlawfully Excluded.

The defendant offered to prove that there had been an utter disregard of the alleged building restriction on F street, especially in the immediate neighborhood of the defendant's store. This evidence was overruled, and accordingly was not presented. The Vice Chancellor in dealing with this phase of the matter relied upon what was said by Vice Chancellor Howell in Newbery v. Barkalow,

supra. It will be remembered that the resolution which is said to embody the restrictive covenant fixes "the line of buildings on the *main avenues* of the Association." Vice Chancellor Howell held "that the restrictive covenant applied not to the streets at all, but applied to each and all of the avenues, the word 'main' in the quoted phrase being surplusage." We do not think this was a proper construction of the language employed in the assumed restrictive covenant. It will be borne in mind that the resolution embodying these words was passed on the 9th of June, 1873. It does not satisfactorily appear that at that time a map had even been prepared showing avenues and streets. It does appear that the first maps displayed by the Association designated all thoroughfares running east and west as avenues, and all thoroughfares running north and south as streets. The words "main avenues" found in the resolution, under the circumstances shown, would seem by fair intendment to relate not to avenues as such to the exclusion of streets, but merely to *main thoroughfares.* The use of the word "main" was not surplusage. It indicated clearly that the plan of development was in embryo, and that the directors did no more by the resolution than to express a purpose to adopt a building restriction on such thoroughfares as might thereafter develop into main thoroughfares. It is not perceived upon what theory the word "main" is stricken from the resolution by the Vice Chancellor. It meant something when originally employed and is consistent with the theory just suggested. If, as we contend, the language of the resolution had in contemplation main thoroughfares, without regard to an arbitrary designation on a map then or thereafter to be made of streets and avenues, it follows that the defendant was entitled to show first, that F street was a main thoroughfare; and second, that there had been an abandonment or utter lack of compliance with the

terms of the alleged restrictive covenant in the neighborhood where the store in question was located. It is insisted that this evidence was germane to the controversy; that it was important and controlling and that its exclusion involved reversible error No court of equity should execute upon the defendant the extreme injunctive power to his substantial injury and loss without hearing all available testimony tending to establish that the character of the neighborhood had changed and that the restrictive covenant, if ever created, had been abandoned without dissent in the immediate location of his own property.

V.

The Complainants Have No Such Interest in the Alleged Restrictive Covenant as Would Permit Them to Receive the Relief Sought.

All the complainants own property so remotely located from the building of the defendant as that his alleged violation of the restrictive covenant could do them no substantial harm. The complainant, Wildman, owns property on the north side of Tenth avenue, a block and a half east of the defendant's property. Newman owns property located on the north side of Tenth avenue, 150 feet distant from D street. Heyniger owns property located on the south side of Tenth avenue, more than a block distant from the defendant's property. The lot owned by the Borough of Belmar is on Ninth avenue, distantly removed from the defendant's store It is insisted that none of the complainants has suffered such substantial injury as to justify the court in exercising its injunctive power. The theory upon which equity has enforced these restrictive covenants is that they are created by the original owner for the mutual benefit of adjoining prop-

erty owners, as a part of a general scheme; and the scheme here presented (assuming, but not admitting, that one was formulated) was evidently designed to establish and preserve a uniform building line so that abutting and adjacent owners would have an unobstructed view.

In Barton v. Slifer, 72 Eq., 817, the Court said:

> "It is not to be expected that the court will be appealed to for the preservation of the general scheme in localities where the complainant is without interest. It is only when the interest of a property owner is affected that, in my judgment, he can reasonably be charged with the duty of applying to the court for the preservation of the general scheme."

In Morrow v. Hasselman, 3 Robb., 612, relief was granted because it appeared that *"substantial, or at least appreciable damage is shown in this case,* for complainant's view to the east is especially affected by these violations, and she has a special interest and right in preventing the obstruction to her view."

And in this connection it is worthy of note that in Newbery v. Barkalow the complainant would have had his view obstructed by the proposed construction of a livery stable that extended out into the restricted area almost to the street line and cut off his view of the adjacent street.

We think it is safe to say that in all the cases where restrictions or restrictive covenants have been enforced the court has lent its aid only where the party applying has been injuriously affected in some substantial way by the breach of the restriction In such cases it has appeared that the complaining party was either an adjacent owner or owned property so near to the offending party that injury for the reasons suggested was obvious and certain.

Here, however, each of the complainants owns

property remotely located, and upon no possible theory could suffer loss, injury, or even annoyance by a building, sightly in character, which in any aspect of the matter presented an encroachment of about 3 feet, and this, too, where in the immediate neighborhood there were other encroachments similar in character, some of which were also more flagrant and extensive. For example, the hotel building immediately adjacent to the defendant's store as now built has upon it a two-story porch beginning at the ground level. It is covered by an independent roof, and occupies the entire front of the structure. It extends out beyond the restricted building line at least 10 feet, 6 or 7 inches. The foundation of the building itself is over the building line 2¼ inches. The next building to the hotel (being the second building counting from the defendant's structure) has a bay window attached which extends over the restricted line 2 feet 6¼ inches. This bay window starts at the ground, is extended the entire height of the building, and is terminated by a tower projecting above the roof. See pages 238. 239 and 240. This evidence is not contradicted. In this connection the photographs offered by the defendant will be of great service. The picture taken near the corner of Tenth avenue and F street looking down Tenth avenue, shows the general location of structures in respect to the alleged building line An examination of this photograph will make it obvious that what the defendant has done is not out of harmony with the location of other structures on the avenue, and that no property owner in his immediate neighborhood, much less the complainant can suffer any appreciable injury, or even annoyance.

VI.

The Complainants Have Been Guilty of Laches.

The relief sought is extraordinary. Equity requires a punctilious activity in asserting the right here claimed. Slight laches or acquiescence will defeat a complaining suitor. Let us see what the controlling facts are in this case. It appears that work was begun on the 13th of October, 1913. It further appears that the first bill, namely, that instituted by Heyniger, was not filed until the 20th day of November, 1913, and that the bill filed by the Borough, Wildman, and Newman joining was not filed until the 19th of December, 1913. The complainants' proof tends to establish that the defendant informed Poole, the Mayor, of his intention to build, and asked if he would be permitted to construct over the building line; that Emlen, the Borough Engineer, at the direction of Poole, surveyed the lot; that this was done before any excavation was made; that the surveyor indicated the alleged building line; that on the 3d of November a survey made by this same surveyor indicated that the building was constructed with its northerly wall over the building line. On the 14th of November Heyniger served a notice upon the defendant that he, Heyniger, would apply for an injunction. This he subsequently did, filing his bill on the 20th of November. On the 4th of December notice was served upon the defendant, calling his attention to the alleged encroachment, running in the name of the Mayor of Belmar, and on the 6th of December a similar notice was served by Wildman and still another by Newman. No suit, however, in behalf of these complainants, namely, the Borough, Wildman and Newman, was instituted until the 19th of December. The notices referred to and any threatened action upon the part of any of the complainants cannot relieve them from the imputation of laches. As we have already stated,

work was begun by the defendant on the 13th of October. This involved the laying out of the foundation walls. It brought home to the complainants knowledge of a proposed intention to violate the alleged restrictive covenant.

The matter stood thus: The first formal notice was served by Heyniger November 14th, 1913. No bill was filed until November 20th, 1913. The suit was not brought by the Borough, in which Wildman and Newman joined, until December 19th, 1913. The work, which had begun on the 13th of October, had progressed so that on November 14th, the date of the Heyniger notice, the whole foundation was level with the ground, the south and east walls were up from seven to nine feet, and on the Tenth avenue side the pilasters had been constructed to the height of about three feet. There had been actually expended in cash in the work up to that date about $3,700, and enforceable contracts had been entered into practically covering the entire construction. These contracts aggregated many thousands of dollars, the building being an expensive one. See pages 482, 484 and 485. Before November 19th, the day before the bill was filed, the defendant had paid out in cash the sum of at least $5,000. Page 485. On December 19th, the date of filing the second bill, the walls were up, the rafters were laid and the roof was framed. Pages 490 and 526. On this date, to the cash expenditure of $5,000, paid prior to November 19th, should be added for materials supplied by the Lewis Lumber Company and paid for by the defendant, $3,637.73; also the item of $2,600 paid in cash to Isaac Traub, the contractor, December 8th. See pages 523, 556 and 557. This made a total expenditure in cash as of or prior to December 19th of about $12,000. In addition, it is to be borne in mind that previous to November 19th contracts which were not revocable and which contemplated the completion of the building had been entered into.

This evidence offered by the defendant was unassailed and accordingly must be accepted as a verity. It is manifest that before any legal proceedings were instituted, the defendant had assumed by way of contracts large obligations and had expended a large sum of money. The complainants had violated the established rule of law which requires that "legal proceedings must be taken before there has been a serious expenditure of money." Winslow v. Newcome, 100 Atl. Rep., page 613.

A mere threatened exercise of an actual or alleged right by the complainants cannot relieve them from laches. Each was in a position where each knew precisely what the defendant was doing and intended to do. What the defendant did was not done secretly. It was done in the open and was watched in its various phases by each of the complainants. Promptness and punctilious activity was required of them, if they intended to seek extraordinary relief by injunction.

A somewhat recent case (Smith v. Spencer, 11 Buch. 389) discusses at length, (quoting many authorities) the duty of a complainant in such a posture. There the complainant and defendant were bound by a mutually restrictive covenant, which created, among other obligations, the duty to observe a building line. The defendant began his erection in August, 1911. When the foundation was being laid the complainant believed that some portion of the house was within the restricted area, and so notified the defendant. The defendant continued building. The eaves of the defendant's house overhung the restricted space 2 feet 2 inches. There was also a cellar way which extended 3 feet further into the restricted space. Before the defendant's house had been fully completed (though substantial work had been done) and on the 18th of December, 1911, the complainant filed a bill praying for an injunction upon the theory that the construction was within the restricted area fixed at ten feet on side

lines It was further shown that on October 31st counsel for the complainant wrote a letter to the defendant, calling his attention to the erroneous location of the building, and other correspondence followed. *The bill, however, was not filed, as already stated, until the 18th of December.* The Court in commenting upon the situation said:

> "In the meantime the construction was going forward, and until the date of the filing of the bill no proceedings were taken to enjoin the construction. It was the duty of the complainants, under this state of facts, to act *immediately* after they had ascertained what the situation was. Sutcliffe v. Eisele, 62 N. J. Eq. 222, 50 Atl. 69; Zelman v. Kaufherr, 76 N. J. Eq. 52, 73 Atl. 1048; Meaney v. Stork, 80 N. J. Eq. 60, 82 Atl. 492. The complainants cannot, in a situation like this, protect their rights *by claiming such rights, however persistently, by mere correspondence. Legal proceedings must be taken before there has been a serious expenditure of money.* They waited until the defendant's building was half finished, and not until then did they seek the relief which they should have sought as soon as they had ascertained the facts. On this branch of the case I must hold that the complainants are guilty of laches.
>
> "The complainants therefore can have no relief against the defendant, and the bill must be dismissed, with costs."

The rule thus laid down would seem to be in accord with the general trend of authority and consistent with the numerous cases cited by the learned Vice Chancellor.

The authority of the case just cited was followed under similar circumstances by Vice Chancellor Backes in Winslow v. Newcome, 100 Atl. Rep., p. 613. The principle observed and summarized in that case is as follows:

> "The rule applied in equity is that to protect restrictive building covenants, legal proceed-

ings must be taken before there has been a serious expenditure of money."

In the matter now before the court thousands of dollars had been spent before suits were begun, though the complainants had full knowledge of the proposed construction and of the progress of the work

VII.

The Suits Are Not Prosecuted in Good Faith.

No one of the complainants, as we have already shown, has suffered any appreciable injury, and the institution of the two suits appear to have been inspired by Poole, the Mayor of the Borough. It may be well doubted whether the Borough has any substantial interest which would give it a status in equity. The property which it owns is remote from the defendant's building, being located upon a different avenue. It would seem to have no status in equity to institute such proceedings with a view merely of enforcing the restrictive covenant for the benefit of individuals. If such a theory is entertained by the Borough or any of the complainants, it is not disclosed in the bill filed by the Borough, or in the argument made by counsel. There are three other complainants, two joined with the Borough, and the third, Heyniger, is prosecuting alone and in his own name. It appears affirmatively that Poole was unfriendly to Levinsohn. Mr. Levinsohn testified that Poole was "against him" because, as he put it, "I do not deal in his bank." The testimony discloses that there was trouble over a loan. Mr Poole was acting as cashier of the Belmar bank. Mr Levinsohn gave a check to "a Trenton concern in the amount of $400." This check overdrew his account 20c. and was protested by Poole. Levinsohn said: "That hurt me very bad in my character because that is the first check I ever had protested."

Immediately thereafter he withdrew his account from the bank, and since that time (which was prior to the institution of the suit) Levinsohn says that Poole was unfriendly to him. The record discloses that when Levinsohn was interrogated on cross-examination in respect to this matter, he was overcome with emotion. The record reads, "The witness at this moment went into hysterics," and the court thereupon adjourned for the day. See page 539. It is noteworthy that Poole, when recalled to the stand made no substantial denial of what Levinsohn had said. See page 571, near top.

Poole admits that the Heyniger suit was instituted without any consultation with the Council; that he, Poole, suggested to him the serving of a notice upon the defendant "in connection with *my attorney,* Mr. Cooper," and that thereupon the suit was instituted. See page 81, at line 30.

Wildman testified that he was asked by Mr. Cooper, the attorney, to join in the suit. He said that he "subscribed" to the suit; that he wrote his name on a piece of paper, and that the amount so subscribed for the maintenance of his own litigation was the princely sum of $5. See page 123 and top of page 124.

Heyniger says that Poole asked him to bring the suit against Levinsohn. See page 159. He admitted that his house was eight or nine hundred feet away from the proposed construction, and that the proposed building did not obstruct his vision. See page 159, at line 23, and lines following. He frankly confessed that Poole agreed "to see that the suit did not cost him anything." Page 160, at line 23.

Jacob Newman testified that Poole asked him "to join in it," the suit. See page 115, at line 19. When asked if Poole told him that he would pay the bill, he answered, "I could not say." He added that he did not know "who is going to pay the bill * * * and that he did not expect to." Page 115, at line 30.

He finally said that Mayor Poole told him "it would not cost me anything." He was then asked this question: "You would not have pressed this suit under any circumstances, would you?" A. "Not if I had to pay." Page 119, top.

It is clear, therefore, that Poole inspired the litigation; that he agreed to stand sponsor for the costs; that he sought and found complainants to initiate the suit who were not substantially injured and who would not otherwise have invoked the intervention of the court. Poole himself admits that the governing body of the Borough had no knowledge of his activity until after he had reached an understanding with Heyniger. See page 81, at line 24. The probability is that the Common Council had no knowledge of his eagerness to enjoin Levinsohn until the time when the resolution of December 9th was passed, which authorized the institution of a suit in the name of the Borough.

We think this recital of facts bears all the earmarks of bad faith. The suits seem to have been inspired either by the personal animosity of Poole or his unnecessary activity as Mayor of the Borough. He drew into the litigation as complainants persons who were not injured, and who would not otherwise have sought to interfere with the defendant in the enjoyment of his property. We think no duty devolved upon him as a public official to enter upon such an undertaking and to initiate and prosecute the suits under the circumstances disclosed. For these reasons, it would seem to us that a court of equity should not impose upon the defendant the rigorous terms of an injunction which in effect means that his present building must be destroyed.

VIII.

Conclusion.

It is respectfully insisted that for the reasons urged the complainants should be denied the relief sought, and that the decree below should be reversed.

Respectfully submitted,

EDMUND WILSON,
PATTERSON & RHOME,
DURAND, IVINS & CARTON,
Counsel for Appellant.