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New Jersey
Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY

Between: ALONZO COTTON, Complainant, and LEWIS M. CRESSE, individually, and ANDREW SCULL and JOSEPH I. SCULL, trading as Scull Brothers, Defendants.	On Bill for Injunction.

Bill of Complaint

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

Humbly complaining unto your Honor, your orator, Alonzo Cotton, of the City of Ocean City, in the County of Cape May, in the State of New Jersey, respectfully shows:

1. That in the year A. D., 1880, the Ocean City Association, a corporation duly organized under the laws of the State of New Jersey, was seized in fee of a certain large tract of land situate within what is now the said city of Ocean City, in the county of Cape May, in the state of New Jersey; which said tract of land the said Ocean

City Association caused to be divided and laid out in numerous lots and streets, according to a certain map or plan recorded by the said Ocean City Association in the office of the Clerk of the said County of Cape May, at Cape May Court House, on the 9th day of June, A. D., 1880.

2. Your orator further shows unto your Honor that on the 1st day of February, A. D., 1881, the said Ocean City Association conveyed to one William H. Burrell, by deed duly recorded in the office of the Clerk of the said County of Cape May, a certain parcel of ground known as lot numbered 440, Section A, on the said plan of lots of the said Ocean City Association, which said lot was and is bounded and described as follows:

BEGINNING at a point in the southeasterly line of Asbury Avenue, at a distance of three hundred and forty feet southwestwardly from the southwesterly line of Eighth Street; containing in front or breadth on said Asbury Avenue thirty feet, and of that width extending in length or depth southeasterly between lines parallel with said Eighth Street one hundred feet to a fifteen feet wide street;'' which said deed, conveying the parcel of ground above described, contained certain reservations and restrictions, to wit, as follows:

> ''And also under and subject to the express conditions and restrictions that no building of any description whatever shall at any time be erected within ten feet of the front line of said avenue, nor within four feet of the side lines of said lot (excepting where a party may own two or more contiguous lots, then a building may be erected on any part of the lot or lots

the owner thereof may desire, without regard to the intervening line or lines, provided the same is not built within four feet of the outside lines of said lots, nor within ten feet of the front lines thereof)
* * *"

3. Your orator further shows unto your Honor that on the 5th day of March, A. D., 1881, the said William H. Burrell and wife conveyed the said parcel of ground, known as lot numbered 440, above described, to Mary Boyce, by deed duly recorded in the office of the Clerk of the said County of Cape May, in Book 48 of Deeds, at page 514, subject to the aforesaid reservation and restrictions of the said Ocean City Association; and that the said Mary Boyce and Robert Boyce, her husband, on the 28th day of February, A. D., 1895 conveyed the said parcel of ground, known as lot numbered 440, above described, to Alonzo Cotton, your orator, by deed duly recorded in the office of the Clerk of the said County of Cape May in Book 116 of Deeds, at page 514, subject to the said reservations and restrictions of the said Ocean City Association; and that since the said 28th day of February, A. D., 1895, your orator continuously has been and now is seized in fee of the said lot numbered 440.

4. Your orator further shows unto your Honor that on the 1st day of March, A. D., 1881, the said Ocean City Association conveyed to one William H. Burrell, by deed duly recorded in the office of the Clerk of the said County of Cape May, in Book 48 of Deeds, at page 359, a certain parcel of ground in the said city of Ocean City, including lots numbered 436 and 438 on the said recorded plan of lots of the said Ocean City

Association, subject to the same reservations and restrictions of the said Ocean City Association as are hereinabove set forth in the second paragraph; that on the 5th day of March. A. D., 1881, the said William H. Burrell and wife conveyed the said lot numbered 438 to John D. Boyce, by deed duly recorded in the office of the Clerk of the said County of Cape May, in Book 48 of Deeds, at page 516, which said lot numbered 438 was and is bounded and described as follows:

"BEGINNING at a point in the southeasterly line of Asbury Avenue, at the distance of three hundred and ten feet southwestwardly from the southwesterly line of Eighth Street; containing in front or breadth on said Asbury Avenue thirty feet, and of that width extending in length or depth southeasterly between lines parallel with said Eighth Street one hundred feet to a fifteen feet wide street."

5. Your orator further shows unto your Honor that the said John D. Boyce conveyed the said parcel of ground known as lot numbered 438, last above described, to Cainer P. Moore, on the 16th day of March, A. D., 1892, by deed duly recorded in the office of the Clerk of the said County of Cape May, in Book 438 of Deeds, at page 381.

6. Your orator further shows unto your Honor that the said parcels of ground above described, known respectively, as lots numbered 440 and 438 on the said recorded plan of lots of the said Ocean City Association, are contiguous for the distance of 100 feet; that is, the said lots numbered 440 and 438 respectively have a common boundary line, beginning at a point in the southeasterly line of the said Asbury Avenue, three

hundred and forty feet southwestwardly from the southwesterly line of the said Eighth Street, and thence running southearswardly parallel to the lines of the said Eighth Street to a fifteen feet wide street.

7. Your orator further shows unto your Honor that in the year A. D., 1900, the said Gainer P. Moore, then seized in fee of the said lot numbered 438, desired to erect thereon a certain building on the rear portion of the said lot, but being uncertain as to the effect, if any, of the aforesaid reservations and restrictions of the said Ocean City Association, in regard to the location of buildings on lots sold by the said Association, subject to which reservations and restrictions the said Moore and your orator had purchased the said lots numbers 438 and 440 respectively, the said Moore came to your orator and requested him to enter into a certain agreement regarding the location of such buildings as might be erected on the said lots, in order that such buildings might have a sufficient supply of light and air; whereupon the said Moore and your orator, being in doubt as to whether the said reservations and restrictions of the said Ocean City Association were any longer of value and binding upon their said lands or upon any other lands in the vicinity thereof, and both parties strongly desiring to make certain and secure for their respective lots a perpetual and sufficient supply of light and air such buildings as might be erected thereon, entered into a written contract under seal, touching and concerning the location of such buildings as might be erected on the said lots numbered 438 and 440 respectively, which contract was duly executed by the parties thereto on the 14th day of February, A. D., 1901, a full

and correct copy of which contract is hereto annexed and made a part hereof and marked Exhibit 1.

8. Your orator further shows unto your Honor that the said contract under seal was duly acknowledged and recorded in the office of the Clerk of the said County of Cape May, on the 18th day of May, A. D., 1909; that at the time the said contract was made your orator's said lot, numbered 440, was vacant; that the said Gainer P. Moore never questioned the validity or effect of the said contract, but, on the contrary endeavored always faithfully to perform the same in the belief that the provisions thereof conferred perpetual benefits upon the said adjoining lots owned by himself and your orator respectively.

9. Your orator further shows unto your Honor that the said Gainer P. Moore died on the 1st day of May, A. D., 1902, leaving a will in which he devised the said lot numbered 438, together with lot numbered 436, to his widow, Harriet E. Moore who had actual knowledge of the existence and contents of the above mentioned written contract, having been present when the same was executed and having signed the same as a subscribing witness; and that the said Harriet E. Moore, after the death of her husband, the said Gainer P. Moore, repeatedly recognized and ratified the said contract as creating perpetual restrictions upon the location of such buildings as might be erected upon the said lots numbered 438 and 440 respectively, in accordance with the provisions of the said contract.

10. Your orator further shows unto your Honor that in the month of June, A. D., 1909, your orator relying upon the provisions of the said contract

began, and shortly thereafter completed, the erection of a permanent, brick building upon his aforesaid lot numbered 440 for which structure your orator paid the sum of six thousand dollars; that one of the walls of the said permanent, brick building, beginning at a point 8 feet from the property line of the said Asbury Avenue, is built upon and along a line about four inches inside the said common boundary line between the said lots numbered 440 and 438, for a distance of 42 feet, at which point, in conformity with the terms of the aforesaid written contract, the said wall is set back a distance of three feet from the said common boundary line, standing parallel to said common boundary line for a distance of 26 feet; that the said permanent, brick building contains two stories, the lower of which is so divided as to make two stores, while the upper contains dwelling apartments; that in the portion of the above mentioned wall, standing as aforesaid along and within four inches of the aforesaid common boundary line between the said lots numbered 440 and 438, there are ten windows, opening upon lot numbered 438, all of which will more particularly appear from a plan or drawing of the said wall, hereto annexed and made a part hereof and marked Exhibit 2.

11. Your orator further shows unto your Honor that the said Harriet E. Moore, on the 9th day of June, A. D., 1910, conveyed the said lots numbered 438 and 436 to Joseph I. Scull, by deed duly recorded in the office of the Clerk of the said County of Cape May, in Book 245 of Deeds, at page 412; that the said Joseph I. Scull had actual as well as constructive notice of the existence and contents of the aforesaid written contract made

by and between the said Gainer P. Moore and your orator, touching and concerning the location of such building as might be erected on the said lots numbered 440 and 438 respectively; that on the 15th day of May, A. D., 1911, the said Joseph I. Scull and wife conveyed the said lots numbered 438 and 436 respectively, to Lewis M. Cresse, one of the above named defendants, by deed duly recorded in the office of the Clerk of the said County of Cape May, in Book 265 of Deeds at page 64; that the said Lewis M. Cresse had both actual and constructive notice of the existence of the said written contract and of the convenants therein touching and concerning the location of such buildings as might be erected on the said lots numbered 440 and 438 respectively.

11. Your orator further shows unto your Honor that the said Lewis M. Cresse and the said Joseph I. Scull and Andrew Scull, the above named defendants, are now engaged in erecting a permanent three-story, brick building extending over all or nearly all the area of the said lots numbered 438 and 436, one of the walls of which structure is being placed along and upon the aforesaid common boundary line between the said lots numbered 438 owned by the said defendant, Lewis M. Cresse, and the said lot numbered 440, owned by your orator; that the location of the said walls at any place nearer than three feet to the said common boundary line, for all or any part of the distance of fifty feet along the same from the southeasterly line of the said Asbury Avenue, is contrary to the true intent and meaning of the aforesaid written contract under the seal, and is in violation of its provisions; that if the said wall, which the said defendants are now employed in erecting along and upon the said common

boundary line for the distance of more than fifty feet along and upon the same, from the said southeasterly line of Asbury Avenue aforesaid, be completed and raised to the height of two or three stories, as your orator is informed is the present purpose of the said defendants, the said wall will cause your orator to suffer irreparable damage, for the reason that the said wall, erected as contemplated will shut off all light and air from two windows in the aforesaid permanent brick building of your orator, located as above set out, for a distance of forty-two feet along and upon a line, on your orator's said lot four inches from the said common boundary line, which building your orator so placed in reliance upon the terms and restrictions in the said written contract; that the said wall now being erected by the said defendants as aforesaid, will if completed, totally darken and deprive of ventilation two rooms on the first floor, and two rooms on the second floor of your orator's said buildings, as well as the stairway leading from the said first floor to the said second floor, and will partially darken and deprive of ventilation one room on the said first floor and one room on the said second floor of your orator's said building; all of which will greatly and irremediably depreciate the value of your orator's said building and will have the effect of rendering a large part of the same utterly worthless as a dwelling house or place of business or for any other profitable purpose.

All of which conduct and pretences, in which the said defendants persist notwithstanding the objection and remonstrances of your orator from time to time made to the said defendants, Lewis M. Cresse and Joseph I. Scull, are contrary to

equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises.

In consideration whereof, and forasmuch as your orator is without adequate remedy in the premises except with the assistance of this Honorable Court, where matters of this nature are properly cognizable and relievable.

To the end therefore, that the said defendants may, without their several and respective oaths, to the best of their knowledge. information and belief, full, true, and perfect answer make to all and singular the matters aforesaid, and that as particularly as if the same were here repeated and they were distinctly interrogated thereto; and to the end that the said defendants, and each of them, as well as their respective agents, servants, and employees, and all persons claiming by, through, from or under the same, may be perpetually enjoined from violating any or all of the provisions and restrictions contained in the aforesaid covenant made by and between your orator and the said Gainer P. Moore, touching and concerning the location of such building as might be erected on the said lots numbered 440 and 438 respectively; and from building or erecting any wall or building or structure of any kind whatsoever nearer than three feet to the said common boundary line between the said lots for a distance of fifty feet along the same from the southeasterly line of Asbury Avenue aforesaid; and to the end that your orator may have such other and further relief as the nature of the case requires and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant into your orator not only the State's

writ or writs of injunction issuing out of and under the seal of this Honorable Court, to be directed unto the said defendants to restrain them and each of them, as well as their servants and agents and employees, and such persons as may claim by, from, through or under them, from violating all or any of the provisions of the aforesaid covenant, and from building or erecting any wall or building or structures of any kind whatsoever within three feet of the aforesaid common boundary of the lots numbered 440 and 438 respectively, for a distance of fifty feet along the same from the southeasterly side of Asbury Avenue aforesaid; but also the State's writ or writs of subpoena issuing out of and under the seal of this Court, to be directed to the said defendants, Lewis M. Cresse, Joseph I. Scull, and Andrew Scull, all of the City of Ocean City, in the County of Cape May, in the State of New Jersey, commanding them by a certain day, and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order or decree therein as to your Honor may seem meet, and shall be agreeable to equity and good conscience.

And your orator will every pray, etc.

BLEAKLY & STOCKWELL,
Solicitors for and of
Counsel with Complainant.

Order for Amendment

IN CHANCERY OF NEW JERSEY

Between:
ALONZO COTTON,
Complainant,
and
LEWIS M. CRESSE, individually. and ANDREW SCULL and JOSEPH I. SCULL trading as Scull Brothers,
Defendant's.
} On Bill, &c.

Application for this purpose having been made by Blakly & Stockwell, of counsel with the complainant, and on notice to George A. Bourgeois, Esquire, solicitor for defendant, and no objection being made thereto:

It is thereupon ordered, on this sixth day of April, nineteen hundred and twelve, that complainant's bill be, and the same is hereby amended as follows, by substituting for paragraph 11, of said bill, the amendment attached hereto and made a part hereof.

"II. Your orator further shows unto your Honor, that the said Harriet E. Moore, on the ninth day of June, A. D., nineteen hundred and ten, conveyed the said lots Nos. 438 and 436, respectively to Joseph I. Scull, one of the defendants in this bill, which deed was duly recorded in the office of the Clerk of the County of Cape May in Book 245 of Deeds, pages 412; that the said conveyance was made to the said Joseph I. Scull, confidential real estate agent of the said Harriet E. Moore, for the purpose of clearing title

to the property, and for the purpose of facilitating a profitable sale of the same; that the said Joseph I. Scull, both at and before the time or receiving and conveyance aforesaid, had actual knowledge of the existence and contents of the aforesaid agreement made by and between the said Gainer P. Moore and your orator, which said agreement was executed in duplicate and one copy thereof retained by the said Gainor P. Moore and one by your orator; that the said Joseph I. Scull had both seen the said agreement and had the same in his possession before the said Harriet E. Moore, as well as during the progress of a certain suit brought by the said Harriet E. Moore to make clear and establish her title to the said lots; that thereafter the said Joseph I. Scull claimed to have sold the said premises to one Lewis M. Cresse, one of the defendants herein.

Your orator charges, however, that instead of conveying to the said Lewis M. Cresse the full, legal title to the said premises, said Joseph I. Scull and wife, by deed dated May fifteenth, nineteen hundred and eleven, conveyed to the said Lewis M. Cresse, one of the defendants herein, only an undivided one-half interest in and to said lots, Nos. 438 and 436, which deed was recorded in the office of the Clerk of Cape May County, in Book 265, pages 64, &c.; that the said Lewis M. Cresse had actual knowledge of the existence and contents of the aforesaid agreement between your orator and the said Gainer P. Moore, and as to the contents thereof, before the execution and delivery of the said deed by the said Joseph I. Scull and wife to him, the said Lewis M. Cresse, and the said Lewis M. Cresse took title to the said undivided one-half interest in and to said premises

with full knowledge of the said agreement, the contents thereof, and the rights of your orator in respect to said premises, known as lot No. 438.

Your orator charges that the said defendant, Joseph I. Scull is the owner of an undivided one-half interest in said premises, and the defendant, Lewis M. Cresse, is the owner of the other undivided one-half interest."

BLEAKLEY & STOCKWELL,
Sols.

Affidavits of Harriet E. Moore

State of Pennsylvania,
County of Philadelphia. } ss:

Harriet E. Moore being of full age and being duly sworn, according to law, upon her oath says: That she is the widow of Gainer P. Moore, deceased, and that said Gainer P. Moore died on the second day of May, one thousand nine hundred and two (1902), and that he died seized and possessed of lots 436 oand 438 in Section A, plan of lots of the Ocean City Association, and which are situate between Eighth and Ninth Streets, on Asbury Avenue, Ocean City, New Jersey. That said Gainer P. Moore left a last will and testamen which was probated at Cape May Court House, New Jersey, in the Orphans Court, and of record in the Surrogate's office in said Cape May County; that the said last will and testament of the said Gainer P. Moore, devised to deponent the said lots number 436 and 438 in Section A, plan of lots of the Ocean City Association.

Deponent further says that Gainer P. Moore in his lifetime, and Alonzo Cotton, of the City of Ocean City, N. J., entered into an agreement rela-

tive to the division line of lot number 438, Section A and lot number 440, Section A; said lot 440 being bound by said Alonzo Cotton.

Deponent further says that said agreement, or a copy thereof, was in her possession after the death of said Gainer P. Moore but she has no knowledge as to its present whereabouts.

Deponent further says that said agreement was, from the best of her knowledge, relative to the right of Gainer P. Moore, deceased, and the said Alonzo Cotton erecting buildings on the division line of said lots 438 and 440 Section A, plan aforesaid.

Deponent further says that at the time of the death of the said Gainer P. Moore deceased, she knew that an agreement had been made by the said Gainer P. Moore deceased, and Alonzo Cotton to the effect that the said Gainer P. Moore, deceased, could build to the division line of said lots aforesaid, and that the said Alonzo Cotton could build to the division line of said lots 438 and 440, in Section A, aforesaid, and that by said agreement the said Gainer P. Moore and the said Alonzo Cotton, for certain distances, were not to build to the division line of said lots 438 and 440, Section A aforesaid; that deponent does not remember, or recall, the exact distances as mentioned in the said agreement.

Deponent further says that while she was the owner of said lots 438 and 440 in Section A, and desiring to secure a sale thereof she secured a purchaser of the said lots through Joseph I. Scull, a real estate agent of Ocean City, New Jersey, and that said lots were sold by her as will appear by the records in the Clerk's office, Cape May County, New Jersey; that before selling the said lots, numbered 436 and 438 she informed the

said Joseph I. Scull, agent aforesaid, as to the said agreement made by the said Gainer P. Moore, deceased, and the said Alonzo Cotton, relative to the building on said division line between said lots 440 and 438.

Deponent further says that Gainer P. Moore, deceased, in his lifetime, erected a greenhouse on the division line of said lots 438 and 440 in Section A, plan aforesaid, a distance of about fifty feet, extending from the rear line of said lots.

HARRIET E. MOORE.

Sworn and subscribed before me this
twenty-fifth day of March, A. D., 1912.
Andrew B. Scull,
M. C. C. of N. J.

State of Pennsylvania, } ss:
County of Philadelphia. }

Deponent says, in addition to the affidavit already made in this cause, that Joseph I. Scull acted as the agent of deponent in respect of the sale of premises known as Lots Nos. four hundred and thirty-eight and four hundred and thirty-six, in Section A, Ocean City, New Jersey, being located on the east side of Asbury Avenue; that there was some question as to whether deponent had the right to sell said premises, and give a good legal title thereto; that to determine that question a suit was brought in the Court of Chancery of this State, and a decree was entered in said court affirming the right of this deponent to dispose of said premises and her power to convey the full legal title thereto; that in respect of said proceedings the said Joseph I. Scull acted

as the agent of this deponent; that prior to said proceedings deponent, through said Scull, endeavored to sell said premises to a man by the name of Chance; that in connection with said proposed sale deponent has an interview with said Scull and Chace together at her home in the City of Philadelphia; that deponent then told said Scull and said Chance in the presence of each other that there was in existence the agreement between deponent's husband, Gainer P. Moore and Alonzo Cotton, respecting the erection of buildings upon lots numbered four hundred and thirty-eight and four hundred and forty, one of which was owned by deponent, and the other by Alonzo Cotton; that deponent then explained to both of them the contents of said written agreement and handed the said agreement that had been executed by both deponent's husband and the said Cotton to the said Chance in the presence of Joseph I. Scull.

Deponent further says that she executed the deed to Joseph I. Scull for said premises, not as a sale of said premises but for the sole purpose of facilitating a sale to other parties and for the purpose of the suit above mentioned, and that an agreement was drawn up and executed by said Scull and deponent showing that said Scull held said property in trust for deponent until the Court of Chancery of New Jersey should determine whether or not deponent had the right and power to sell said premises and make legal title thereto under the will of her said husband; that early in the summer of nineteen hundred and eleven, the said Joseph I. Scull represented to deponent that he had procured a purchaser for the said lots in the person of one

Harriet E. Moore

Lewis M. Cresse, of Ocean City, and shortly thereafter made settlement with deponent by handing to deponent the consideration for said purchase, a part of which was represented by a check or checks drawn by the said Lewis M. Cresse; that prior to the receipt of said purchase money in the summer of nineteen hundred and eleven, deponent had received no consideration for the sale of said premises from said Scull.

Deponent further says that before she conveyed the said lots numbered 436 and 438 in Section A to Joseph I. Scull, that he, Joseph I. Scull told deponent that the agreement which Alonzo Cotton and deponent's husband, Gainer P. Moore, made relative to and concerning the right of the said Gainer P. Moore and the said Alonzo Cotton building on the division line between lots 538 and 440 was of record and that the same had been recorded.

Deponent further says that she never knew that said Joseph I. Scull owned any interest in said lots 436 and 438 until she saw in the Ocean City Sentinel that Lewis M. Cresse and Joseph I. Scull were to build on said lots 436 and 438; and deponent further says, that Joseph I. Scull always to her that the said Lewis M. Creesse was the purchaser of said lots 436 and 438.

HARRIET E. MOORE.

Sworn and subscribed before me this
30th day of March, 1912.
Andrew B. Scull,
M. C. C. of N. J.

Affidavits of Alonzo Cotton

State of New Jersey,
County of Camden. } ss:

Alonzo Cotton, of full age, being duly sworn according to law, on his oath deposes and says:

That he is the complainant in the foregoing bill and that he has read the same and that such of the contents thereof as are stated to be true are true; and that such of the contents thereof as are stated to be true to the knowledge and belief of the said complainant are true to the knowledge and belief of this deponent.

And more particularly, this deponent says that he is a resident of the City of Ocean City, in the County of Cape May, in the State of New Jersey, and that he is now and since the 28th day of February, A. D.. 1895, continuously has been seized in fee of a certain tract or parcel of ground known as lot numbered 440, Section A, on the recorded plan of lots of the Ocean City Association, which said lot has a frontage of about thirty feet, on the southeasterly side of Asbury Avenue, in the said City of Ocean City is about one hundred feet in depth.

This deponent further says that prior to the year A. D., 1900, and for several years thereafter, Gainer P. Moore was seized in fee of a parcel of ground in the said City of Ocean City, which said parcel was known as lot numbered 338 on the plan of lots of the said Ocean City Association and adjoined and was, for a distance of 100 feet, contiguous to this deponent's said lot numbered 440 the said lots numbered 440 and 438 respectively having a common boundary line.

This deponent further says both these said lots numbered 440 and 438 were at one time, before this deponent and the said Gainer P. Moore ac-

quired their respective titles, owned in fee by the said Ocean City Association, which conveyed the same subject to various restrictions, among which was the restriction that no building should be erected on either of the said lots within four feet of the side lines thereof.

This deponent further says that in the year 1900, the Gainer P. Moore desired to erect a certain building on the rear portion of his said lot numbered 438, but was in doubt as to whether the aforesaid restriction regarding the location of buildings on lots bought of the said Ocean City Association were still in effect in the immediate vicinity of the said lots numbered 438 and 440 respectively; that the said Gainer P. Moore thereupon came to this deponent owner in fee of the said lot numbered 440, adjoining and contiguous to Mr. Moore's said lot, and requested this deponent to enter into an agreement with him concerning the question of building restrictions in regard to their respective lots, for the specific purpose of settling all doubt in the premises and for the purpose of securing to the said lots a perpetual and sufficient supply of light and air for such buildings as might be erected on their said respective lands.

This deponent further says that on the 14th day of February, A. D., 1901, therefore, he and the said Gainer P. Moore, both strongly desiring to remove all uncertainty in the matter of restrictions, and both desiring to perpetuate, as to their respective lots, building restrictions having substantially the same beneficial effect of these incorporated in the original deeds of the said Ocean City Association, entered into a covenant by the terms of which it was provided, in effect, that such building as might be erected up to the

party line, on the front half of this deponent's lot should not be approached nearer than three feet by which such building as might be erected on the front half of Mr. Moore's adjacent lot, in consideration of this deponent's covenanting, in effect, that such building as should be erected on the rear half of this deponent's lot, numbered 440, should not approach nearer than three feet such building as might be erected up to the party line on the rear half of Mr. Moore's lot; a true and correct copy of which agreement as recorded, is, with the certificate of record attached thereto, attached to said bill and marked Exhibit 1.

This deponent further says that at the time this covenant was made both parties thereto specifically intended to create beneficial restrictions that should be permanently binding upon the use of their said adjoining lots; that Mr. Moore. from the time of making this covenant until the time of his death, endeavored faithfully to observe it in the belief that it was, in legal effect, a perpetual restriction upon the use of his said lot; and that this deponent likewise believed the said restriction was, in legal effect, permanently binding upon his said lot numbered 440, upon which, in reliance upon and in conformity with the provisions of the said covenant, this deponent erected a permanent two-story brick structure, in the year A. D., 1900, placing one of the walls thereof within about four inches of the said party line on the front half of his said lot, but placing the continuation of the said wall, from the middle of the said party line, three feet therefrom for the length of so much of the said wall as stands upon the rear half of his said lot numbered 440.

This deponent further says that the aforesaid covenant was not drawn by an attorney or counsellor at law, or after consultation with any person familiar with the technicalities of covenants or agreements relating to land; but that the said agreement was drawn up by the said Gainer P. Moore on his own initiative; said Moore then Mayor of and a Justice of the Peace in Ocean City aforesaid; and that at the time the same was executed, and theretofore, for several years, thereafter, this deponent's said lot 440 was and remained vacant until the erection of the aforesaid two-story, permanent brick building.

This deponent further says that this two-story brick structure cost him six thousand dollars; that the first floor of the said structure is divided into two stores. And that the upper story contains dwelling apartments; that in the portion of the wall of the said building facing lot numbered 438, now owned by one or more of the defendants in this suit there are ten windows overlooking the front half of the said adjacent lot.

This deponent further says that on the 1st day of May, A. D., 1912, the said Gainer P. Moore died leaving a will in which he devised to his widow, Harriet E. Moore, the said lot 438 and lot 436, who had actual knowledge of the existence and contents of the said covenant above mentioned. having read the same before its execution and having been a subscribing witness thereto, and that at all times she regarded the same as creating, in legal effect, permanent restriction upon the use of the said lots 440 and 438; that the said Harriet E. Moore conveyed the said lots numbered 438 and 436 to Joseph I. Scull on June 9th,

1910, she, the said Harriet E. Moore, having at various times theretofore conferred with the said Joseph I. Scull regarding the existence, contents, and legal effect of the said covenant, and calling his attention to the same and its provisions; that the said Joseph I. Scull and his wife conveyed the same to Lewis M. Cresse, one of the defendants in this suit, on the 15th day of May, A. D., 1911.

That after deponent and said Gainer P. Moore had entered into said agreement (Exhibit 1) and after said Gainer P. Moore had erected his said greenhouse upon the said party line and in the year 1905 or 1906 deponent had a conversation with said Lewis M. Cresse at the offices of the Ocean City Bank of which said Cresse was then President, respecting deponent's said lot and the adjoining lot mentioned in the agreement (Exhibit 1); that deponent went to see the said Cresse for the purpose of inducing the said Cresse to purchase from deponent his said lot No. 440. Deponent then having it in mind to move away from Ocean City to City of Philadelphia; that deponent was informed that said Cresse was in a position to buy said property if he so desired; deponent then told said Cresse that the said lot had a peculiar value because of the agreement deponent had with the owner of the adjoining lot (438), Gainer P. Moore.

Deponent then explained to said Cresse the points of said agreement and particularly that under it the owner of lot 440 could build up to the dividing line between lot 440 and 438, beginning at Asbury Avenue and running back 50 feet, and that the owner of lot 438 could not at any time build nearer the said dividing line than 3 feet therefrom; deponent at said interview also told that said greenhouse had been erected by said

Gainer P. Moore under said agreement; said Cresse said the location did not suit him or words to this effect and did not want the property.

That deponent is informed that Joseph I. Scull is interested as part owner of said lot 438, although the legal title thereto stands on the records in the name of said Cresse; that late in the Spring, or in the early Summer of 1911 said Cresse stopped deponent on Eighth Street near Central Avenue, Ocean City, and said: "you own that brick building on Asbury Avenue where Miss Phillips is and which is built but to the side line" (referring to deponent's said lot 440 and the brick building thereon); deponent answering that he did own it and he had a right to build up to the lot by an agreement with Gainer P. Moore; that said agreement was recorded in the Clerk's office at Cape May Court House and deponent had a copy of it at his home in Ocean City if said Cresse wished to see it. Said Cresse made no comment on this statement of deponent and deponent did not know nor did said Cresse say that he, the said Cresse, was in any way interested or expected to be interested in lot 438 aforesaid. Deponent says that the conveyance to Joseph I. Scull by Harriet Moore was only in trust for the purpose of sale and for the purpose of making title thereto and that when settlement was made upon the purchase by the said Cresse then only did said Harriet Moore receive the consideration for the property; that said Scull and Cresse are close friends and business associates and in Ocean City are reputed to be the joint owners of said lot 438. Deponent is credibly informed that said property is assessed in the names of Joseph I. Scull and Lewis M. Cresse.

Deponent further says that Lewis M. Cresse had both actual and constructive notice of the aforesaid covenant before and at the time of the said conveyances to him of the lot No. 438; that the said covenant was duly recorded in the office of the Clerk of Cape May County on May 18th, 1909.

This deponent further says that said Lewis M. Cresse and the said Joseph I. Scull and Andrew Scull, the defendants in this suit are now engaged in erecting a permanent, three-story brick building extending over all or nearly all the area of the said lots numbered 438 and 436, one of the walls of which structure is being placed along and upon the aforesaid common boundary line between the said lot numbered 438 owned by the said defendant, Lewis M. Cresse, and the said lot numbered 440, owned by this deponent; that the location of the said wall at any place nearer than three feet to the said common boundary line, for all or any part of the distance of fifty feet along the same from the southeasterly line of the said Asbury Avenue, is contrary to the true intent and meaning of the aforesaid written contract under seal, and is in violation of its provisions; that if the same wall, which the said defendants are now employed in erecting along and upon the said common boundary line for the distance of more than 50 feet along and upon the same, from the said southeasterly line of Asbury Avenue aforesaid, be completed and raised to the height of two or three stories, as this deponent is informed is the present purpose of the said defendants, the said wall will cause deponent to suffer irreparable damage, for the reason that the said wall, erected as contemplated, will shut off all light and air from ten windows in the aforesaid

permanent brick building of deponent, located, as above set out, for a distance of 42 feet along and upon a line, on deponent's said lot, four inches from the said common boundary line, which building deponent so placed in reliance upon the terms and restrictions in the said written contract; that the said wall now being erected by the said defendants as aforesaid, will, if completed, totally darken and deprive of ventilation two rooms on the first floor, and two rooms on the second floor of deponent's said building as well as the stairway leading from the said first floor to the said second floor, and will partially darken and deprive of ventilation one room on the first floor and one room on the second floor of deponent's said building; all of which will greatly and irremediably repreciate the value of deponent's said building and will have the effect of rendering a large part of the same utterly worthless as a dwelling house or place of business or for any other purpose; that deponent as soon as he learned of the intention of said Cresse, Joseph I. Scull and Andrew Scull to erect on said lot 438 a structure in violation of the terms of said covenant, notified each of said persons that if they, or either of them, should attempt to build on said lot up to the side line of said lot in violation of said covenant, they would do so at their peril, and that they are proceeding to erect said wall and structure in the face of said notice by deponent.

ALONZO COTTON.

Sworn and subscribed to before me this
27th day of March, A. D., 1912.
Charles Bridge.

Alonzo Cotton

State of New Jersey, }
County of Mercer. } ss:

Alonzo Cotton of the City of Ocean City, County of Cape May and the State of New Jersey, being duly sworn according to law upon his oath says:

That he knows and is acquainted with Elmer B. English of the City of Ocean City, New Jersey; that the said Elmer B. English came to deponent's house about a week ago and said to deponent that he, Elmer B. English had been talking to Joseph I. Scull and that he, Elmer B. English, had said to the said Joseph I. Scull that the space of four inches between deponent's northeasterly sidewall of his brick building on lot 440, Section A, and the wall which Lewis M. Cresse and Joseph I. Scull, as owners were to erect on the division line between lots 440 and 438 in Section A, should be closed because he, the said Elmer B. English, had told the said Joseph I. Scull that to leave the space open it would cause deponent's wall and the wall of the said Joseph I. Scull and the said Lewis M. Cresse to become damp, that then the said Elmer B. English said to deponent "that he thought and believed if deponent would go to the said Joseph I. Scull that he, Scull, would build the four-inch space between the said walls and take the windows out and build them up solid and form a gutter from deponent's roof to the side wall of the said Lewis M. Cresse and Joseph I. Scull, as was about to be built." Deponent further says that he said, at this time and at this conversation with the said Elmer B. English, that he, deponent, "could not say anything as his case was in his attorney's hand." That this concluded the conversation with deponent and

said Elmer B. English then left deponent's house. Deponent further says: That this is the only conversation that he had with the said Elmer B. English as to the said four-inch space between the said two walls; that he never consented in any way or manner to have the side wall of the building to be erected by the said Joseph I. Scull and the said Lewis M. Cresse as owners, to be built flush against deponent's wall.

ALONZO COTTON.

Sworn and subscribed before me this
second day of April, Nineteen hundred
and twelve.
Andrew C. Boswell,
M. C. C. of N. J.,

Affidavits of Elmer B. English

State of New Jersey, } ss:
County of Cape May. }

Elmer B. English of the City of Ocean City, County of Cape May and State of New Jersey, being duly sworn, according to law upon his oath saith:

That he is the Elmer B. English of the contracting firm of English and Johnson, the said firm of English and Johnson having erected on lot 440, Section A, plan of lots of the Ocean City Association a two-story double brick building for Alonzo Cotton, of the City of Ocean City, County and State of aforesaid: That he is well acquainted with the said two-story double brick building and floor plans thereof: That on the northeasterly side of said two-story brick building there is a store now occupied by Mary E. C.

Phillips, and that the said store has a window in the front and windows in the side: That the windows in the side of said building, in said store occupied by said Mary E. C. Phillips face and overlook lot number 438, in Section A plan of lots of the Ocean City Association: That in the arrear of said store there is a lavatory and in said lavatory there is a window which faces and overlooks said lot number 438 Section A, that on the northeasterly side of said two-story brick building, owned by the said Alonzo Cotton, and on the second floor thereof there is an apartment, which apartment has in the front rooms windows in the front and one window on the side: That in the rear of said front room and adjoining the same there is a sleeping room with the windows facing and overlooking said lot 438 Section A, that in the rear of said sleeping room and adjoining the same there is another sleeping room with windows in said room and facing and overlooking said lot 438: That in the stairway leading from first floor to the second floor there is a window facing and overlooking said lot 438.

Deponent further says, that said building was erected by the firm of said English and Johnson in the year of 1909, and that the northeasterly side wall was built near the division line between lots 438 and 440 Section A plan of lots in the Ocean City Association: That said northeasterly side wall extended in a southeasterly direction on or near the said division line between the said lots numbered 438 and 440 to a point made a junction with a greenhouse that was then on said division line between said lots number 438 and 440, that said building was then offset from said junction of said northwesterly wall line, of said two-story double

brick building, and said greenhouse, a distance of three (3) feet, and then said building, the said building erected by the said Alonzo Cotton on the said lot number 440, was continued in a southeasterly direction and parallel with the said division line between said lots 438 and 440 and keeping a distance of three (3) feet from said division line.

Deponent further says that on lot 438 in Section A there has been a foundation placed up to the division line between said lots number 438 and 440: That there is every indication that a building is to be erected on said lot number 438, and that a wall, of brick, was this day in process of erection the first work done thereon was the day and date of this affidavit: That said brick wall, now in process of erection is on the division line between said lots 438 and 440, Section A, in the plan of lots of the Ocean City Association, and that the deponent has been informed and believes it to be true and that said brick wall is for the southwesterly side of the building to be erected on said lot 438 at least two-stories in height.

That the said wall, if erected, on said division line between lots, aforesaid, numbered 438 and 440, will completely shut in and close several windows on the northeasterly side of said building erected by the said Alonzo Cotton on lot 440: That the store occupied by Mary E. C. Phillips will have two windows therein, closed and shut in and the store made considerably dark: That the lavatory in use in the rear of said store by reason of a window, therein, closed by the erection of said wall, will become totally dark and without air, that the window in the stairway will be closed and shut in and the stairway darkened:

Elmer B. English

That a window in the front room of the living apartment on the second floor will be closed and shut in and said front room to some extent become darkened: That the bedroom in the rear of said front room, with its only windows facing said lot 438, will be completely shut in and closed by the erection of said wall and building, and that said bedroom will be completely dark and without air: That said bedroom in the arrear of the aforesaid bedroom will have its only windows shut in and closed by the said building and that said bedroom will become completely dark and without air.

ELMER B. ENGLISH.

Sworn and subscribed before me this
26th day of March, A. D., 1912.
W. Scott Hand,
Notary Public.

State of New Jersey, } ss:
County of Cape May. }

Elmer B. English of the City of Ocean City, County and State aforesaid, being duly sworn, according to law, upon his oath saith: That he is the assessor of real and personal property for the City of Ocean City. N. J.: That for period for about six years he was the assessor of real and personal property for the Second Ward, in said Ocean City, and up to October, 1911, and from said October, 1911, under the Commission Form of Government for the said City of Ocean City he was appointed Assessor for real and personal property, in said Ocean City, for all of said City, including the First and Second Wards:

That as Assessor of real and personal property for said Ocean City it is his duty to ascertain the true owners of the real estate of Ocean City and to assess the said real estate.

The deponent further says that the said Ocean City and the County Clerk have an arrangement whereby the said County Clerk, he being of Cape May County, is to furnish to the said Ocean City a transfer of all deed of conveyances as may be recorded in said County Clerk's Office in order that the proper owners of lots, lying and being in said Ocean City, may be properly assessed, and that the abstract from said County Clerk's Office are sent direct to deponent.

That deponent in the year, 1910 received an abstract in which Harriet E. Moore conveyed to Jos. I. Scull lots 436 and 438, Section A, Ocean City, New Jersey; that deponent so entered on the Second Ward duplicate for said Ocean City the name of Jos. I. Scull as the owner of the said lots 436 and 438: That in the year of 1911 the deponent received another abstract from the County Clerk of Cape May County showing that lot 436 and 438 Section A had been conveyed by Jos. I. Scull and wife to Lewis M. Cresse which abstract had date of conveyance as of May 15th, 1911.

Deponent further says that when it became necessary, as Assessor for the year 1911, to prepare the Duplicate of assessment for the Second Ward of said Ocean City, and not being able to understand the conveyance of Jos. I. Scull and wife to Lewis M. Cresse, bearing date May 15th, 1911, as deponent, as Assessor believed the said lots 436 and 438 to be owned by the said Jos. I. Scull, that he, deponent, in the fall of 1911 made inquiry of the said Jos. I. Scull as to the ownership of

said lots 436 and 438, and the said Jos. I. Scull informed deponent that the said lots 436 and 438 were owned by him, the said Jos. I. Scull and the said Lewis M. Cresse, that deponent thereupon, after receiving such information from the said Jos. I. Scull placed on the duplicate of the Second Ward, for said Ocean City, that lot 436 was owned by Jos. I. Scull and Lewis M. Cresse and that lot 438 was owned by the said Jos. I. Scull and the said Lewis M. Cresse which appears as of record in the duplicate of Assessment for the Second Ward, of said Ocean City, on page 1.

Deponent further says that he was present when the said Jos. I. Scull made application for a building permanent for the erection of a building on lots 436 and 438 Section A, Ocean City, New Jersey.

Deponent further says that on the Twenty-fifth day of March, 1912, he was in the presence of Jos. I. Scull, and Building Inspector, for the City of Ocean City, Henry A. W. Smith and at which time, on said date, the said Jos. I. Scull and the said Henry A. W. Smith were discussing the issuing of a Building Permit for a building to be erected on lots 436 and 438 in Section A of Ocean City, N. J.: That at said date and time the said Jos. I. Scull wanted the permit to be for one building, although it was the intention to erect a building with three stories and apartments over each store said three stores and apartments being in one building.

Deponent further says that on said lots 436 and 438 there was a greenhouse and a dwelling house: That said dwelling house had four rooms on the first floor and four rooms on the second floor and one room on the Third floor: That the said dwelling house was sold and moved from the said lots

436 and 438 and that the purchaser of said dwelling house was R. Howard Thorn: That said R. Howard Thorn said in the presence of deponent that he purchased the said dwelling house from the said Jos. I. Scull.

ELMER B. ENGLISH.

Sworn and subscribed before me this
27th day of March, 1912.
Wm. Lake,
M. C. C.

State of New Jersey,
County of Cape May. } ss:

Elmer B. English of the City of Ocean City, County and State aforesaid being duly sworn according to law upon his oath saith, that he has been a resident for the last past thirty years; that he is now Assessor for the City of Ocean City to assess real and personal property, therein, and that he is familiar with all the lots as planned by the Ocean City Association, a map of which was filed in the County Clerk's Office many years ago; that the City of Ocean City has adopted the same numbers and sections for the assessment duplicates and that the number of lots, as assessed in Ocean City are assessed as lots by their various numbers in their various sections according to the plan of lots of the Ocean City Association.

Deponent further says, that on the northwesterly side of Asbury Avenue and beginning at Eighth Street and extending to Ninth Street the lots are numbered consecutively in odd numbers from 417 to 447, inclusive, all in Section A: That on the southeasterly side of Asbury Avenue be-

ginning at Eighth Street and extending to Ninth Street the lots are numbered consecutively, in even numbers from 418 to 448, inclusive, and that on the southeasterly side of said Asbury Avenue between Eighth and Ninth Streets Alonzo Cotton of the City of Ocean City is the owner of lot 440, all of said lot on said southeasterly side being in Section A.

Deponent further says that the following buildings are now on the following lots on Asbury Avenue between Eighth and Ninth Streets.

Lot Number	Owner	Kind of Bldg.
417	Ocean City Title and Trust Co.	Brick
419	Peter Murdock	Frame
421	E. Morris Corson	Brick & Frame
423	Leander Corson	Frame
425	Cecelia and Lewis M. Cresse	One Frame Bldg. on two lots
427	Cecelia and Lewis M. Cresse	
429	Joseph I. Scull	Brick
431	Leverton L. Newcomb	Frame
433	Andrew Sack	Frame and Galv. Iron
435	Ocean City Association	Brick
437	Albert Fogg	Galvanized Iron, One Bldg. on two lots
439	Albert Fogg	
441	Watson A. Lewis	Brick
443	Frank Schneider	Frame and Brick
445	Amelia C. Knorr	Frame
447	Chas. A. Campbell	Frame

All of the above lots being on the northwesterly side of Asbury Avenue, between Eighth and Ninth Streets.

On the southeasterly side of Asbury Avenue between Eighth and Ninth Streets.

Elmer B. English

Lot Number	Owner	Kind of Bldg.
418	R. Howard Thorn	Frame Bldg on Two lots
420	R. Howard Thorn	
422	R. Howard Thorn	Frame Bldg.
424	Geo. Bickle	Frame Bldg on Two lots
426	Geo. Bickle	
428	Samuel Russell	Frame Bldg.
430	Weston Estate	Brick "
432(½)	Chas. E. Kreamer	Brick Bldg on two lots
432(½)	Lydia E. O'Brien	
434	Steelman & Simmons	
436	Cresse and Scull	In Process of erection, 3-story Brick Building
438	Cresse and Scull	
440	Alonzo Cotton	Brick Bldg.
442	City of Ocean City	No. Bldg.
444	Chas. Chalmers	Frame Bldg.
446	City of Ocean City	No. Bldg.
448	City of Ocean City	No. Bldg.

That on the west corner of Asbury and Ninth Street there is a frame building owned by Anderson Bourgeois on lot number 461 and on the east corner of Asbury Avenue and Ninth Street there is a lot owned by Elizabeth A. Fisher Estate, number 416 with a Brick and frame building.

Deponent further says that he resided on Asbury Avenue near Ninth Street for many years and that he had noticed the erection of buildings between Eighth and Ninth Streets on Asbury Avenue and that the following buildings were erected on Asbury Avenue between Eighth and Ninth Streets, since the first day of January, 1901, on the following lots:

Elmer B. English

On lot 417, Brick Building,
429, Brick Building, Jos. I. Scull, owner
433, Frame and Galv. Iron,
435, Ocean City Association, Brick
437, Albert Fogg, Galv. Iron, } one bldg. on Two lots
439, Albert Fogg, Galv. Iron, }
440, Alonzo Cotton.

Sworn and subscribed before me this
30th day of March, 1912.
Andrew C. Boswell,
M. C. C. of N. J.

State of New Jersey, } ss:
County of Cape May. }

Elmer B. English of the City of Ocean City, County of Cape May and State of New Jersey, being duly sworn according to law, upon his oath says: That he is the same Elmer B. English who has taken two other affidavits in this cause; that he is assessor of the City of Ocean City and that as such he is acquainted with the lots and the numbers of said lots, on Asbury Avenue, between Seventh and Eighth Streets, Ocean City, New Jersey. That the lots as numbered on the Northwesterly side of Asbury Avenue between Seventh and Eighth Streets are as follows: 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405, 407, 409, 411, 413, 415; that the lots numbered on the Southeasterly side of Asbury Avenue between Seventh and Eighth Streets are as follows: 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408, 410, 412, 414, 416.

Deponent further says that he has resided in Ocean City for about thirty years and that on As-

bury Avenue near Ninth Street in said Ocean City he made his home and residence for many years; that from Seventh Street to Ninth Street on said Asbury Avenue has been the business section of said Ocean City. That all the lots between Seventh Street and Eighth Street, said Ocean City, on Asbury Avenue, have buildings thereon fronting on the sidewalk, except lots 399 and 401 which has an old building on said lots in the rear, which building was erected before the said Ocean City was laid out in streets and lots and before the Ocean City Association became the owner of the land which now is known as Ocean City, and excepting another lot being lot 414 which has a building on said lot in the rear. That all the buildings that front on the sidewalk between Seventh and Eighth Streets, on said Asbury Avenue, were erected before the first day of January, 1901, excepting a building erected on lot 395 by Charles and Willard Adams, a building erected on lot 412 by Joseph I. Scull and a building erected on lot 406 by John Gandy, now deceased, Everton A. Corson and Edward M. Sutton; that the said three buildings were erected after the year of 1901.

ELMER B. ENGLISH.

Sworn and subscribed before me this
30th day of March, 1912.

Andrew C. Boswell,
M. C. C. of N. J.

Affidavit of David P. Cresswell

State of New Jersey, } ss:
County of Cape May. }

David P. Cresswell of the City of Ocean City, County and State, aforesaid, being of full age and being duly sworn, according to law, upon his oath saith: That he has resided in the City of Ocean City for the past nineteen years and that before coming to the said City of Ocean City, he resided in the City of Philadelphia and State of Pennsylvania, where he was employed by John Doyle, a contractor and builder, and was so employed by the said John Doyle for at least sixteen years; that deponent in his employment, with said John Doyle, had occasion to inspect and become familiar with the construction of brick buildings.

Deponent further says, that on the twenty-ninth day of March, 1912, he inspected the two-story brick building of Alonzo Cotton which is situate on lot 440, Section A, plan of lots of the Ocean City Association, on the Southeasterly side of Asbury Avenue, between Eighth and Ninth Streets, Ocean City, New Jersey; that said brick building, of said Alonzo Cotton, has two stores on the first floor anl living apartments, over the stores, on the second floor; that the Northeasterly side wall of the said brick building, of said Alonzo Cotton, begins about eight feet from the front line of lot number 440 and about four inches from the division line between lots 438 and 440, and from this point the said Northeasterly side will extend in a southeasterly direction, four inches distant about, parallel with the said division line, between lots 438 and 440, a distance of about forty feet; that on the division line, between lots 438 and 440, and beginning

at a point about eight feet from the front line of lots 438 and 440 a brick wall has been erected about six feet high and said brick wall, on said division line extends in a southeasterly direction about fifty feet.

Deponent further says, that he has inspected the various rooms in the Northeasterly portion of said brick building, on said lot number 440, and finds that the first floor has a store in the front and in the rear of said store is a lavatory and that in rear of said lavatory is a stairway leading from the first to the second floor and back of the stairway, on the first floor is a pantry and that all of these rooms have for a side the Northeasterly side wall of the said brick building, on lot 440; that the rooms on the said first floor in rear of said pantry, in the Northeasterly portion of said Cotton's building, are in the offset of said building. Deponent further says, that on the second floor, in the northeasterly portion of said Cotton's building, there is a front room with two windows in the front and one window in the side, and that, in the rear of said front room is a sleeping room with twin windows, and that, in the rear of said bedroom is another sleeping room with twin windows, and that, in the rear of said last named sleeping room is a bath room with one window; deponent further says that the above described windows are the only windows in said rooms, and that all of the windows are in the side wall, of said Cotton's building, except two windows which are in the front of the said front room.

Deponent further says, that if the brick wall, on the division line between lots 438 and 440 is erected two stories that it will close the windows of the Northeasterly side wall, of the building,

owned by the said Alonzo Cotton, and said side wall. if erected, will cause one store to be made considerably dark and the lavatory in the rear of the store will become completely dark and without air, that the stairway leading from the first to the second floor will be made dark and the pantry will be made dark and without air.

Deponent further says, that the front room on the second floor will be made considerable dark, and that, two sleeping rooms, on the second floor will be made completely dark and without air, and that, the bath room, on the second floor, will be made dark and without air.

Deponent further says, that there is not any possible way for light and air to be had in the said lavatory by any re-construction, if the said wall, on said division line, is erected; that there is no possible way for light and air to be had for the two sleeping rooms, on the second floor, except by sky lights if the wall is erected on said division line; that there is no possible way for the store to have the same light as it has now only by the construction of light well which would run through a sleeping room, if said wall is erected on said division line.

Deponent further says, there is no possible way by re-construction of having the same light and air to the stairway, leading from the first to the second floor, if said wall is erected on said division line.

Deponent further says, that the bath room and the pantry, if the wall is erected, on said divission line, can secure light and air by windows being placed in the three-foot offset.

Deponent further says, that the building of said Alonzo Cotton, on said lot 440, will receive another damage, which will result most disas-

trously to the said Alonzo Cotton and to his said building, in that, if the said wall on the division line is erected, that there will be an open space alongside of his Northeasterly side wall and the Southwesterly side wall being erected on said division line, only four inches in width; that from the rains and snow falling into this four-inch wide space the northeasterly side wall of said Cotton's building will be always damp resulting in the decay of the lumber in the said building of said Alonzo Cotton and it will be impossible to keep paper on the wall in the said rooms, having for the sides, the said wall of the northeasterly side of said Cotton's building, and that it will be impossible for the paper to remain on said side wall that is now there.

Deponent further says, that because of the atmosphere, peculiar to sea side resorts, of which Ocean City is one, and the said building of said Cotton being located in a sea side resort that the dampness from the snow and rain falling in the said four-inch space cause the wood work and timber in said Cotton's building to rot and decay quicker than if it was a building in an inland place.

Deponent further says, that he has noticed that the wall now erected, on the division line, by Lewis M. Cresse and Joseph I. Scull, as owners, it being now about six feet high, that prevention to the dampness by reason of the side wall being close to the side wall of the said Cotton's building, is taken, in that, terra-cotta block are being used about twelve inches square with four air chambers in each and said terra-cotta block is being placed on the inside of said brick wall on said division line.

Deponent further says, that if the said wall is erected, on said division line, two stories high, the said building of Alonzo Cotton, as herein set forth, will be ruined to such an extent as to an irreparable loss; that the building of said Cotton will become unfit for use, that is the Northeasterly portion thereof, and that in a few years the wood work, by reason of the dampness, will decay, and that the building, although comparatively a new one, will be useless for the purpose for which it has been erected and the damages sustained will be beyond measure and calculation.

DAVID P. CRESSWELL.

Sworn and subscribed before me this
29th day of March, 1912.
Andrew C. Boswell,
M. C. C. of N. J.

Affidavit of Mark Lake

State of New Jersey, } ss:
County of Cape May. }

Mark Lake of Ocean City, County and State, aforesaid, being duly sworn according to law, upon his oath says: That he has resided in the City of Ocean City for about thirty years and that Alonzo Cotton erected in the year 1909 on lot 440 Section "A" a two-story double brick building; that on lots 438 and 436 Lewis M. Cresse and Joseph I. Scull, as owners, are erecting a three-story brick building; that the common boundary line of the said Cotton's land, lot 440, with the land of the said Lewis M. Cresse, and the said Joseph I. Scull, lots 436 and 438, is between lots 440 and 438; that Alonzo Cotton's

brick building, on said lot 440, extends nearly to the division line between lots 438 and 440 and is on or near said division line, extending in length of about forty feet; that Lewis M. Cresse and Joseph I. Scull, as owners, are erecting on the division line, between lots 438 and 440 a side wall for the building to be erected on said lots 436 and 438.

Deponent further says, that he has noticed within the past few days the said building of said Alonzo Cotton, on lot 440, and the side wall being erected on the said division line between lots 438 and 440 by the said Lewis M. Cresse and the said Joseph I. Scull, as owners, and that if the said wall on the said division line, between lots 438 and 440, is erected by the said Lewis M. Cresse and the said Joseph I. Scull, as owners. that said side wall will close and shut in several windows in the Northeasterly side wall of the building owned by the said Alonzo Cotton on said lot 440; that two bedrooms in the said building, on lot 440, will be made completely dark and without air and one store in said building, on lot 440, will be made considerably dark and the lavatory in said building, on lot 440, will be made dark and without aid and the stairway leading from the first floor to the second floor will be made dark.

Deponent further says, that the side wall, if erected, by the said Lewis M. Cresse and Joseph I. Schull, as owners, will injure and ruin the said building, of Alonzo Cotton on said lot 440 beyond estimation; that no person would live in the apartment with the bedroom windows closed and the bedrooms without air, except a very cheap class of tenants, who would pay but a very small rent; that the store will be made so dark that it

would be necessary to use artificial light in order to conduct business therein during the daytime.

MARK LAKE.

Sworn and subscribed before me this
29th day of March, 1912.
Andrew C. Boswell,
M. C. C. of N. J.

Affidavit of Henry A. W. Smith

State of New Jersey,
County of Cape May. } ss:

Henry A. W. Smith of the City of Ocean City, County and State aforesaid, being duly sworn, according to law, upon his oath saith: That he is the Building Inspector for the City of Ocean City and that he keeps a record of the Buildings to be erected in the said Ocean City and issues permits, by virtue at his office, for the erection of buildings; that his duplicate copy of permits for the erection of a building on lots 436 and 438 and Section A, Ocean City, among other things, shows that Messrs. Cresse and Scull are the owner: That said building to be erected on lots 436 and 438 Section A, on the east side of Asbury Avenue, 160 feet, north of Ninth Street and that the building to be 57 feet wide and 59 feet deep, and that said permit was issued on the 25th day of March, 1912 although it bears date the 14th day of March, 1912.

Deponent further says that Jos. I. Scull, came to his Office on or about the 14th day of March, 1912 and requested deponent to come to his, Jos. I. Scull, office, and there to inspect plans for the

erection of a building on lots 436 and 438 Section A: That on the 14th day of March, 1912 an application for a building permit was made which permit, of application, shows that a building was to be erected on lots 436 and 438 Section A, and that L. M. Cresse and Jos. I. Scull are owners: That the costs of the permit, fifteen dollars ($15.00) was paid by Jos. I. Scull.

Deponent further says that he received that information which was placed in the application for the Building Permit from the Architect who drew the plan for the said Building to be erected on said lots 436 and 438: That the name L. M. Cresse as appears in the application is Lewis M. Cresse.

H. A. W. SMITH.

Sworn and subscribed before me this
27th of March, 1912.
Wm. Lake,
M. C. C.

Affidavit of William Garwood

State of New Jersey,
County of Cape May. } ss:

William Garwood of the City of Ocean City, County of Cape May and State of New Jersey, being duly sworn, according to law, upon his oath says: That he is a resident of the said Ocean City and has been for several years; that he has inspected the brick building owned by Alonzo Cotton, and the building in course of erection by Lewis M. Cresse and Joseph I. Scull; that said Cotton's building is on lot 440 Section A, and the building in course of erection by Lewis M. Cresse and Joseph I. Scull, as owners, is on lots 436 and 438, in Section A, and both are on

the southeasterly side of Asbury Avenue between Eighth and Ninth Streets, Ocean City, New Jersey.

Deponent further says, that the said Lewis M. Cresse and the said Joseph I. Scull, as owners, are erecting a side wall on the division line between lots 438 and 440, which side wall begins on the front of said division line about eight feet from the front line of said lots 438 and 440 and from this point said wall extends in a southeasterly direction, on said division line, about the distance of fifty feet.

Deponent further says, that in the Northeasterly side wall of Alonzo Cotton's brick building, which side wall is near the said division line, between lots 438 and 440, there are several windows; that if said side wall is erected by the said Lewis M. Cresse and the said Joseph I. Scull, on said division line, between lots 438 and 440, the said Alonzo Cotton will receive injuries irreparable, in that—two bedrooms will become completely dark, and without air; one store will be made considerably dark; the stairway leading from the first floor to the second floor will become dark; a lavatory will be made dark and without air; and that the said store and apartments, in the said Cotton's building, would only be occupied, if at all, by persons who would only pay a very small rent; that deponent does not see any way in which the said apartment and store of the said Alonzo Cotton, in said brick building, could be remodelled or re-arranged to secure light and air to the bedrooms and lavatory and stairway.

WILLIAM GARWOOD.

Sworn and subscribed before me this
29th day of March, A. D., 1912.
Andrew C. Boswell,
M. C. C. of N. J.

Affidavit of Ralph L. Goff

State of New Jersey,
County of Cape May. } ss:

Ralph L. Goff of the City of Ocean City, County and State, aforesaid, being duly sworn, according to law, upon his oath says: That he is a civil engineer and at the present time he is the City Engineer for the City of Ocean City, New Jersey; that said City of Ocean City has not any plot or map but that it uses the map as filed by the Ocean City Association.

Deponent further says, that on the 29th day of March, one thousand nine hundred and twelve, he made a survey on Asbury Avenue between Seventh and Ninth Streets, for the purpose of showing the encroachments of the various buildings on said Asbury Avenue between said Seventh and Ninth Streets, beyond the ten-foot front restructive building line and the four-foot side building restrictive line, such restrictive building lines being incorporated in the deeds of the Ocean City Association and in the deeds to their subsequent grantors and grantees, with recitals referring to said restrictions; that the lots on Asbury Avenue between Seventh and Ninth Streets are subject to the conditions and restrictions of the Ocean City Association and that one of the restrictions is that no building shall be built within ten feet of the front property line and not within four feet of the said side property lines.

Deponent further says, that the survey he made on the said 29th day of March, 1912, shows the encroachments of the buildings on said Asbury Avenue and between Ninth and Seventh Streets, as follows:

First on the Northwesterly side of Asbury Avenue from Ninth Street to Seventh:

Lot 447 the building encroaches 2 feet on the Southwesterly and one foot on the Northeasterly side lines beyond the four feet restrictive lines.

Lot 445 the building encroaches 2 feet on the Northeasterly restrictive four-foot line.

Lot 443 the building encroaches 1 foot 8 inches on the front ten feet.

Lot restrictive line.

Lot 441 the building encroaches 3 feet on the Southwesterly restrictive line and 1 foot and 1 inch on the restrictive front line.

Lots 439 and 437 with one building occupying two lots the building encroaches 3 feet and ½ foot on the Southwesterly restrictive side line.

Lot 435 the building does not encroach or violate the restrictions.

Lot 433 the building does not violate the restrictions.

Lot 431 the building encroaches 4 feet on the restrictive front line

Lot 429 the building encroaches 2 feet on the Southwesterly and 2 feet on the Northwesterly side lines of the restrictive four feet.

Lots 427 and 425, one building on two lots, the building encroaches on the Southwesterly side line ½ foot and 5 feet on the front line, restrictive lines.

Lot 423 the building encroaches on the southwesterly side line nine inches on the restrictive side line.

Lot 421 the building encroaches one foot and five inches on the front restrictive lines.

Lot 419 the building encroaches 7 inches on the Southwesterly restrictive side lines.

Lot 417 the building does not encroach.

Lot 415 the building encroaches on the front line one-half foot and on the Northeasterly side line 2 feet 4 inches.

Lot 413 the building encroaches 2 feet on the Northeasterly and 2 feet on the Southwesterly restrictive side lines.

Lot 411 the building encroaches 2 feet on the Northeasterly and 2 feet on the Southwesterly side lines and one foot four inches on the front lines.

Lot 409 the building encroaches 2 feet on the southwesterly side line and one foot four inches on the front lines.

Lot 407 the building does not violate the restrictions.

Lot 405 the building encroaches 3 feet on the southwesterly side line and 6 feet on the front line.

Lot 403 the building encroaches 6 feet on the front line.

Lots 401 and 399 there are two small old buildings on the rear of the lot and the restrictions are not violated it being the first house erected in Ocean City before the City was laid out into streets and lots and the house was erected by the owner of the land, when a farm, but now City of Ocean City.

Lot 397 the building encroaches six feet on the front line.

Lot 395 the building encroaches 1 foot on the Southwesterly side line and 1 foot on the Northeasterly side line.

Lot 393 the building encroaches 1½ foot on the Southeasterly side line and the barn in the rear of said building on said lot 393 encroaches 3 feet and 4 inches on the Northwesterly side line.

Lot 391 the building encroaches 1 foot and 3 inches on the Southwesterly side line.

Lot 389 the building encroaches 9 inches on the Northeasterly side line.

Lot 387 the building encroaches on the Southwesterly side line 3 feet and four inches and 4 inches on the Northeasterly side line.

Lot 365 the restrictions have not been violated.

Second: On the Southeasterly side of Asbury Avenue between Ninth and Seventh Streets, Ocean City, New Jersey, the ten-foot and the four-foot restrictions, front and side lines, respectively have been violated, as by survey made this 29th day of March, 1912.

Lots 448 and 446 no violations on said lots.

Lot 444 the building encroaches 1 foot 3 inches on the Southwesterly line and 1 foot on the Northwesterly line, being side lines of said lot.

Lot 442 is a vacant lot and not any building thereon.

Lot 440 the building violates the restrictions by an encroachment on the Southwesterly line of 2 feet and 4 inches and on the Northwesterly line by 3 feet and eight and three-quarter inches.

The foundation laid on lots 438 and 436 violate the restrictions by the encroachment of 4 feet on the southwesterly line and 1 foot on the Northwesterly line.

Lots 434 and 432 violate the restrictions by encroaching 1 foot on the southwesterly side line and 4 feet on the Northwesterly side line.

Lot 430 the building violates the restrictions by encroachment of 4 feet on the Southwesterly side line and ½ foot on the Northwesterly side line.

Lot 428 the building does not violate the restrictions.

Lots 426 and 424, one building on two lots, the building violates the restrictions by encroachments of 4 feet on the Northwesterly side line.

Lot 422 the building violates the restrictions by encroachments and 2 inches on the side lines.

Lots 418 and 420 the building was erected regardless of restrictions, the building encroaching in one instance of 3 feet 8 inches in the northeast line.

Lot 416 the building violates the restriction by encroaching on the Southwesterly side line ½ foot.

Lot 414 there is no violation, it being partly vacant. The lot has on it in the rear a building adjoined to the building on lot 416, the lots being owned by the same person.

Lot 412 the building violates the side restriction on the Northeasterly side by an encroachment of 2 feet.

Lot 410 the building encroaches on the Southwesterly front line 2 feet and 4 inches.

Lot 408 the building encroaches in violation of the restriction on the Southwesterly side line 3 feet and 7 inches.

Lot 406 the building does not violate the restriction.

Lot 404 the building violates the side line restriction on the Southwesterly side by an encroachment of 6 inches.

Lot 402 the building violates the southwesterly side line restriction by an encroachment of 1 foot.

Lot 400 the building violates the southwesterly side line restriction by an encroachment of 8 inches.

Lot 398 the building violates the restriction by an encroachment over the southwesterly side line of 8 inches.

Lot 396 the building violates the southwesterly side line restriction by an encroachment of 6 inches.

Lot 394 the building violates the southwesterly

side line restriction by an encroachment of 5 inches.

Lot 392 the building violates the southwesterly side line restriction by an encroachment of 6 inches.

Lot 390 the building violates the restriction by an encroachment of 6 inches on the southwesterly side line, and 1 foot and 9 inches on the Northeasterly side line.

Lot 388 violates the restriction by an encroachment of 7 inches on the southwesterly side line.

Lot 386 violates the restriction by an encroachment of 2 inches on the Southwesterly side line.

Deponent further says, that the section in which he made the survey is the business section of the City of Ocean City and has been such business section for the past fifteen years. Deponent further says, that on the corner, which is the west corner of Asbury Avenue and Ninth Street there is another encroachment which he discovered by a survey made by him several years ago, which encroachment is one foot, about, over the the restrictive Northwesterly side line.

Deponent further says, that throughout his affidavit the word encroachment means that the restrictions as to the four-foot side lines and the ten-foot front line has been violated by the distance he states as is encroached.

RALPH L. GOFF.

Sworn and subscribed before me this
29th day of March, A. D.. 1912.
Andrew C. Boswell,
M. C. C. of N. J.

Exhibit 1

THIS AGREEMENT made this Fourteenth day of February A. D. 1901 between Alonzo Cotton of Ocean City County of Cape May State of New Jersey of the first part and Gainer P. Moore the same City, County and State, of the second part is as follows to wit—that we the parties of the first and second part owning properties adjoining each other on the east side of Asbury Avenue below 8th Street being Lots Nos. 438 and 440 enter into a mutual agreement that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury Avenue, and that the said party of the second part, may build up to the party line, fifty feet from the property line of the street back, that is to say, that each party can use the ine one half the distance from Street to Street which is 100 feet, provided, he lets no part of the Building hang over the line. And it is further agreed, that if either party, desires to erect a building extending more than fifty feet from the property line on either street, he shall not build nearer the party line than three feet.

For the true and faithful performance of all which, we set our hands and seals the day and year afore mentioned

ALONZO COTTON (seal)

Harriet E. Moore

GAINER P. MOORE (seal)

Exhibit 1

State of New Jersey, } ss:
Cape May County, }

Be it remembered that on this fifteenth day of May, in the year of our Lord, one thousand nine hundred and nine (1909) before me, a commissioner of deeds in said County, personally appeared Alonzo Cotton, who, I am satisfied is one of the grantors mentioned in the attached agreement and I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

(Signed) R. CURTIS ROBINSON,
Commissioner of Deeds.

1901

Agreement
35

Alonzo Cotton
and
Gainer P. Moore

Received in the Clerks office of Cape May County, N. J. at Cape May C. H. on the 18th day of May 1909, and Recorded in Book No. 242 of Deeds, Page 422 at 8 A. M.

JULIUS WAY,
Clerk.

Order to Show Cause

(Filed)
IN CHANCERY OF NEW JERSEY

Between: ALONZO COTTON, Complainant, and LEWIS M. CRESSE, individually, and ANDREW SCULL, and JOSEPH I. SCULL, trading as Scull Brothers, Defendants.	On Bill, &c.

Upon reading the bill of complaint in this cause and the affidavits attached thereto, and on motion of Bleakly & Stockwell, of counsel with the complainant: It is, on this twenty-seventh day of March, in the year of our Lord one thousand nine hundred and twelve, ordered that the said defendants show cause before the Chancellor, at the Chancery Chambers, in the State House, in in the City of Trenton, New Jersey, on the second day of April, nineteen hundred and twelve, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue according to the prayer of said bill, and for such further relief as may be just.

And it is further ordered that the said defendants, their agents, servants and employees, and all persons acting upon their authority, in the meantime and until the further order of this Court in the premises, desist and refrain from building or erecting any wall or building or struc-

ture of any kind whatsoever, within three feet of the common boundary line of certain lots, situate in the City of Ocean City, in the County of Cape May, in the State of New Jersey, which said lots are numbered 440 and 438, Section A, on the recorded plan of lots of the Ocean City Association, for the distance of fifty feet along the said common boundary line from the southeasterly line of Asbury Avenue, in the City of Ocean City, in the County of Cape May, State of New Jersey; and that the said defendants, their agents, servants and employees, and all persons acting upon their authority, in the meantime and until further order of this court in the premises desist and refrain from violating in any way all or any of the covenants and restrictions set forth in a certain contract under seal made by and between Alonzo Cotton, of the City of Ocean City, in the County of Cape May, State of New Jersey, and Gainer P. Moore, of the same place, on the fourteenth day of February, A. D. nineteen hundred and one, and duly acknowledged and recorded in the office of the Clerk of the said County of Cape May, at Cape May Court House, in the State of New Jersey, on the eighteenth day of May, A. D., nineteen hundred and nine.

And it is further ordered that a copy of the said bill and affidavits, and of this order be served on the said defendants within two days from the date hereof, which copies of said bill and affidavits and of this order may be uncertified.

EDWIN R. WALKER,
Chancellor.

Answering Affidavit of Ralph L. Goff

IN CHANCERY OF NEW JERSEY

Between:
ALONZO COTTON,
Complainant,
and
LEWIS M. CRESSE, *et al.*,
Defendants.
} On Bill, &c.

State of New Jersey,
Atlantic County. } ss:

Ralph L. Goff, of full age, being duly sworn, on his oath says that he is a civil engineer and surveyor doing business in Ocean City, New Jersey; that he is and for the past thirteen years has been City Engineer of Ocean City; that he is acquainted with the building restrictions of Ocean City Association, and is well acquainted with the street and property lines in Ocean City, and especially with those between Seventh and Ninth Streets on Asbury Avenue; that on March twenty-ninth and thirtieth he made and caused to be made a survey or measurements locating the different buildings built on Asbury Avenue between Seventh Street and Ninth Street with reference to the side and front property lines of the buildings there built, and found that there are on each side of Asbury Avenue between Seventh and Ninth Streets, thirty-two lots, sixty-four in all; that on the Easterly side of said avenue within the two squares above mentioned there are erected twenty-five buildings, and on the Westerly side of said avenue within the two squares there are erected thirty-one buildings; that deponent has been acquainted with Ocean

City for the past fifteen years, and from deponent's personal knowledge and from the information deponent has gained in his business as City Surveyor, he has learned that said buildings have been erected and constructed during the course of the past thirty years; that the buildings in said district first erected were largely cottage dwellings, but for the past thirteen years, Asbury Avenue between Sixth Street and Ninth Street, and more especially between Seventh Street and Ninth Street, has been converted from a residence section into a business section, and is now the principal business portion of Ocean City; that within the past twelve years the buildings erected on said avenue have been of more modern character, more expensive, and entirely adapted to business uses; that of the thirty-one buildings erected on the westerly side of said avenue within the two squares above mentioned, twenty-seven are so located that they violate either the side line restriction or the front line restriction of Ocean City Association, and of the twenty-five buildings erected on the easterly side of said Asbury Avenue within the two blocks above mentioned, twenty-four of said buildings have been located on the ground so that they violate one or more of said restrictions, as follows:

On the northwest side of Asbury Avenue, on Lot 447 the building projects over the restricted line on the southwest side 2.23 ft.; on the northeast side 1.02 ft.

On Lot 445 the building projects over the restricted line on the northeast side 2.07 ft.

On Lot 443, known as the Snyder lot, the building projects over the restricted front line 1.68 ft.; over the restricted line on the southwest side .14 ft.; on the northeast side .09 ft.; on the north-

east side of the building a porch extends 4 ft. over the line.

On Lot 441, which is the Headley lot mentioned in the case of Ocean City Association and Snyder vs. Headley, the building projects over the restricted line on the southwest side 4 ft.; on the northeast side 4 ft.; on the front 1.2 ft.

On Lot 439, the building projects over the restricted line on the southwest side 4 ft.; on the northeast side 4 ft.

On Lot 437 the building projects over the restricted line on the southwest side 4 ft.; on the northeast side 3.45 ft.; on the front .26 ft.

On Lot 433 the building projects over the restricted line on the northeast side 3.66 ft.; on the front .32 ft.

On Lot 431 the building projects over the restricted line on the southwest side 3.64 ft.; on the front 4.12 ft.

On Lot 429 the building projects over the restricted line on the southwest side 2 ft.; on the northeast side 2.03 ft.; on the front 4.88 ft.

On Lot 427 the building projects over the restricted line on the southwest side .44 ft.; on the northeast side 4 ft.

On Lot 425 the building projects over the restricted line on the southwest side 4 ft.

On Lot 423 the building projects over the restricted line on the southwest side .76 ft.

On Lot 421 the building projects over the restricted line on the northeast side .28 ft.; on the front 1.42 ft.

On Lot 419 the building projects over the restricted line on the southwest side .58 ft.

On Lot 415 the building projects over the restricted line on the northeast side 2.33 ft.; on the front .55 ft.

On Lot 413 the building projects over the restricted line on the southwest side 1.95 ft.; on the northeast side 2 ft.

On Lot 411 the building projects over the restricted line on the southwest side 2.33 ft.; on the northeast side 2 ft.; on the front 1.35 ft.

On Lot 409 the building projects over the restricted line on the southwest side 2 ft.; on the northeast side .2 ft.; on the front 1.32 ft.

On Lot 405 the building projects over the restricted line on the southwest side 3.28 ft.

On Lot 399 the building projects over the restricted line on the northeast side 4 ft. (in rear).

On Lot 397 the building projects over the restricted line on the southwest side .8 ft.

On Lot 395 the building projects over the restricted line on the southwest side 1.04 ft.; on the northeast side .9 ft.; on the front .12 ft.

On Lot 393 the building projects over the restricted line on the southwest side 1.56 ft.; on the northeast side (barn in rear) 3.33 ft.

On Lot 391 the building projects over the restricted line on the southwest side 1.3 ft.; on the northeast side 3.92 ft.

On Lot 389 the building projects over the restricted line on the northeast side .72 ft.

On Lot 387, the building projects over the restricted line on the southwest side 3.4 ft.; on the northeast side .39 ft.; in rear 4 ft.; in front 6.58 ft.

On Lot 385 the building projects over the restricted line on the southwest side (in rear) 4 ft.

On the southeast side of Asbury Avenue, on Lot 444, the building projects over the restricted line on the southwest side 1.23 ft.; on the northeast side 1.05 ft.; on front 2.28 ft.

On Lot 440, which is complainant's lot, the

building projects over the restricted line on the southwest side 2.33 ft.; on the northeast side 3.73 ft.; on the front 1.93 ft.

The building on Lot 438 and 436 is the one involved in this suit.

On Lot 434 the building projects over the restricted line 1 ft. on the southwest side; on the northeast side 4 ft.; on the front 1.7 ft.

On Lot 432 the building projects over the restricted line on the southwest side 4 ft.; on the northeast side 4 ft. on the front 1.7 ft.

On Lot 430 the building projects over the restricted line on the southwest side 4 ft.; on the northeast side .56 ft.; on the front 1.71 ft.

On Lot 428 the building projects over the restricted line on the southwest .14 ft.; on the front .19 ft.

On Lot 426 the building projects over the restricted line on the southwest side .15 ft.; on the northeast side 4 ft.; on the front .3 ft.

On Lot 424 the building projects over the restricted line on the southwest side 4 ft.; on the front .3 ft.

On Lot 422 the building projects over the restricted line on the southwest side .18 ft.; on the northeast side 4 ft.; on the front .2 ft.

On Lot 420 the building projects over the restricted line on the southwest side 4 ft; on the northeast side 4 ft.; on the front .1 ft.

On Lot 418 the building projects over the restricted line on the southwest side 4 ft.; on the northeast side 3.69 ft.; on the front .17 ft.

On Lot 416 the building projects over the restricted line on the southwest side .55 ft.; on the northeast side 4 ft; on the front .17 ft.

On Lot 414 the building projects over the restricted line on the southwest side 4 ft.; on the northeast side 4 ft.

Ralph L. Goff

On Lot 412 the building projects over the restricted line on the southwest side 4 ft.; on the northeast side 2 ft.; on front 1.95 ft.

On Lot 410 the building projects over the restricted line on the southwest side 2.33 ft.; on front .3 ft.

On Lot 408 the building projects over the restricted line on the southwest 3.6 ft.; on the front .3 ft.

On Lot 406 the building projects over the restricted line on the southwest .15 ft.; on the northeast side .15 ft. on front .2 ft.

On Lot 404 the building projects over the restricted line on the southwest side .48 ft.; on the front 1.3 ft.

On Lot 402 the building projects over the restricted line on the southwest side 1.2 ft.

On Lot 400 the building projects over the restricted line on the southwest .65 ft.

On Lot 398 the building projects over the restricted line on the southwest side .7 ft.

On Lot 396 the building projects over the restricted line on the southwest side .5 ft.

On Lot 394 the building projects over the restricted line on the southwest side .4 ft.; on the front .44 ft.

On Lot 392 the building projects over the restricted line on the southwest side .5 ft.; on the front .37 ft.

On Lot 390 the building projects over the restricted line on the southwest side .52 ft.; on the northeast side 1.8 ft.; on the front 1.83 ft

On Lot 388 the building projects over the restricted line on the southwest side 3 ft; on the front .56 ft.

On Lot 386 the building projects over the restricted line on the southwest side .17 ft.; on the front .66 ft.

Deponent further says that he made the survey and measurements for Harry Headley in the Chancery suit of Ocean City Association vs. Headley, and in making that survey deponent made measurements of all the buildings erected on Asbury Avenue between Sixth and Ninth Streets; that because of the inclement weather and insufficient time deponent was unable to make measurements of the buildings between Sixth Street and Seventh Street, and is unable to state at this time how many of those buildings are located in violation of said restrictions.

RALPH L. GOFF.

Sworn and subscribed before me this
30th day of March, 1912.
Louis E. Stern,
An Attorney at Law
of N. J.

Answering Affidavit of Joseph I. Scull

State of New Jersey, } ss:
Atlantic County. }

Joseph I. Scull, of full age, being duly sworn according to law, on his oath says that he is the builder of the building being erected on Lot No. 436 and 438 Asbury Avenue, Ocean City, New Jersey; that the foundation wall along the Southeasterly line of said lot and immediately adjoining the lot of complainant was put in and completed on the thirteenth day of March, nineteen hundred and twelve, and the entire foundation was completed on or about the sixteenth day of March, nineteen hundred and twelve; that prior to the putting in of said foundation wall deponent had entered into tentative contracts with various material men for materials for said building;

that the building in course of construction by deponent is a brick and tile, semi-fireproof building, to contain three stores on the ground floor and six living apartments above; that said building, when completed, will cost upwards of Eighteen Thousand Dollars; that after completing the foundation for said building, deponent refrained from further expense in the construction of said building and refrained from ordering materials, excepting a small order of brick, until March twenty-fifth, when deponent commenced laying the brick wall on said foundation, and at the time the restraining order was served upon deponent in this cause, he had erected a brick wall on the Southeast line, to a height of about six feet, and had given orders for the shipment of a large quantity of other building materials, for which deponent is now liable to an amount of approximately Eight Thousand Dollars.

Deponent forther says that the cost of building said wall along the Southeasterly line and adjoining complainant's property has cost approximately Five Hundred Dollars.

Deponent further says that Ocean City Association and the grantees of Ocean City Association have, by their acts, abandoned the side line and front restrictions on Asbury Avenue property, between Sixth and Ninth Streets, and have acquiesced in the violation of those restrictive lines for the past fifteen years, to deponent's knowledge.

Deponent further says that Mr. Cotton, the complainant in this suit, is a violator of those restrictions on both sides and the front of his lot.

JOSEPH I. SCULL.

Sworn and subscribed before me this
30th day of March, 1912.
Anna Castner Tucker,
Notary Public of N. J.

Answering Affidavit of Elmer B. English

State of New Jersey, } ss:
Cape May County. }

Elmer B. English, of full age, being duly, sworn, according to law on his oath deposes and says, that he is a contractor and builder in Ocean City, New Jersey; that he built the building on Lot No. 440 for Alonzo Cotton; that after Joseph I. Scull had put in the foundation wall along the Southeasterly line of Lot No. 438, adjoining Mr. Cotton's property, Mr. Scull asked deponent to ask Alonzo Cotton to permit deponent to build up directly against the Northeasterly side wall of Mr. Cotton's building, which stood four inches away from the dividing line, for fear the four-inch space between said buildings would cause dampness to said buildings.

Deponent further says that he thereupon called upon Mr. Cotton at his home, on or about the sixteenth day of March, nineteen hundred and twelve, and ask Mr. Cotton to consent to such a construction, the said Joseph I. Scull having agreed to pay Mr. Cotton for the four inches of his ground that would be taken for the building of such wall.

Deponent further says that he stated to Mr. Cotton what he believed would be the advantage of so building such a wall, as it would then become a party wall and could be protected at the roof by extending the tin work over the entire wall.

Deponent further says that Mr. Cotton said to deponent that he considered it would be to the advantage of both of them to have the wall thus built, and deponent understood, from Mr. Cotton's conversation, that he would consent to this

building the wall, and immediately thereafter deponent informed the said Joseph I. Scull of his conversation with Mr. Cotton; that Mr. Cotton came from his home with deponent, and deponent thought he was going to Mr. Scull's office, but instead he went into the office of Andrew Boswell, Esq., and after that time Mr. Cotton made no further reference to the subject of building the wall adjoining Mr. Cotton's property.

ELMER B. ENGLISH.

Sworn and subscribed before me this
30th day of March, 1912.
Rolla Garretson,
Notary Public.

Answering Affidavit of Joseph I. Scull

State of New Jersey, } ss:
Atlantic County. }

Joseph I. Scull, of full age, being duly sworn according to law, on his oath says that he is builder of the building being erected on Lot No. 436 and 438 Rsbury Avenue, Ocean City, New Jersey; that the foundation wall along the Southeasterly line of said lot and immediately adjoining the lot of complainant was put in and completed on the thirteenth day of March, nineteen hundred and twelve, and the entire foundation was completed on or about the sixteenth day of March, nineteen hundred and twelve; that prior to the putting in of said foundation wall deponent had entered into tentative contracts with various material men for materials for said building; that the building in course of construction by deponent is a brick and tile, semi-fire-proof build-

ing, to contain three stores on the ground floor and six living apartments above; that said building, when completed, will cost upwards of Eighteen Thousand Dollars; that after comple. the foundation for said building, deponent refrained from further expense in the construction of said building and refrained from ordering materials, excepting a small order of brick, until March twenty-fifth, when deponent commenced laying the brick wall on said foundation, and at the time the restraining order was served upon deponent in this cause, he had erected a brick wall on the Southeast line, to a height of about six feet, and had given orders for the shipment of a large quantity of other building materials, for which deponent is now liable to an amount of approximately Eight Thousand Dollars.

Deponent forther says that the cost of building said wall along the Southeasterly line and adjoining complainant's property has cost approximately Five Hundred Dollars.

Deponent further says that Ocean City Association and the grantees of Ocean City Association have, by their acts, abandoned the side line and front restrictions on Asbury Avenue property, between Sixth and Ninth Streets, and have acquiesced in the violation of those restrictive lines for the past fifteen years, to deponent's knowledge.

Deponent further says that Mr. Cotton, the complainant in this suit, is a violator of those restrictions on both sides and the front of his lot.

JOSEPH I. SCULL.

Sworn and subscribed before me this
30th day of March, 1912.
Anna Castner Tucker,
Notary Public of N. J.

Answering Affidavit of Elmer B. English

State of New Jersey,
Cape May County. } ss:

Elmer B. English, of full age, being duly, sworn, according to law on his oath deposes and says, that he is a contractor and builder in Ocean City, New Jersey; that he built the building on Lot No. 440 for Alonzo Cotton; that after Joseph I. Scull had put in the foundation wall along the Southeasterly line of Lot No. 438, adjoining Mr. Cotton's property, Mr. Scull asked deponent to ask Alonzo Cotton to permit deponent to build up directly against the Northeasterly side wall of Mr. Cotton's building, which stood four inches away from the dividing line, for fear the four-inch space between said buildings would cause dampness to said buildings.

Deponent further says that he thereupon called upon Mr. Cotton at his home, on or about the sixteenth day of March, nineteen hundred and twelve, and asked Mr. Cotton to consent to such a construction, the said Joseph I. Scull having agreed to pay Mr. Cotton for the four inches of his ground that would be taken for the building of such wall.

Deponent further says that he stated to Mr. Cotton what he believed would be the advantage of so building such a wall, as it would then become a party wall and could be protected at the roof by extending the tin work over the entire wall.

Deponent further says that Mr. Cotton said to deponent that he considered it would be to the advantage of both of them to have the wall thus built, and deponent understood, from Mr. Cotton's conversation, that he would consent to this building the wall, and immediately thereafter de-

ponent informed the said Joseph I. Scull of his conversation with Mr. Cotton; that Mr. Cotton came from his home with deponent, and deponent thought he was going to Mr. Scull's office, but instead he went into the office of Andrew Boswell, Esq., and after that time Mr. Cotton made no further reference to the subject of building the wall adjoining Mr. Cotton's property.

ELMER B. ENGLISH.

Sworn and subscribed before me this
30th day of March, 1912.
Rolla Garretson,
Notary Public.

Answering Affidavit of Lewis M. Cresse

State of New Jersey,
County of Cape May. } ss:

Lewis M. Cresse, of full age, being duly sworn, according to law on his oath deposes and says, that he is one of the defendants in the above cause.

Deponent further says that he did not know of the agreement between Moore and Cotton, referred to in the bill in this cause, until at or about the time of the conveyance to him by Scull of the undivided one-half interest in the property in question, to wit, May fifteenth, A. D., nineteen hundred and twelve; that at that time Scull produced and showed to this deponent a letter from the Fidelity Trust Company of Newark, New Jersey, and one from Bourgeois & Coulomb attorneys of Atlantic City, New Jersey, in both of which letters it was stated that the agreement between Moore and Cotton was a personal agreement, and did not bind the land, a one-half interest in which deponent was then

purchasing; that deponent saw and read said agreement, and was himself of the opinion that it was made as a personal matter between Moore and Cotton, fisst, because it did not say in it that it was to be binding on the heirs and assigns, and secondly, because it was a contract merely that Moore and Cotton should not build on the restricted portions of said lot.

Deponent further says that the price of Five Thousand Dollars paid by Joseph I. Scull as consideration for the conveyance of the lots in question is a fair and adequate market price for said lots, providing said lots can be built upon for their total width, but is an excessive price therefor if the three feet provided for in the agreement between Cotton and Moore can not be built upon and occupied.

LEWIS M. CRESSE.

Sworn and subscribed before me this
6th day of April, 1912.
John Semple,
M. C. C.

Memorandum

(Filed)

IN CHANCERY OF NEW JERSEY

Between: ALONZO COTTON, Complainant, and LEWIS M. CRESSE, *et al.*, Defendants.	34-629 On Bill, &c. (Not for print.

On application for preliminary injunction.

Memorandum

Messrs. Bleakly & Stockwell, for complainants.
Messrs. Bourgeois & Coulomb, for defendants.

WALKER, C.

In February, 1901, the complainant entered into a written agreement with Gainer P. Moore as follows:

"This agreement made this fourteenth day of February, A. D. 1901, between Alonzo Cotton of Ocean City, County of Cape May state of New Jersey, of the first part, and Gainer P. Moore, of the same City, County and State, of the second part, is as follows, to wit: That we, the parties of the first part and second part, owning properties adjoining each other on the east side of Asbury Avenue below 8th Street, being lots Nos. 438 and 440 enter into a mutual agreement that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury Avenue, and that the said party of the second part may build up to the party line fifty feet from the property line of the street back, that is to say, that each party can use the line one half the distance from street to street which is one hundred feet, provided, he let no part of the building hang over the line; and it is further agreed that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build it nearer the party line than three feet.

For the true and faithful performance of all which, we set our hands and seals the day and year aforementioned."

The defendants subsequently acquired title to lot No. 438 with actual notice of the agreement. The complainant long ago built upon his lot and

conformed to the lines specified in the covenant. The defendants have commenced to build on their lot in disregard of the agreement and propose to build on the division line where the complainant's building runs to that line, and thus shut off the light and air which the complainant enjoys through appertures in his building.

On behalf of the defendants it is insisted that the covenant in question does not run with the land nor create an easement but is purely personal, and, therefore, is not enforcible. Reliance is largely based upon the case of *People v. Railroad,* 57 Ill., 436. That was a case in which the defendant agreed with the owner of an elevator to run a track into it for the delivery of grain. The track subsequently was disused and a portion of it removed. Later, lessees of the premises sought by mandamus to compel the restoration and use of the track. Relief was denied on the ground that the agreement was entirely personal between the original parties to it. *Costigan v. Pennsylvania R. R. Co.,* 58 N. J. L. (25 Vr.) 233, is also relied on by the defendants' counsel. In that case the Supreme Court refused to give effect to a covenant which was not a grant of an easement nor of a right in the nature of an easement and was one that did not run with the land.

These two cases of People v. Railroad and Costigan v. P. R. R. Co. are cases at law, and, admittedly courts of law will not enforce covenants of the kind there under review.

However, a different rule prevails in equity, and it will be enforced in appropriate cases. *Brewer v. Marshall,* 19 N. J. Eq., (4 C. E. Gr.) 537. In this case Chief Justice Beasley, speaking for the court of errors and appeals, said at p. 544:

"Nor is this doctrine without illustration in our own courts. It was enforced in the case of *Van Doren v. Robinson,* 1 C. E. Green 256. This was a suit founded on a covenant in a conveyance, whereby the grantee agreed to reconvey to the grantor whenever he, the grantee should quit the actual possession of the premises. The grantee conveyed to a stranger, who took the title with constructive notice of the covenant. Chancellor Green maintained that this was a mere personal covenant; that it neither ran with the lands nor bound the alienee in equity, but that it would be enforced against such alienee in equity when he was chargeable with notice of the original contract. And in *Holsman v. Boiling Spring Bleach Co.*, 1 McCarter, 347, the same accurate jurist maintained the right of equity to exert its authority in proper cases to prevent injustice, without any dependency on the merely legal rights of the parties. And I think it is also manifest from the case of *Rogers v. Danforth,* 1 Stoct, 294, that Chancellor Williamson was of the same mind on this subject, for he remarked with reference to a covenant touching lands that he does not think that it follows that because a suit at law can not be maintained, a Court of Chancery may not protect the rights of the parties under it.

From this review of the authorities, I am entirely satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the

> title. So far I think the law is not in doubt, and the only question in this case which I have regarded as possessed of any material difficulty, is whether the covenant now in controversy is embraced within the proper limits of this branch of equitable jurisdiction."

The covenant under consideration in the case at bar was intended by the parties to it, as I read it, to be effectual and binding by way of building restriction upon their adjoining premises, and upon their successors in title. For years it was so acted upon. True, it could not bind the alienees of either party without notice of its existence, but as actual notice is present in this case, I think the agreement enforcible under the doctrine of *Brewer v. Marshall. supra.*

Quite apposite is the case of *Whatman v. Gibson*, 9 Sim. 196, observed upon by Chief Justice Beasley in Brewer v. Marshall at p. 543. There as here the restrictions did not exist in a deed which formed a link in the chain of title, but resided in a deed made between one time owners of different lots, and the restrictive covenant was enforced against a purchaser with notice who had not executed the covenant but derived title under a purchaser who had; and, as said by Chief Justice Beasley at the same page (543):

> "These decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land."

This view leads to the making absolute of the order to show cause, and a preliminary injunction will be issued. Let the costs abide the event.

Judgment

(Filed)

The State of New Jersey, ss:
(Seal)

The State of New Jersey to Lewis M. Cresse, Joseph I. Scull, and Andrew Scull, their servants, agents, workmen and employees, and each and every of them: GREETING:

Whereas, it has been represented to us, in our Court of Chancery, on the part of Alonzo Cotton, complainant, that he has lately exhibited his bill of complaint against you, the said Lewis M. Cresse, Joseph I. Scull and Andrew Scull, defendants, to be relieved touching the matters and things therein contained, and that your actings and doings in the premises are contrary to equity and good conscience: We, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly enjoin and command you, the said Lewis M. Cresse, Joseph I. Scull and Andrew Scull, your servants, agents, workmen, and employees, and each and every of you, under the penalty that may fall thereon, that you and each and every of you, do absolutely desist and refrain from

Building, erecting or placing any wall, or building, or structure of any kind whatsoever on that certain parcel or lot of ground situate in the City of Ocean City, in the County of Cape May, in the State of New Jersey, known as lot numbered 438, Section A, (on the plan of lots of the Ocean City Association, recorded in the office of the Clerk of the County of Cape May, on the ninth day of June, eighteen hundred and eighty), at any place or places on the said lot numbered 438 within three feet of the common boundary line between the said lot numbered 438 and that certain contiguous and adjoining

until the final hearing of this cause and the further order of this court;

It is, therefore, on this 22nd day of April, A. D. Nineteen hundred and twelve, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the order to show cause why an injunction should not issue in accordance with the prayer of the complainant's bill be made absolute; and that a preliminary injunction issue out of and under the seal of this court, directed unto the said defendants, Lewis M. Cresse, Joseph I. Scull, and Andrew Scull, restraining them and each of them, as well as their and each of their servants, agents, workmen and employees, from building, erecting or placing any wall or building or structure of any kind whatsoever on that certain parcel or lot of ground, known as lot No. 438, Section A, on the recorded plan of lots of the Ocean City Association, at any place or places on the said lot within three feet of the common boundary line between the said lot numbered 438 and the adjoining lot numbered 440, Section A, on the recorded plan of lots of the Ocean City Association, for the distance of fifty feet along the said common boundary line measured from the southeasterly line of Asbury Avenue, in the City of Ocean City, in the County of Cape May, in the State of New Jersey; which said lot numbered 438 was and is bounded and described as follows:

Beginning at a point in the southeasterly line of Asbury Avenue, in the City of Ocean City, in the County of Cape May, in the State of New Jersey, at a distance of three hundred and ten feet southwestwardly from the southwesterly line of Eighth Street; containing in front or breadth and said Asbury Avenue thirty feet, and of that

teen hundred and one, and is as follows:

"This agreement made this fourteenth day of February, A. D. 1901, between Alonzo Cotton of Ocean City, County of Cape May, State of New Jersey, of the first part, and Gainer P. Moore, of the said City, County and State of the second part, is as follows, to wit: that we, the parties of the first part and second part owning properties adjoining each other on the east side of Asbury Avenue below 8th Street, being lots Nos. 438 and 440 enter into a mutual agreement that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury Avenue, and that the said party of the second part may build up to the party line fifty feet from the property line of the street back, that is to say, that each party can use the line one-half the distance from street to street which is one hundred feet, provided, he let no part of the building hang over the line; and it is further agreed that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build it nearer the party line than three feet.

For the true and faithful performance of all which, we set our hands and seals the day and year afore mentioned.

(Signed) ALONZO COTTON (Seal)
" GAINER P. MOORE (Seal)
Harriet E. Moore."

Until you, the said Lewis M. Cresse, Joseph I. Scull, and Andrew Scull, shall have fully answered the bill of complaint, and our said court shall make other order to the contrary.

WITNESS, Edwin Robert Walker, our Chancellor, at Trenton, the twenty-second day of April, A. D. nineteen hundred and twelve.

SAMUEL K. ROBBINS,
Clerk.

Bleakly & Stockwell,
Solicitors.

A true copy, Sam. K. Robbins.
Clerk

Interlocutory Decree

(Filed)

IN CHANCERY OF NEW JERSEY

Between: ALONZO COTTON, Complainant, and LEWIS M. CRESSE, JOSEPH I. SCULL and ANDREW SCULL, Defendants.	On Bill for Injunction. On Application for Preliminary Injunction.

On Application for Preliminary Injunction.

This cause coming on to be heard on the second day of April, A. D. nineteen hundred and twelve, before the Chancellor, at the State House, in the City of Trenton, in the State of New Jersey, on the return of an order to show cause why an injunction should not issue according to the prayer of the bill filed by the complainant in the above named cause; and the said cause at that time having been adjourned with the consent of

the court and the parties to the said cause, to the sixth day of April, A. D. nineteen hundred and twelve, at which time the said cause having come on to be heard before the Chancellor, at the Chancery Chambers, in the Court House, in the City of Camden, in the State of New Jersey, in the presence of H. F. Stockwell, for Bleakly & Stockwell, of counsel with the complainant, and in the presence of George A. Bourgeois, for Bourgeois & Coulomb, of counsel with the defendants; and the pleadings and proofs having been read, and the arguments of the respective counsel have been heard and considered; and the court having duly considered the said pleadings, proofs and arguments; and it appearing to the court that the order to show cause should be made absolute, and that a preliminary injunction should be issued, giving to the above named complainant the relief prayed for by him, until the final hearing of this cause and the further order of this court:

It is, therefore, on this 22nd day of April, A. D. nineteen hundred and twelve, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the order to show cause why an injunction should not issue in accordance with the prayer of the complainant's bill be made absolute; and that a preliminary injunction issue out of and under the seal of this court, directed unto the said defendants, Lewis M. Cresse, Joseph I. Scull, and Andrew Scull, restraining them and each of them, as well as their and each of their servants, agents, workmen and employees, from building, erecting or placing any wall or building or structure of any kind whatsoever on that certain parcel or lot of ground, known as lot No. 438, Section A, on the recorded

plan of lots of the Ocean City Association, at any place or places on the said lot within three feet of the common boundary line between the said lot numbered 438 and the adjoining lot numbered 440, Section A, on the recorded plan of lots of the Ocean City Association, for the distance of fifty feet along the said common boundary line measured from the southeasterly line of Asbury Avenue, in the City of Ocean City, in the County of Cape May, in the State of New Jersey; which said lot numbered 438 was and is bounded and described as follows:

Beginning at a point in the southeasterly line of Asbury Avenue, in the City of Ocean City, in the County of Cape May, in the State of New Jersey, at a distance of three hundred and ten feet southwestwardly from the southwesterly line of Eighth Street; containing in front or breadth on said Asbury Avenue thirty feet, and of that width extending in length or depth southeasterly between lines parallel with said Eighth Street one hundred feet to a fifteen feet wide street; which said lot or parcel of ground is adjoining and contiguous to that certain lot of land now owned by Alonzo Cotton and known as lot numbered 440, Section A, on the plan of lots of the Ocean City Association, recorded by the said Association in the office of the Clerk of the County of Cape May, at Cape May Court House, in the State of New Jersey, on the ninth day of June, A. D. eighteen hundred and eighty; and from violating, in any way, all or any of the covenants, provisions, and restrictions set forth and contained in a certain written contract or agreement under seal, made by and between Alonzo Cotton of the City of Ocean City, in the County of Cape May, in the State of New Jersey, owner of the said lot num-

bered 440, the complainant in this suit, and Gainer P. Moore of the said City of Ocean City, formerly owner of the said lot numbered 438, which said written contract or agreement is dated the fourteenth day of February, A. D. nineteen hundred and one, and is as follows:

This agreement made this fourteenth day of February, A. D. 1901, between Alonzo Cotton of Ocean City, County of Cape May, State of New Jersey, of the first part, and Gainer P. Moore, of the same City, County and State of the second part, is as follows, to wit: That we, the parties of the first part and second part owning properties adjoining each other on the east side of Asbury Avenue below 8th Street, being lots Nos. 438 and 440 enter into a mutual agreement that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury Avenue, and that the said party of the second part may build up to the party line fifty feet from the property line of the street back, that is to say that, each party can use the line one-half the distance from the street to street which is one hundred feet, provided he let no part of the building hang over the line; and it is further agreed that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build it nearer the party line than three feet.

For the true and faithful performance of all which, we set our hands and seals the day and year afore mentioned.

(Signed) ALONZO COTTON (Seal)
" GAINER P. MOORE (Seal)

Harriet E. Moore.

Until the said defendants shall have fully answered the bill of complaint of the above named complainant, and until this court shall make other order to the contrary.

E. R. WALKER,
Chancellor of the State of New Jersey.

Notice of Appeal

(Filed)

IN CHANCERY OF NEW JERSEY

Between: ALONZO COTTON, Complainant, and LEWIS M. CRESSE, JOSEPH I. SCULL and ANDREW SCULL, Defendants.	On bill for Injunction.

The defendants, Lewis M. Cresse, Joseph I. Scull and Andrew Scull, hereby appeal from the whole and every part of the interlocutory decree of the Chancellor made in this Court in the above stated cause on the day of April, nineteen hundred and twelve, which adjudges that the complainant is entitled to the injunctive relief sought, to the Court of Errors and Appeals in the last resort in all causes.

Dated, May 2, 1912.

BOURGEOIS & COULOMB,
Solicitors for and of counsel with Defendants.

Petition of Appeal

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

H. L. COULOMB,
Of Counsel with Defendants.

Petition of Appeal

(Filed)

NEW JERSEY COURT OF ERRORS AND APPEALS

Between: ALONZO COTTON, Complainant and Respondent, and LEWIS M. CRESSE, JOSEPH I. SCULL and ANDREW SCULL, Defendants and Appellants.	On Appeal.

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

The petition of Lewis M. Cresse, Joseph I. Scull and Andrew Scull, the appellants in the above stated cause respectfully shows:

That your petitioners find themselves aggrieved by an interlocutory decree made in the Court of Chancery by his Honor. Edwin R. Walker. Chancellor of the State of New Jersey, bearing date the 22nd day of April, nineteen hundred and twelve, wherein Alonzo Cotton was complainant

and Lewis M. Cresse, Joseph I. Scull and Andrew Scull, were defendants, in this respect, to wit:

That the said interlocutory decree adjudges that the said defendants and each of them, as well as their and each of their servants, agents, workmen and employees, be restrained from building, erecting or placing any wall or building or structure of any kind whatsoever on that certain parcel or lot of ground, known as lot No. 438, Section A, on the recorded plan of lots of the Ocean City Association, at any place or places on the said lot within three feet of the common boundary line between the said lot numbered 438 and the adjoining lot numbered 440, Section A, on the recorded plan of lots of the Ocean City Association, for the distance of fifty feet along the said common boundary line measured from the southeasterly line of Asbury Avenue, in the City of Ocean City, in the County of Cape May, in the State of New Jersey; which said lot numbered 438 was and is bounded and described as follows:

BEGINNING at a point in the southeasterly line of Asbury Avenue, in the City of Ocean City, in the County of Cape May, in the State of New Jersey, at a distance of three hundred and ten feet southwestwardly from the southwesterly line of Eighth Street; containing in front or breadth on said Asbury Avenue thirty feet, and of that width extending in length or depth southeasterly between lines parallel with said Eighth Street one hundred feet to a fifteen feet wide street; which said lot or parcel of ground is adjoining and contiguous to that certain lot of land now owned by Alonzo Cotton and known as lot numbered 440, Section A, on the plan of lots of the Ocean City Association, recorded by the said Association in

the Office of the Clerk of the County of Cape May, at Cape May Court House, in the State of New Jersey on the ninth day of June, A. D. eighteen hundred and eighty; and from violating in any way, all or any of the covenants, provisions and restrictions set forth and contained in a certain written contract or agreement under seal, made by and between Alonzo Cotton, of the City of Ocean City, in the County of Cape May, in the State of New Jersey, owner of the said lot numbered 440, the complainant in this suit, and Gainer P. Moore, of the said City of Ocean City, formerly owner of the said lot numbered 438, which said written contract or agreement is dated the fourteenth day of February, A. D. nineteen hundred and one, and is as follows:

This agreement made this fourteenth day of February, A. D. 1901, between Alonzo Cotton of Ocean City, County of Cape May, State of New Jersey, of the first part, and Gainer P. Moore, of the same City, County and State of the second part, is as follows, to wit: That we the parties of the first part and second part owning properties adjoining each other on the east side of Asbury Avenue below 8th Street, being lots Nos. 438 and 440 enter into a mutual agreement that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury Avenue, and that the said party of the second part may build up to the party line fifty feet from the property line of the street back, that is to say, that each party can use the line one-half the distance from street to street which is one hundred feet, provided, he let no part of the building hang over the line; and it is further agreed that if either party de-

sires to erect a building extending more than fifty feet from the property line on either street, he shall not build it nearer the party line than three feet.

For the true and faithful performance of all which we set our hands and seals the day and year afore mentioned.

(Signed) ALONZO COTTON (Seal)
" GAINER P. MOORE (Seal)
Harriet E. Moore.

Until the said defendants shall have fully answered the bill of complaint of the above named complainant, and until this Court shall make other order to the contrary; upon the ground that the same is erroneous and contrary to law and equity;

Your petitioners therefore pray that the said interlocutory decree of the said Chancellor may be, in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable Court shall seem meet.

BOURGEOIS & COULOMB,
Sol. of Appellants.

STATE OF NEW JERSEY } ss.
COUNTY OF CAMDEN }

Edwin G. C. Bleakly being duly sworn on his oath says that on Tuesday, March 19th, 1912, he was consulted by Alonzo Cotton, the complainant, who stated he was afraid Joseph I. Scull and Lewis M. Cresse were about to break the agreement made by him with Gainor P. Moore, their predecessor in title, and deponent at once called said Joseph I. Scull on the telephone and said Scull then said that they intended to proceed and erect a wall along Cotton's line regardless of said Moore agreement with Cotton—deponent then and there notified said Scull not to proceed or that deponent on behalf of Cotton would proceed to *injunct* him. Said Scull also informed deponent that they had investigated and fully considered the said Moore-Cotton agreement and that they were going ahead in spite thereof.

EDWIN G. C. BLEAKLY.

Sworn to and subscribed before me this 6th day of April, 1912.

WALTER CARSON,
Attorney at Law of N. J.

STATE OF NEW JERSEY } ss.
COUNTY OF CAMDEN }

Alonzo Cotton of the City of Ocean City, County of Cape May, upon his oath says, that when the foundation wall was placed on the division line between lots 438 and 440 in Section A. that he, deponent, was out of the City of Ocean City, and that he did not know that the foundation was laid until after he returned to Ocean City.

Deponent further says that in the fall of 1911 deponent learned of the intention of Joseph I. Scull and Lewis M. Cresse to erect a building on lot No. 438, and he, deponent, went to said Joseph I. Scull and requested to see the plans for the building to be placed on said lot 438; that Joseph I. Scull said to deponent that the plans were not ready; that deponent then informed the said Joseph I. Scull that if he placed any building on

said lot 438, in violation of the agreement he, deponent made with Gainor P. Moore, that he, Scull, would do so at his peril; that not obtaining any satisfaction from the said Joseph I. Scull as to his intention as to erecting a building on said lot, he, deponent, went to Lewis M. Cresse, and made inquiry as to the intention of said Lewis M. Cresse erecting a building on said lot 438 whereupon the said Lewis M. Cresse informed deponent that the whole matter was in the hands of said Joseph I. Scull; that deponent informed said Cresse that if he placed any building on said lot 438 in violation of deponent's agreement with said Gainor P. Moore would do so at his peril.

ALONZO COTTON.

Sworn and subscribed before me this 6th day of April, 1912.

ANDREW C. BOSWELL,
M. C. C. of N. J.

A true copy.
Saml. K. Robbins, Clerk.

New Jersey Court of Errors and Appeals

Between

ALONZO COTTON,

Complainant & Respondent;

and

LEWIS M. CRESSE, JOSEPH I. SCULL AND ANDREW SCULL,

Defendants and Appellants.

RESPONDENT'S BRIEF.

Statement.

Complainant, Alonzo Cotton, filed his bill against defendants, Cresse and Scull, for the purpose of enjoining the violation by those defendants of a certain agreement or covenant, made between Cotton and the defendants' predecessor in title. Said agreement is as follows:

> "**This Agreement,** made this fourteenth day of February, A. D. 1901, between Alonzo Cotton, of Ocean City, County of Cape May, State of New Jersey, of the first part, and Gainor P. Moore, of the same city, county and State, of the second part, is as follows, to wit: That we, the parties of the first part and second part, owning properties adjoining each other on the east side of Asbury Avenue below 8th Street, being lots Nos. 438 and 440 enter into a mutual agreement that the said

party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury Avenue, and that the said party of the second part may build up to the party line fifty feet from the property line of the street back, that is to say, that each party can use the line one-half the distance from street to street which is one hundred feet, provided, he let no part of the building hang over the line; and it is further agreed that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build it nearer the party line than three feet.

For the true and faithful performance of all which, we set our hands and seals the day and year aforementioned.

(Signed) ALONZO COTTON. (SEAL)
(Signed) GAINOR P. MOORE. (SEAL)
Harriet E. Moore."

The Chancellor entered an interlocutory decree providing for the issuance of a preliminary injunction. Defendants have appealed to this court from such interlocutory decree, and the controversy on this appeal is, therefore,, brought within very narrow limits. The essential facts are not disputed.

Uncontradicted Facts Governing the Issue.

1. On the date of execution of said agreement, Cotton was the owner of lot No. 440, Section A, on the plan of Ocean City, and Gainor P. Moore, the other party to said agreement, was the owner of the adjoining lot, No. 438. Both lots front on Asbury Avenue and in the block between

Seventh and Eighth Streets. This block is the *principal business* section of Ocean City.

2. Said agreement was *not drawn by a lawyer,* but by Gainor P. Moore, one of the parties to the agreement.

3. Moore and Cotton were aware of the fact that the general Ocean City restrictions prevailing in the Ocean City deeds had been quite generally violated in that business section, and the building restrictions in those deeds were, therefore, not considered to be in force in that block.

4. Moore approached Cotton with a view to the execution of such an agreement. Moore desired to erect on the rear half of his lot a structure which should come up to the division line between said two lots. The purpose of the execution of the agreement, as stated by Cotton in his affidavits and not contradicted, *was to establish for these two adjoining lots beneficial restrictions that should be permanently binding upon the use of their said adjoining lots.*

5. The agreement insured to Moore the right to build up to the division line on the rear of the lot, and to Cotton the right to build up to the division line on the front half of his lot, and that Cotton should not approach the division line on the rear of the lot within three feet, and that Moore should not approach the division line within three feet on the front of his lot. *Relying upon these restrictions, mutually beneficial to the said adjoining lots, and for the purpose of making a permanent improvement to the said lot, Cotton, in the year 1909 erected upon his lot No. 440 a large brick store property,* in conformity to the rights and obligations provided for in said Moore agreement. That brick structure scripuously adhered to the conditions imposed by the Moore agreement, and while coming to within four inches of the

division line on the front half of the lot, was kept three feet from the building line on the rear half of that lot. *On the other hand, Moore, on the execution of that agreement, erected a building along the division line on the rear half of his lot.*

6. *Cotton's brick building would be ruined* by the construction attempted by the defendants in violation of the Moore agreement. It is not disputed that Cotton's damage would be irreparable. The affidavits of Cotton, Elmer B. English, David P. Cresswell and Mark Lake all show that a large part of the floor space in the first and second floors would be made useless, rooms would be completely darkened, and they would be deprived of all ventilation. This condition applies to ten windows in said Cotton building, and for a distance of forty-two feet along the division line. Two rooms on the first floor, two rooms on the second floor, as well as a stairway from the first to the second floors, would be deprived of all light and ventilation. Further, one room on the first floor and one room on the second floor would also be partially darkened and deprived of ventilation. One of the rooms so deprived of light and ventilation is the bath room and toilet. The erection of the defendants' structure along the division line would also leave open a four-inch space or well from the foundation to the roof of Cotton's building, and thus subject that wall to continued dampness and thereby affect not only the building itself, but the comfort and health of the occupants of the building.

7. Defendant Scull was the agent of Harriet Moore, the owner of the lot purchased by defendants. Scull, acting as such agent, had full knowledge of the existence and contents of said agreement from Harriet Moore. (Affidavits by Harriet Moore, pages 15-16-17 and 18.) Cotton states that defendant Cresse had knowledge of this agreement

sometime before Cresse purchased, by virtue of a conversation between Cotton and Cresse. (Cotton, pages 23 and 24.) Defendant Cresse denies knowledge of the existence of this agreement *until just before he bought the property,* (Cresse, page 70), but he does not deny the conversation referred to by Cotton. Defendant Cresse, (pages 70 and 71) admits knowledge of the agreement and its terms before buying.

It was not contended by defendants before the Chancellor, nor is it now contended by them, that they took without notice of this agreement. It also appears from the affidavit of Mr. Bleakly, (page) that the defendants were notified about the time they started the erection of the building, and also afterwards, that they must not violate said agreement and build within three feet of the division line, as provided for therein.

Argument.

1. IT WOULD BE UNCONSCIONABLE FOR DEFENDANTS UNDER THE DISPUTED FACTS TO VIOLATE THIS CONTRACT.

Defendants knew of this agreement and that Cotton had, in reliance upon it, constructed a large brick store which would be utterly ruined if they should violate the agreement. It is not pretended that Cotton and Moore acted otherwise than in good faith in the execution of this agreement and in their mutual compliance with its terms. Moore erected a structure up to the division line on the rear of his lot and defendants now have the benefit and advantage of that act of Moore. Cotton deprived himself of three feet on the rear of his lot for Moore's benefit in reliance upon the agreement that he should have the right to build up to the common line on the front of his lot. Not only did Cresse and Scull have actual notice of the existence of this agreement, but both are prominent men

in the community, have lived there for many years, knew exactly how Cotton had acted under said agreement and what the result upon his fortunes would be from a violation of its terms. If we take the defendants at their word, they bought lot No. 438 with the deliberate intention of setting aside the Moore agreement and ruining the property of Cotton, relying upon the technical objection that the words "heirs and assigns" had not been inserted in that agreement. The defendants are in no sense innocent and without knowledge of the "just rights" of Cotton. We submit that the open and avowed disregard by defendants of those known rights is wrong in both law and morals and will not be tolerated by a Court of Equity.

2. The parties to the agreement intended that it should provide mutual beneficial restrictions upon their adjoining properties, permanent in their character.

(a) Mr. Cotton, in his affidavits, expressly states that it was the intention of both him and Mr. Moore that these restrictions were to be permanent.

Mr. Moore, upon the execution of this agreement, proceeded at once to the erection of a building on his property up to the common boundary line according to the terms of the agreement. In other words, Mr. Moore sought immediately to take advantage by permanent improvement upon his own land. Mr. Cotton's lot was then vacant and remained so for some years, it being Mr. Cotton's intention to sell. Mr. Cotton states that this restriction gave an added value to his lot and that he so informed defendant Cresse some years ago when endeavoring to induce said Cresse to buy the Cotton lot. These statements by Mr. Cotton are not contradicted.

(b) Sensible men would never make an agreement of this character with the intention that its terms should be defeated by the death of either party or a sale by either party of his lot. The parties contract as—

> "Owning properties adjoining each other on the east side of Asbury Avenue below 8th Street, being lots Nos. 438 and 440."

They were not contracting for anything temporary, or merely personal to an individual, but for a permanent beneficial improvement to both lots.

If we accept defendants' interpretation of this agreement, we must consider Mr. Cotton as doing an utterly foolish and futile thing. He would be in the position of conferring permanent rights and benefits to his adjoining owner, who immediately took advantage of those rights and benefits with the probability of his own rights under the agreement being defeated by the death of Mr. Moore, or the sale by Mr. Moore of his lot. Such an assumption is negatived by the fact that Mr. Cotton, after Mr. Moore's death, and while Mrs. Moore, the widow, was in possession of the Moore property, put up a large and expensive store and brick building, pursuant to the terms of the written agreement. The windows of this structure were all along the side next to the Moore property, and were within four inches of that property. Had Mr. Cotton ever supposed that he was contracting for something temporary only, and for a right which would be enforceable only during the ownership or lifetime of Mr. Moore, he would never have expended this large sum of money in reliance upon the agreement. Nor can we suppose that Mr. Moore would have given Mr. Cotton the right to erect a permanent structure up to the dividing line on the front of the lot with the probability of Mr. Moore's right

to build on the rear up to the line, and his right to light and ventilation would be swept away by the death of Mr. Cotton or the sale of the Cotton lots. Sensible men do not act in such fashion.

(c) Furthermore, we must remember that the agreement was drawn by a layman and by Mr. Moore, who was the other party to the agreement. Mr. Cotton trusted him to put into shape the intention of the parties. The mere absence of the words "heirs and assigns" under these conditions can have no significance. We may consider the agreement as inartificially drawn by a layman, but a Court of Equity will see that the true intention of the parties, as manifested by their conduct and by all the surrounding circumstances, is given effect.

We submit, therefore, that under the admitted facts, a Court of Equity cannot do otherwise than give effect to the true intention of the parties and prevent, by its injunctive process, a violation of that agreement, to the manifest and irreparable damage of Mr. Cotton.

It is contended by the defendants that the mere absence of the words "heirs and assigns" is proof conclusive of the personal and temporary character of the restrictions involved, and that because these words did not appear in the contract the Court is powerless to prevent the irreparable injury which threatens the complainant.

We submit that defendants' contention that, where privity of estate is lacking, the words "heirs and assigns" are a necessity in contracts of the type in question, in order to make them enforceable against grantees with notice, is not only contrary to natural justice, but wholly artificial and unsupported by the authorities.

We contend that the cases on this branch of equity jurisdiction lead to this conclusion: That where owners of adjacent properties enter into a covenant imposing reciprocal restrictions upon the use of their lands; and

those restrictions are not, in nature, contrary to public policy; and it appears from a fair interpretation of the covenant and the surrounding circumstances that the parties to the agreement intended its provisions to be permanently binding upon their lands, then equity will compel grantees with notice to observe those restrictions, especially when the complainant has already acted upon them in good faith. The presence or absence of the words "heirs and assigns" in such covenant is merely one of the many elements to be considered in a particular case in ascertaining the intention of the parties. When those words are present, then, of course, the intention of the parties is obvious; but it is most arbitrary and unreasonable to insist that the same intention cannot be shown in any other way.

Sir George Jessel said (45 Law Jr. Rep. 280), "There is no magic in words." Equity has regard to substance and not to mere form of contracts and instruments which it is called upon to interpret.

AUTHORITIES.

1. (Hadden v. Shantz, 15 Ill. 582; L. & N. Rr. Co. v. Krelle, 104 Ill. 460). "In construing deeds or other writings, Courts must seek to ascertain and give effect to the intention of the parties; and for that purpose they may and will take notice of attendant circumstances, and by them determine the intention of the parties. * * * * The law must give a common sense construction to grants, and consider the state of things and the considerations in view of the parties at the time the grant was made, which moved them to its execution and acceptance."

2. In support of the proposition that the words 'heirs and assigns" are not indispensable to give equity jurisdiction to enforce against grantees covenants of the kind before the Court, and to show that the apparent intention of the parties, no matter how expressed, is controlling, attention is called to the following authorities:

The general rule on the subject is stated by Chief Justice Beasley, in the case of *Brewer v. Marshall and Cheeseman,* (19 *N. J. Eq., at p.* 542), in the following language:

> "The point is this: there is a class of cases in which equity will charge the conscience of an alinee of land with an agreement relating to such land, where clearly the agreement neither creates an easement nor runs with the title. This rule has been too frequently acted upon and is too deeply seated in our legal system to be passed by unnoticed or to be rejected as unsound. I regard it as a part of the law.—It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land.—From this review of the authorities, I am entirely satisfied that a Court of Equity will sometimes impose the burden of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title. So far I think the law is not in doubt, and the only question in this case which I have regarded as possessed of any material difficulty, is whether the covenant now in controversy

> is embraced within the proper limits of this branch of equitable jurisdiction."

Counsel for the defendants assert in their brief, at the bottom of page 7, and top of page 8, that the,

> "Only just right which Mr. Cotton was in a position to ask the Court to enforce was that Gainer P. Moore should not violate that agreement, and the only just right of which the defendants had notice was that Gainer P. Moore should not build within the prescribed three feet."

No person, we submit, fairly asking the meaning of the covenant in question, could reach such a conslusion. The defendants themselves, the moment they first heard of the covenant, suspected that it was intended to be binding upon Mr. Moore's grantees, and sought the advice of counsel to quiet their own impressions. They knew also what one of the parties to that agreement believed it to mean, because they were aware that he had built an expensive permanent brick structure in conformity to its provisions. They must have known also that no sane men would have made an agreement of that kind if they intended that either party could, at any moment, by death or by the sale of his lot, render the agreement void and inflict an irreparable injury on the other party. The interpretation of the covenant which the defendants ask to give, is, we assert, contrary to justice and to common sense, and wholly at variance with the spirit of the decisions.

The case of *Kirkpatrick vs. Pershine* (24 *N. J. Eq.*, 212), *decided by Chancellor Runyon*, is similar in some respects to the case at bar, and shows the broad policy by which the Court is guided in doing justice in cases of this kind. The facts in this case are briefly these:

The complainant bought a lot in Newark on April 4th, 1872, without any restriction in his deed regarding the use of his lot or the use of other ground retained by his grantors. On May 3d, of the same year, a month after the conveyance, Kirkpatrick, the complainant, entered into an agreement with his vendors, Mackin and Keasby, who owned the adjoining land, to the effect that he would put up a $18,000.00 house on the lot which he had purchased of them, if they would put certain building restrictions in such deeds as they might later make in conveying their property adjoining Kirkpatrick's lot. Neither Mackin nor Keasby, nor Kirkpatrick covenanted for themselves, their heirs or assigns. Kirkpatrick mentioned nobody but himself in this deed, and Mackin and Keasby assumed no restrictions, but simply promised to restrict other persons that might later buy of them. A restricted covenant of the kind agreed upon was put in Mrs. Pershine's deed, conveying to her, from Mackin and Keasby, the lot adjoining Kirkpatrick's. Mrs. Pershine had notice of the agreement between her vendors and the complainant. At the suit of Kirkpatrick, she was restrained from violating the restrictions; and yet he was in no sense a party to the covenant between Mrs. Pershine and her vendors. The Court held that the defendant was "clearly bound by the agreement made by Messrs. Mackin and Keasby with the complainant."

Another case illustrating the fact that the words "heirs and assigns," or any other particular words, are not necessary to make a restrictive covenant binding upon purchasers with notice is that *of Cott v. Towle,* (4 *English Chancery Appeals, p.* 652). The Court, consisting of Sir C. J. Selwyn and Sir C. N. Giffard, held that the complainant was entitled to relief on the following facts: The complainant, a brewer, sold a tract of land, in fee. The purchaser covenanted that his vendor and successors should have the exclusive right to sell beer to such public house as might be erected on the land sold. The purchaser did not covenant

for his heirs and assigns, and there was nothing positive in the conveyance showing that the covenant of the purchaser was to be binding upon subsequent occupants of premises. The defendant bought the land with notice of the covenant, and erected a public house thereon in which he offered for sale beer of his own making. The defendant was restrained from violating the covenant. The Court said:

> "What we have to deal with here is the general abstract question—whether a person purchasing with notice of such a covenant as this is to be bound by it, and upon that I can only say that I entirely agree with the conclusion at which the learned Vice-Chancellor has arrived, and I think this appeal (the defendant's) must be dismissed with costs."

In the Massachusetts case of Whitney v. Union Pacific Railway Co. (11 *Gray,* 539), Judge Bigelow pointedly states that covenants of the type in question will be enforced in equity, even though they do not purport to bind assigns, if justice requires it. The Court said:

> "Upon this point, the better opinion would seem to be that such agreements are valid, and capable of being enforced in equity against those who take the estate with notice of them, although they may not be, strictly speaking, real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed.—Therefore an agreement or covenant, though merely personal in its nature and not purporting to bind assigns, will nevertheless be enforced against them unless they have a higher and better equity as bona fide purchasers without notice."
>
> "It is on this ground that a purchaser of an estate taking it with notice of a prior agreement by the

> vendor to sell it to another can be compelled in equity to convey it according to such agreement * * * * on this the precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform."

One of the clearest cases interpreting the principle on which relief is granted in cases of the present type is that *of Lewis v. Gollner, et al., decided in the New York Court of Appeals,* 1891 (129 *N. Y., 227*). The facts were as follows: The defendant Gollner was the equitable purchaser of land in the vicinity of the complainant's residence. Gollner announced his intention of erecting a seven-story flat on the premises, whereupon the complainant, in order to prevent the deterioration of the neighborhood, bought Gollner's interest in the land in question, paying him six thousand dollars more than the original purchase price. As a part of the transaction, Gollner entered into a contract with the complainant by the terms of which Gollner promises that "he would not construct or erect any flats in plaintiff's immediate neighborhood or trouble him any more." Shortly thereafter Gollner purchased another lot in the same neighborhood, and conveyed it to his wife, who had notice of her husband's contract with the complainant. She began the erection of a flat house, but was restrained by the Court. The opinion, in part, is as follows:

> "The moment he (Gollner) bought or leased any such land, he came under an obligation not to use it in a particular way; the land in his hands necessarily

> became restricted and limited in the use of which it was capable * * * *. In other words, when he bought the land the plaintiff's equitable rights at once attached to it, became a burden upon it so long as Gollner owned it, so that apparently the contract ceases to be merely and purely personal, because it affects, and was intended to affect the use of Gollner's after acquired land in that neighborhood. But if the contract remains technically a personal one, I think the reasonable and settled doctrine is that the contract equity is so attached to the use of the land which is the subject matter as to follow the land itself into the hands of a purchaser with full knowledge of all the facts, who buys with his eyes open to the exciting equity, and more especially when he buys for the express purpose of defeating and evading that equity. * * * * Equity has no comparison for a fraud, and he who buys in and of one with full knowledge of what is right, but with purpose to defeat it, should not escape, the hand of equity by a criticism upon the origin of the restriction violated."

The case last cited renders perfectly clear the doctrine upon which equity grants relief in cases of the kind now before the Court. The contract which the Court will enforce need not contain the words "heirs and assigns"; the covenant, in order to bind his successors in title, with notice, need not, as a matter of law, make any express reference to them; he may refer to himself only in the agreement; and yet equity will not permit his assignee to violate the terms of the contract when its original purpose would be frustrated thereby. It is not denied that in the present case, as in the one last cited, the defendants' predecessor referred to himself in the contract which he made. But we contend that it is little better than absurd to argue that for this reason alone the covenant made by

Moore and Cotton cannot, as a matter of law, be construed as showing an intention to bind their successors. The common sense of the situation is clearly antagonistic to such a contention. The parties contracted as adjoining land-owners. Cotton's land was unoccupied. The covenant related to the erection of *buildings,* each of which might extend for more than "fifty feet from the property line," showing clearly that the parties were providing for large structures that might one day be built on the lots in question. One of the parties, as the defendants well knew, had erected a permanent brick structure in conformity to the terms of that agreement. How can it be plausibly asserted, therefore, under the admitted facts, that Cotton and Moore made, and intended to make,—not the fair, beneficial, and sensible agreement on which the complainant has acted,—but an absurd contract which either party could break at will, and, which, for that reason, would have been useless to both parties, unless they should be willing to undergo the risk of suffering irreparable injury at the caprice of either? We submit that although Cotton and Moore mentioned themselves only in the covenant, and such buildings as they might erect, there is no ground for asserting that it was their intention that such buildings as they might erect were to be protected by the covenant only during the pleasure of the other party.

In the case of Wilson v. Hart (*Law Rep.* 1 *Ch. Appeals,* 463), *mentioned with approval by Chief Justice Beasley, in Brewer v. Marshall, supra, at* 543, the covenant in question did not purport to bind assigns; but nothwithstanding this fact, the Court restrained the covenantor's assignee from violating the agreement, even though the covenant did not run with the land, and was a covenant "not against the use of land", but merely against the personal use of such building as might be erected thereon.

Counsel for the defendants, on page 8, of their brief, admit that the case of Wilson vs. Hart would be an authority for the plaintiffs' contention if, in the case at bar, the covenant provided that "no building should be erected within three feet, etc." The fact that Cotton and Moore stipulated that neither "party" would build within three feet constitutes, according to defendants' counsel, a fundamental difference between the case at bar and the Wilson case. The fact is overlooked, however, that the intention that no person shall build within the prescribed three feet can be as readily gathered from the covenant and circumstances before the Court as could be done if the parties to the agreement had used more precise language. No person, we contend, reading the covenant entered into by Moore and Cotton, and honestly endeavoring to ascertain its true meaning and purpose, could reach a conclusion other than that the contracting parties intended the moderate restrictions which they imposed upon their lands should be permanent in their effect. As we have already endeavored to point out, the intention of the parties to the original covenant, which is to be gathered from the language of the agreement itself and from the surrounding circumstances, is the controlling feature in cases of this type; and the intention that the provisions of an agreement should have permanent effect does not have to be expressed in any set phrase. The successors in title of persons entering into a covenant, such as is before the Court in this case, are, according to the authorities, obliged to abide by the covenant, if the exercise of ordinary common sense and the desire to deal fairly would have shown them that a violation of the covenant by an assignee would be contrary to the original purpose expressed in it and would cause irreparable injury to those who, in good faith, had acted upon its provisions. This elementary principle of honest conduct will work no hardship to persons who deal in real estate.

Counsel for the defendants, at the bottom of page 6 of the brief, argue that the case of Van Doren vs. Robinson (16 N. J. Eq., 256) offers no authority for the plaintiffs' contention in the present suit. This case was mentioned by the Chancellor in granting the preliminary injunction. Counsel argues that the title which Robinson acquired was a feasible one, and, having taken it with notice, he was bound by whatever defect there might be in it. There is no occasion, however, for laying stress upon this particular case, inasmuch as no relief in equity is more commonly granted than that which compels the purchaser of land, having notice of a contract entered into by the vendor to sell to another, to abide by the terms of such contract. The principle of the innumerable decisions in this branch of the law is perfectly obvious. Relief is granted not because the vendor conveyed a defeasible title, or because the contract which he made expressly bound his heirs and assigns," but simply because common honesty requires that no person acquiring title to real estate, when fully aware of a contract in relation thereto made by his vendor with another, shall be allowed to defeat the just rights of that other person. This one line of cases, we believe, is a sufficient answer to the defendants' contention that the words "heirs and assigns", or any similar stereotyped phrase, is fundamentally necessary to give the Court jurisdiction to enforce a contract made by the defendants' grantor.

The case of Dennis vs. Wilson (107 Mass. 592) is another one in which a covenant in regard to the use of land was enforced by the Court against a grantee with notice, even though the covenant itself contained no express provisions or positive evidence that the rights created by it were intended to be permanent. The facts in this case are, briefly, these: One, Jenkins, owned a tract of land, a strip of which he

sold to the defendant, "excepting and reserving a right of way to pass and repass from said land with teams and otherwise on the northerly side of said premises." The deed contained no express statement that the right reserved by Jenkins was to be for the benefit of any person other than himself. However, when Jenkins sold the remaining strip of land, adjacent to that sold to Wilson, the purchaser was adjudged to be entitled to the same privileges in Wilson's land as Jenkins had enjoyed.

In the Dennis case, just as in the case at bar, counsel for the defendant argued that the absence of the words "heirs and assigns," or some similar expression, pointing to the intention of the original parties to make a covenant perpetually binding, operated to confine to Jenkins himself the benefits which he derived under the covenant. He acquired, it was argued, a merely personal right of way, and that when he sold the land which he occupied, when the covenant was made, the right of way in the adjoining land was extinguished. The Court, however, took a very different view, and held that any inference to the effect that Jenkins' privileges were purely personal was overcome by the *nature* of the right which he had under the covenant, and by the fact that its use was *incident* to the occupation of a particular piece of real estate, from which fact the reasonable conclusion was that the privileges were to exist indefinitely for the benefit of whatever person might be in the one position to enjoy them. The Court said, in part:—

> "It is contended that the want of words of limitation to heirs and assigns not only limits the right to the life of the party to whom the reservation was made, but makes it personal to him.—Even if it were conceded that * * * for want of words of inheritance, the right is limited to the life of Jenkins, it does not follow that it is a mere personal right, not assignable. Its character must be determined by the

purposes for which the way was intended to be used. Those purposes being ascertained from the terms of the deed, aided, if necessary, by the situation of the property and the surrounding circumstances, the deed is to be construed accordingly. * * * The rights of Jenkins in the way in question here, after he sold his other land and had no right to enter upon it, were reduced to a mere nonentity, if they were only personal rights when reserved."

"As a matter of authority, the case of Bowen vs. Connor, (6 Cush., 132), is directly in point. There were no words of inheritance; but the way was held to be appurtenant."

"The limitation of a right in express terms, to the life of a person, may afford some ground of inference that it was intended as a personal right; but that ground of inference would be overcome if the nature of the right and its apparent use were such as to indicate that it related wholly to the convenience or occupation of real estate. When, however, the limitation results from omitting words of inheritance by an inartificial reservation, the inference in that direction, if any can be drawn therefrom, must be very slight."

Page 592. "Such an easement is never presumed to be personal, when it can fairly be construed to be apurtenant to some other estate."

Washburn on Easements, 28-29, 161. Smith vs. Porter, 10 Gray, 66.

In other words, in Massachusetts, where Courts give relief in such cases as the one at bar, on the theory that the agreements create easement, the Supreme Court has held that the absence of the words "heirs and assigns" is of no consequence if the essential nature of the covenant is such that its enjoyment would be inseparable from a particular piece of land; and whether or not such is the case, in a given in-

stance, depends upon the object of the contract as it appears from the instrument itself and from the situation of the parties.

Another case illustrating the policy of the Court to examine the circumstances surrounding the making of a covenant relating to the use of laws, in order to ascertain the purpose of parties thereto, and to give effect to it, if not contrary to public policy, is that of Barron v. Seibard, (8 page 358,) decided by Chancellor Walworth. In this case it appeared that an owner of a tract of land had divided the same into lots, some of which had been sold subject to the restriction that the conveyance should become void if the grantee should engage in or *permit on the demised premises "any trade or business whatsoever which should or might be in any wise offensive to the neighboring inhabitants." The complainant had purchased his lot before any of the restrictive covenants had been made, and was in no sense legally a party to them. But the Court held that the complainant was one of the "neighboring inhabitants," that to be sufficient to entitle him to relief within the spirit of the restriction, and held that he was entitled to the injunction which he sought.*

The case of Hemsley vs. Marlborough Hotel Co. (62 N. J. Eq., 171,) is cited by counsel for defendants to prove that the Courts of this State have already refused to grant relief in a case like the present one. This conclusion is erroneous. Under the peculiar facts of the Hemsley case the Court was of the opinion that there was no evidence whatever to show that the covenant which the complainant sought to enforce had been made for his benefit. But it is utterly at variance with the facts to assert that the covenant which Mr. Cotton seeks to enforce was not made for his benefit. He is, as counsel for the defendants points out, individually named in it.

And the Court in the Hemsley case, not only title found, as stated at p. 68, that when the predecessors in ~~title~~ of Mr. Hemsley bought, they could not have taken the land with the benelt of the restrictive covenant in question, but found also that the covenant, where admittedly binding at one time, had been repeatedly violated with the acquiescence of those who might have interposed. Neither was there any evidence in the case of a "common plan" on which the complainant might base his claim to relief; assuming the position, as is frequently done in such cases, of one who was implicitly, if not expressly, entitled to the benefit of the restriction.

The Hemsley case, therefore, has no bearing upon the precise question now before the Court. It cannot be doubted that the covenant in the present case was made for Mr. Cotton's benefit, inasmuch as he is named in it as one of the persons to receive its advantages. The only question, in our view, which the case at bar presents, is, as we have already endeavored to point out, simply this: Could a prospective purchaser of Mr. Moore's lot, fully aware of the contents of the covenant in question, interpreted in the light of the known circumstances, honestly fail to perceive that the benefits which Cotton's premises received under the covenant were intended to be permanent? To this question, we insist, the only reasonable answer is no.

Respectfully submitted,

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NEW JERSEY
Court of Errors and Appeals

BETWEEN
ALONZO COTTON,
Complainant, Respondent,
AND
LEWIS M. CRESSE ET AL.,
Defendants, Appellants.

On Bill for Injunction.
Appeal.

Brief for Appellants.

The appeal in this case is for the purpose of reviewing an interlocutory decree made by the Chancellor restraining the defendants from building on their land in Ocean City, N. J., in violation of an agreement made between the complainant and Gainer P. Moore, the predecessor in title of the defendants, which, it is claimed, prevents the defendants from building on their land within three feet of the complainant's land.

The bill filed by the complainant seeks to restrain the erection of the buildings upon two grounds:

First. Upon the ground that the appellants' land is subject to a four-foot building restriction, part of the general building scheme of the Ocean City Association.

Second. On the ground of the above-referred to agreement.

The agreement sought to be enforced, found on page 54, is in words following:

> "This agreement made this fourteenth day of February, A. D. 1901, between Alonzo Cotton, of Ocean City, county of Cape May, State of New Jersey, of the first part, and Gainer P. Moore, of the same city, county and State, of the second part, is as follows, to wit—that we, the parties of the first and second part, owning properties adjoining each other on the east side of Asbury avenue, below Eighth street, being lots Nos. 438 and 440, enter into a mutual agreement that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury avenue, and that the said party of the second part may build up to the party line fifty feet from the property line of the street back, that is to say, that each party can use the line one-half the distance from street to street, which is 100 feet, provided, he lets no part of the building hang over the line. And it is further agreed, that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build nearer the party line than three feet.
>
> "For the true and faithful performance of all which, we set our hands and seals the day and year aforementioned.
>
> "ALONZO COTTON. [SEAL.]
> "GAINER P. MOORE. [SEAL.]
> "HARRIET E. MOORE."

Defendants contend and insist that covenants, concerning land or the use of land, are enforced by or against others than the original covenantor and covenantee only in three classes of cases:

(*a*) Where the covenant runs with the land.

(*b*) Where there is privity of estate and notice, and

the covenant is made for the benefit of the grantor's remaining land.

(*c*) Where the covenant is entered into between the covenantor and covenantee, their heirs and assigns.

A covenant between a covenantor and a covenantee, where the covenant does not run with the land, and where there is no privity of estate and notice, and where it does not extend to the heirs and assigns of the parties, is a personal covenant, and can be enforced only by one against the other.

The portion of the covenant sought to be enforced in the present case is in words following:

> "And it is further agreed that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build nearer the party line than three feet."

Defendant's contention is that this is purely a personal covenant, binding upon the parties only and enforcible only by one party against the other. It does not presume to attach to the land; it does not provide that no building shall be erected on the land nearer than three feet, but simply defines a course of conduct to be observed by the two parties to the agreement.

I.

The affidavits show that the property of the complainant and defendants lies on Asbury avenue, between Eighth and Ninth streets, in the city of Ocean City; that on Asbury avenue, between Sixth and Ninth streets, there are erected more than one hundred houses, and that more than three-fourths of these buildings are erected in violation of the building restrictions imposed by the Ocean City Association.

The case is directly within the case of *Headley* v. *Ocean City Association*, wherein the Court of Chancery held that the building restrictions of Ocean City Association would not be enforced against Headley,

who was erecting a building on the opposite side of the same avenue from complainant's property, because the numerous violations of the building restrictions on Asbury avenue, between Sixth and Ninth streets, amounted to an abandonment of them.

Ocean City Association v. *Headley*, 62 *Eq.* 322.

Further than this it will appear from an inspection of the agreement that the agreement was entered into between the parties with a view of allowing either party to build in violation of the restrictions imposed by the Ocean City Association. It is manifest, therefore, that Cotton, the complainant, cannot be heard now to complain of a violation of those restrictions when he himself was a party to an agreement which permitted them to be violated. Furthermore, it must be observed that the decision of the Chancellor rested squarely upon the obligation of the agreement above referred to, and which agreement is printed at page 54. It is, therefore, unnecessary to further discuss the question as to whether or not the complainant could be successful upon the theory that the restrictions imposed by the Ocean City Association have been violated.

II.

The agreement upon which the complainant depends and upon which the Chancellor deemed he was entitled to the relief sought, it will be noted, is made to apply solely to the respective parties thereto, namely, Alonzo Cotton and Gainer P. Moore. It will further be observed that it consists of two covenants, one, an affirmative covenant, wherein it provides that the party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury avenue, and the party of the second part may build up to the party line fifty feet from the property line on the street back, that is to say, each party can use the line one-half the distance from street to street, which is one hundred

feet. It will be noted that so far as this affirmative portion of the agreement is concerned, that it permits a violation of the restriction imposed by the Ocean City Association. It will further be observed that it in terms applies *only to the individual. It does not provide that either party, his heirs or assigns,* may so build, but that the said party of the first or second part may so build.

The second portion of the covenant is negative in its character, and it provides that *if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build nearer the party line than three feet.* It is this latter covenant, namely, the covenant providing that "he shall not build nearer the party line than three feet," upon which the complainant must depend for the relief. It will be further noticed that this prohibition against building nearer than three feet applies solely and wholly to the parties themselves, namely, to Alonzo Cotton and Gainer P. Moore. It does not say that if either party, his heirs or assigns, desire to erect a building, etc., that he or his heirs or assigns shall not build nearer the party line than three feet, nor does the agreement provide that the agreement itself, the whole or any part of it, shall be binding upon the heirs and assigns. So far as the agreement is concerned, it is personal to the parties making it. It prevents *Alonzo Cotton* from building within three feet of the party line; it prevents *Gainer P. Moore* from building within three feet of the party line, but it does not prevent the heirs or assigns of Alonzo Cotton from so building, nor does it prevent the heirs and assigns of Gainer P. Moore from so building, nor can it be said that it was the intention of the parties thereto that it should so prohibit.

There was no application made to reform this agreement, and, therefore, in its enforcement the terms of it may not be departed from. To permit any court to interpret this agreement so as to extend it to bind the

heirs and assigns of the respective parties, is permitting the Court to make an agreement other than that which the parties made or intended to make. While a court of equity has power, upon application to it, to reform an agreement, it will not do so, nor has it the power to do so, unless application is so made. A court of equity has no more power to depart from the terms of an agreement in a suit wherein the obligation of the agreement is being litigated, than has a court of law to do so, and, therefore, in the present case, the Court of Chancery was obliged to and should have considered the agreement in question as being binding only upon the parties to it personally, and not upon their heirs or assigns, and, therefore, that it did not bind or oblige the defendants, who were the assigns of Gainer P. Moore, to a performance thereof.

It was conceded by the complainant that the covenant contained in the agreement was not such a covenant as would run with the land, but he insists that it was not necessary that the covenant should run with the land, in order to bind the defendants in this suit, and relied upon the proposition that when a complainant desires to charge the conscience of the defendant with the duty of abiding by a covenant relating to land which he has purchased with notice, the jurisdiction of equity is not affected by the existence or non-existence of privity of estate between the parties.

The equitable proposition contended for by the complainant is in effect that if the alienees take land with notice of a restriction thereon, a court of equity will enforce as against them the observance of that restriction, notwithstanding that there was no privity of estate, and notwithstanding that the restriction did not run with the land, and was not binding on the heirs or assigns.

The Chancellor in his memorandum upon which the decree is based, relies upon this proposition to allow the preliminary restraint, and it, therefore, becomes necessary to discuss this case with respect to this proposition. At the outset we desire to particularly direct the atten-

tion of the Court to the fact that the Chancellor in his opinion considers the subject of notice upon the part of the defendants as to the existence of the restriction as being the paramount factor in his decision, whereas it must surely be conceded that the paramount factor is not whether the defendants had notice of the restriction, but whether the restriction of which they had notice in terms bound them to its performance. If the restriction which the complainant invokes provided that it should be binding upon the heirs and assigns, etc., then notwithstanding there was no privity of estate, and notwithstanding that it did not run with the land, it would be binding upon the defendants if they had notice of it.

In reviewing the cases to which the Chancellor referred in his opinion, we find, that in every single case, the covenant which the court was called upon to enforce was, by its terms, binding on the heirs and assigns, or contained some provision which made it enforcible against the heirs and assigns.

In the case of *Van Doren* v. *Robinson, 16 Eq. 256,* the facts were that property was deeded to one Phœbe Woodward, with the condition that "whenever she, the said Phœbe Woodward shall quit the foregoing described lands and premises, she shall re-convey the same to the said Ferdinand Van Doren, in fee simple, by a good and sufficient deed of warranty, free and clear of all encumbrance made or suffered by her, and in case the said Phœbe Woodward shall die in possession of the said lands and premises, she hereby further covenants with the said Ferdinand Van Doren that her heirs and assigns shall re-convey said land." The facts show that Phœbe Woodward removed from the premises, subsequently selling them to the defendant, and then died. Some years later the suit in question was brought. It will be observed that the obligation to reconvey was imposed not only upon Phœbe Woodward herself, but upon her heirs and assigns. It will also be observed that the provision was directly a

defeasance in Woodward's title, and when Robinson took title thereto, he took title with knowledge of the defeasance contained in the deed, and with further knowledge that the defeasance had become operative, and that at the very time he took title the complainant had a right to have the property reconveyed to him. It is further to be observed in this case that relief was denied the complainant on other grounds, both of laches and of conduct which amounted to an estoppel.

In the case of *Brewer* v. *Marshall, 19 Eq. 537,* the covenant under discussion provided that neither the vendor nor his assigns will sell marl, etc. In this case Chief Justice Beasley said (page 543), after citing a number of cases:

> "It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the *just rights of another* from defeating such rights, and not upon the idea that the engagements enforced create easements, or are of a nature to run with the land."

It will be observed in the case of *Brewer* v. *Marshall,* that the Chief Justice limited the application of the doctrine to the preservation of the *just rights of another.*

In the present case the just rights of Cotton were that Gainer P. Moore should not build within three feet of the side line, etc. *Attention is again directed to the fact that the agreement does not provide that no building shall be erected within three feet of the side line, but provides that the party of the second part, i. e., Gainer P. Moore, shall not erect any building within three feet of the side line,* and the only just right which Mr. Cotton was in position to ask the court to enforce was that Gainer P. Moore should not violate that agreement, and the only just right of which the defendants had notice was that Gainer P. Moore should not build within the proscribed three feet.

In the illustration adverted to by the Chief Justice in *Brewer* v. *Marshall,* at page 543, namely, the case of *Wilson* v. *Hart, Law Rep., 2 Ch. Appeals 463, the* covenant was against the use of any building as a beer shop. In this case the defendant, who was the assignee of the covenantor, was enjoined, although Sir G. J. Turner, L. J., in delivering the judgment, declared that in his opinion the covenant did not run with the land; that it did not purport to bind the assigns, and that it seemed to be a covenant direct, not against the use of the land, but against the personal use and enjoyment of the building to be erected upon the land. The covenant in this case was not that the original covenantor should not sell liquor, etc., on the premises, nor that he should not use the building for the sale of liquor, etc., but that the building should not be used for that purpose, and the defendants, having had notice of the prohibition on the use of the building, were equitably obliged to observe that restriction.

If, in the present case, there had been an agreement that no building should be erected within three feet, etc., the application of the above case of *Wilson* v. *Hart* might possibly obtain, but in view of the peculiar language of the agreement in the present case, it is without authority.

Right here it may not be amiss to observe that in the case of *Fortescue* v. *Carroll, 76 Eq. 584.* the New Jersey Court of Errors and Appeals points out the distinction between the construction of a building and the use to which it might be put, and declares that a covenant providing against the construction of two buildings will not be violated by the erection of one entire building, although that building is to be used as two residences.

In the case of *Watman* v. *Gibson, 9 Sim. 196,* quoted in the case of *Brewer* v. *Marshall,* at page 543, and referred to by the Chancellor in his memorandum, it appears that the covenant enforced was in the first place part of the defendants' chain of title. It also appears

that it was provided in this agreement that it should be a general and indispensable condition on the sale of all or any part of the land; that the several proprietors should observe and abide by the several stipulations, etc. It will be thus seen that this case, which the learned Chancellor declares to be "quite apposite," was founded upon a covenant which distinctly provided that it should be binding upon all the proprietors who should become seized of the land to which it referred.

Chief Justice Beasley, in the case of *Brewer* v. *Marshall,* at page 544, goes on to say:

> "From this review of the authorities I am satisfied that a court of equity will *sometimes* impose the burden of a covenant relating to lands on the alienees of such lands on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the land."

It will be seen that the Chief Justice does not say that these covenants will be enforced in every instance where the purchaser takes with notice. The question, therefore, arises, "In what cases where the purchaser takes with notice will a court of equity enforce the covenant, and in what cases will it not enforce such a covenant?"

It is respectfully submitted that in cases where there was privity of estate between the original covenantee and covenantor, a court of equity will enforce the covenant against any subsequent purchaser taking with notice.

And will refuse to enforce the covenant where the covenant is personal and privity of estate did not exist between the original covenantee and covenantor.

In the case of *DeGray* v. *Monmouth Beach, 50 Eq. 329, 332,* the Court said:

> "It is settled that a court of equity will restrain the violation of a covenant, *entered into by a grantee,* restrictive of the use of lands conveyed, not only against the covenantor, but

> against all subsequent purchasers of the land with notice of the covenant, irrespective of the questions, whether the covenant is of the nature to run with the land, or whether it creates an easement,"

citing *Tulk* v. *Moxhay,* and other cases where there was privity of estate, and where the court of equity enforced the covenant because the purchaser took with notice of it, even though the covenant did not run with the land.

In the five classes of cases mentioned by the Court in the case of *DeGray* v. *Monmouth Beach,* at page 336, we find that the covenant will not be enforced:

"(3.) If it appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin.

"Such intention must appear in the covenant or deed.

Skinner v. *Sheppard, 130 Mass. 180;*
Renals v. *Colishaw, 9 Ch. Div. 125.*

"(4.) If it appears that the covenant has not entered into the consideration of complainant's purchase."

The affidavits in this case show that this restriction in no manner entered into the consideration price paid for the land.

The Court, citing the case of *Renals* v. *Colishaw, 9 Ch. Div. 125,* where it was held that an assign of the covenant could not enforce it because there was no privity of estate, although there was notice.

The precise distinction seems to be between covenants that are purely personal, and covenants which are personal but which are created between vendor and vendee, and those which run with the land.

If the covenant is purely personal, and there is no privity of estate, then it will not be enforced against the assignee of covenantor or covenantor, even though the purchaser has notice.

Curtis v. *Herd, 36 Mass. 459;*

Costigan v. *P. R. R. Co., 54 N. J. L. 233, 241, 242;*

Ross v. *Turner, 44 Am. Dec. 531;*

Morse v. *Aldrich, 36 Mass. 449, 453, 454.*

The cases in which the question of notice becomes important are in the enforcement of negative covenants. If the covenant is entered into between vendor and vendee and is for the benefit of the land granted, then it runs with the land, and there is no difficulty in enforcing it against subsequent purchasers. If, on the other hand, the covenant is between vendor and vendee, and the benefits accrue not to the land granted but the land retained, then it is not a covenant running with the land, and is not enforced upon that theory; but is a negative covenant and is enforced in equity in cases where the purchaser bought with notice, upon the principle of preventing a party having knowledge of the just rights of another from defeating such just rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. In all such cases, however, there must be privity of estate between the covenantor and covenantee.

If the covenant is personal, and is entered into between vendor and vendee, for the benefit of vendor's remaining land, then because of the privity of estate the covenant is a negative covenant and enures to the benefit of the estate or land so retained, as against all persons who purchase with notice. As was the case in *Tulk* v. *Moxhay; Kirkpatrick* v. *Pershine, 24 Eq. 206,* and the other cases cited in the previous memo.

If the contention urged by the complainant be true, to wit, that notice is all that is necessary to confer jurisdiction on a court of equity to enforce these negative covenants, then the case of *Hemsley* v. *Marlborough, 62 Eq. 164, affirmed 63 E. 804,* and *McNichol* v. *Townsend, 73 Eq. 276,* were improperly decided, because in each case the purchasers were bound by constructive notice of the covenant which appeared in the chain of

their title, and yet this Court denied relief in the last-mentioned cases because they were personal covenants, and it did not appear from the deeds that said covenants had been entered into for the benefit of the grantor's remaining land.

In fact, complainant's precise contention is stated by Chief Justice Beasley in the case of *Brewer* v. *Marshall,* above cited, in the following language:

> "But if this complainant is to be relieved, then in equity we have the opposite rule, that all covenants touching land which are known to the purchaser at the time of the transfer to him become attached to the land and will descend with the title to the remotest alienee,"

and then proceeds to show the fallacy of such a claim.

In one or two of the cases will be found an expression concerning privity between the parties, but in these cases it will be found that the Court is referring to privity between the immediate parties to the suit and not privity of estate between the original covenantee and covenantor.

In the case of *Tulk* v. *Moxay, 2 Phil. 744,* the Court used the following language:

> "It is said that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased."

From this expression and similar expressions in other cases, it might be inferred that privity of estate was not an element in the question, but it will be noticed that in this particular case the Court said "inconsistent with the contract entered into by his vendor," which, of course shows that there was privity of estate, and it will be found in all the other cases where a similar expression has been used, that there was privity of estate between the original covenantor and covenantee.

Somewhat aside from the point above discussed is the collateral question of, "In what cases where equity will enforce the covenant may complainant have advantage of it?" that is, assuming a restrictive covenant to be entered into, in which there was both privity of estate and notice, may it be enforced by each against the other, or only by one of them.

The question has been decided in our State in *Milligan* v. *Jordan, 50 N. J. Eq. 363,* that in such case a subsequent grantee or his assigns, but not by a prior grantee or his assigns against a subsequent grantee or his assigns.

Such a case is, of course, a case where the covenant was entered into for the benefit of the remaining land and necessarily shows that there must have been privity of estate.

Complainant, in his brief handed in below, cited a number of cases to rebut appellants' contention that the covenant in question is a personal covenant, and as such cannot be enforced against the assignees of the covenantors, unless there is privity of estate between them, but it is insisted that these cases do not contradict appellants' contention.

In the case of *Trustees* v. *Lynch, 70 N. Y. 444,* it will be found upon reading the statement of the case on page 444 that it was made between plaintiff, their successors and assigns, of the one part, and Beers, his heirs and assigns, his and their tenant, etc., of the other part, which showed on the face of it that it was not a personal covenant.

In the case of *Kirkpatrick* v. *Pershine, 24 Eq. 206,* by reading a statement of the case on page 208 it will be found that this covenant also was between the grantee, her heirs and assigns.

The covenant in defendants' deed was as follows:

> "This conveyance is made subject to the express covenant and agreement on the part of said grantee, her heirs and assigns, that the dwelling," &c.

The next case cited was the case of *Ladd* v. *Boston, 151 Mass. 585.* In that case the owners of sixty-four lots all agreed among themselves to certain covenants, the agreement being between Patrick T. Jackson, his heirs and assigns, and the owners of the balance of said sixty-four lots, their heirs and assigns.

In the case of *Seegar* v. *Harrison, 25 Ohio St. 14,* which was a case where two parties owning land had dedicated a part of each of their lands for a street and staked the street out upon the ground, and afterwards executed an agreement between themselves dedicating it as a street, and thereafter exchanged lands describing the same as bounded upon the proposed street, and one of them built a house upon his land with relation to such street, the Court held that the grantee of the other could not deny the existence of such a street.

In that case there was privity of estate, but further than that the acts of the parties amounted to a dedication which could not be revoked because it was the intention of the original parties so to dedicate, which dedication was not only for the benefit of the owners of the particular property, but also for the benefit of all persons having business transactions with such owners and for the benefit of the public when and as soon as the street should be accepted as a public street.

As was said by Mr. Justice Reed in this Court, in the case of *Groff* v. *Siebert, 38 Atl. 970,* where parties sell land, bounding the same upon an intended street, the grantee, his heirs and assigns, thereby becomes vested with the right of ingress and egress over the lands which cannot be denied to him by the grantor.

The case of *Kettle River* v. *Eastern R. R., 6 L. R. A. 111,* was between corporations, its successors and assigns, as will appear from the opinion, in which it quotes the agreement in part as follows:

> "Now, therefore, the said first party in consideration of the premises aforesaid, and one dollar to it in hand paid, does by these presents

grant, bargain, sell and convey to said second party, its successors, lessees and assigns forever. * * * And the said second party, for itself, its successors, lessees and assigns," etc.

The case of *Inhabitants* v. *Carver, 16 Pick. 183, 184,* was also between the parties, their heirs, executors, administrators and assigns, as will appear from the statement of the case on page 183.

It is admitted that the remedy touching restrictive covenants does not depend upon a common plan.

It is admitted that the case of *Herd* v. *Curtis, 19 Pick. 459,* was in an action at law, but it is insisted that the case of *Herd* v. *Curtis* clearly shows the legal relationship of parties with relation to personal covenants, and after examining cases cited by complainant it is again asserted that where the covenant is personal, that is, between two parties and not extended to their heirs and assigns, such covenant will not be enforced against an assign, unless there is privity of estate, and it is contended that to deny this proposition of law is to overrule the Court of Chancery and later the Court of Errors and Appeals in the case of *Hemsley* v. *Marlborough Hotel Company,* and the later case in this Court of *McNichol* v. *Townsend,* and further to extend the jurisdiction of equity to a class of cases to which Chief Justice Beasley, in *Brewer* v. *Marshall,* stated the jurisdiction should not be extended.

It is respectfully insisted that the covenant in this case does not run with the land. "Covenants run with the land only where there is privity of estate, and where they are for the benefit of the land conveyed."

Herd v. *Curtis, 36 Mass. 459–464;*
Plymouth v. *Carver, 33 Mass. 183;*
Costigan v. *P. R. R., 54 Law 233–242;*
Kettle River v. *Eastern R. R., 6 L. R. A. 111–119;*
Cole v. *Hughes, 54 N. Y. 444;*
Mygatt v. *Coe, 26 N. E. 611–613.*
Louisville v. *Ill. R. R., 51 N. E. 824–825.*

It is respectfully submitted that the covenant contained in the agreement was a personal one, binding only upon Cotton and Moore, and not upon their heirs and assigns, and that the notice that the defendants had was notice of an agreement which was binding only upon Cotton and Moore, and that their notice could not extend beyond the strict terms of the agreement. The court below, therefore, erred in decreeing that the agreement was binding upon the appellants, and in ordering an injunction to issue, restraining them from building within three feet of the complainants line.

The interlocutory decree should be reversed.

Respectfully submitted,

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Appellants.

Southern Bond