

NEW JERSEY COURT OF ERRORS AND
APPEALS.

June Term, 1916.

Between

SAMUEL PROPPER,
Complainant-Appellant,

and

ASA L. COLSON AND
FRANK DAVIS,
Defendants-Appellees.

ON BILL, ETC.

BRIEF ON BEHALF OF APPELLANT.

This is an appeal from that part of the final decree in this cause advised by his Honor Vice-Chancellor Leaming, dated January 5th, 1916, which denies the relief prayed for by the complainant and decrees that the complainant's bill be dismissed. (Case, p. 39.)

STATEMENT OF CASE.

The defendants, Asa L. Colson and Frank Davis, claiming to be the owners of certain lands and premises situate in Wildwood, in the County of Cape May and State of New Jersey, on the northeasterly side of Wildwood Avenue, having a frontage of 67½ feet on the Boardwalk, with a length or depth of 80 feet on Wildwood Avenue and extending under the Boardwalk into the ocean with riparian rights in parallel lines the width of 67½ feet (C. p. 51, l. 18), caused the same to be advertised and sold at public vendue at Wildwood, on August 17th, 1914, by one John A. Ackley, auctioneer. Prior to said public vendue, there was printed and circulated among the prospective bidders a catalogue of sale of Wildwood real estate (C. pp. 46, 51) in which catalogue the lands and premises were scheduled for sale on page 24, under No. 25, as follows:

“No. 25.

The most valuable Boardwalk corner with
RIPARIAN RIGHTS ON FIVE MILE
BEACH TO BE SOLD TO THE
HIGHEST BIDDER WITH-
OUT RESERVE.

This plot of ground has a frontage of 67½ft. on the Boardwalk with a length or depth of 80 ft. on Wildwood Avenue and extending under the Boardwalk into the ocean with riparian rights in parallel lines the width of 67½ft.

THERE IS NO OTHER PLOT OF

GROUND AS VALUABLE FROM
A BUSINESS STANDPOINT
WHICH CAN BE OBTAINED
BY YOU AT THE
PRESENT TIME.

This plot is at the foot of Wildwood Avenue,
ONE OF THE BEST BUSINESS
STREETS ON THE ISLAND.

It leads direct from the Pennsylvania and Reading Railroad Stations to the ocean, on which is situated two banks, leading business houses and hotels. It is the keystone of the Boardwalk front. This plot we desire to sell as a whole, but if the purchaser so desires, we will divide it.

IT WILL POSITIVELY BE SOLD
WITHOUT RESERVE TO THE
HIGHEST BIDDER.

Terms:— 10 per cent. of the purchase price to be paid in cash on day of sale, 30 per cent. of the purchase price to be paid in cash when deed is given, the balance or 60 per cent. of the purchase price can remain on mortgage if the purchaser so desires. To be sold free and clear of all encumbrances. Taxes of 1914 to be paid by the present owners.”

The lands and premises were advertised and sold as a business location, on one of the best business streets on the island, on a street which leads direct from the Pennsylvania and Reading Railroad Stations to the ocean, on which street is located two banks, leading business houses and hotels. It was offered for sale as the best business location on the island, as being upon one of the best business streets, and as being the keystone of the

Boardwalk front. (Case, p. 2, and Exhibit C1, p. 51.)

One of the terms of sale was that the land was "to be sold free and clear of all encumbrances."

The lands and premises, being known as lots Nos. 31, 32 and 33 in block C in the City of Wildwood, New Jersey, were struck off to the complainant, Samuel Propper, for the sum of \$26,925, he being the highest bidder, who signed an agreement of sale and paid the deposit money, amounting to the sum of \$2500. (See Exhibit A, annexed to bill, Case, p. 10, and also Exhibit C2, p. 47, l. 10.)

This agreement of sale was produced immediately after the property was struck off to the complainant, who was called to the desk, and, upon being informed that the agreement called for the lot which he had purchased, the complainant signed the same without reading. (Case, p. 54, l. 30, and p. 55.) This agreement also recites that the land was "free and clear of all encumbrance." (Case, p. 11.)

After the sale, the complainant referred his purchase to his attorney for an examination of title. Application was made to the West Jersey Title & Guaranty Company, at Camden, for title insurance, and the complainant was informed by said company that the lands and premises in question were burdened and encumbered by the following covenants, conditions, restrictions and reservations:

"Under and subject to the covenants and conditions that all buildings shall be artistic in design and attractive in finish and no smithy, factory, livery stable, public garage, slaughter house or fish market shall ever be erected or conducted on the premises conveyed by this deed, and to the right of the grantor herein to fill the lots lying between Atlantic Avenue and the Boardwalk as well as the streets as near to

the Boardwalk as shall appear discreet to the grantor, and to gravel the streets and lay the pavements and curbs and sewer; and also subject to the reservations that there shall be no building or buildings erected on the ocean side of the Boardwalk except ocean piers, but no ocean pier shall be built before August 22nd, 1919, on the ocean front of block 'B' or 'C,' nor shall free bathing ever be prevented on the beach or in the surf in front of any land sold by the grantor September 2nd, 1912, at public sale. The right of way for the present boardwalk and to maintain and operate the same, and the right of way for any future boardwalk on the ocean side of the present boardwalk, and to construct, maintain and operate the same upon surrender and vacation of the present right of way to the adjoining owners; and the right to take sand from the ocean side of the Boardwalk to complete the fill to grade, are each and all hereby expressly reserved to the grantor and its successors and assigns."

(See settlement certificate of Title Company, Exh. C5, C. p. 205, and Exh. C4, C. p. 201, l. 6, etc.)

After said public vendue, and prior to the date fixed for the delivery of the deed, September 25, 1914, the complainant was informed that the owners of the property, Colson and Davis, together with Frank D. Colson, a son of one of the owners, were together at the auction sale, constantly in consultation, and that one of them was bidding against him, and ran the property up on him to the sum of \$26,925, and that their last bid was the bid next preceding the bid at which the premises were struck off to him.

Asa L. Colson, the father, admitted to several parties on the day of the settlement that they bid on the property. The facts developed at the trial that the son of one of the owners was running up the property on the complainant. He claimed that he was bidding for himself, but as against this, the facts are that he was a young man, and the son of one of the owners and a nephew of the other owner, in consultation with the owners during the bidding and without any definite knowledge as to where the money was coming from to pay for property worth \$26,925, which he alleges he was buying for speculative purposes.

It developed at the trial that the auctioneer himself had agreed with the owners to protect them. There was a secret agreement between the owners and the auctioneer (Exh. D1, p. 210) and a verbal guarantee by said auctioneer that the property would not bring less than \$320 a lineal foot. (C. p. 155.) Notwithstanding this agreement and verbal guarantee, no mention whatever was made to the public of an upset or minimum price that the property must bring, but the public was led to believe that the bidding was *bona fide* from the beginning, which bidding under the agreement and guarantee created a false and fictitious impression of the valuation of the lands and premises before the public.

The premises in question were described in the catalogue of sale as having a depth of 80 feet on Wildwood Avenue, to the landward of the Boardwalk. In the agreement of sale, signed by the purchaser without reading upon representations that the land described therein was the same as that sold as No. 25 in the catalogue, the land is recited as having 60 feet, more or less, on Wildwood Avenue, and in the deed for the property which was subse-

quently tendered, the land is described as having 58.92 feet, more or less, on Wildwood Avenue from the rear line to high-water line of Atlantic Ocean (Exh. C1, C. p. 13, l. 10), which high-water line was oceanward from the Boardwalk.

The complainant, with his counsel, attended the meeting for settlement, at Wildwood, at the office of William E. Zeller, on September 25, 1914, and when a deed was tendered, alleging to convey the premises in question, upon examination it was found to contain the variance in the description of the property above referred to, the covenants, conditions, restrictions and reservations above referred to, and also because of the information received as to false and fictitious bidding, the deed tendered was refused. (C. p. 105.)

There is no dispute as to the representations contained in the catalogue and recited in the bill of complaint filed in this cause. (Case pp. 2 and 3.)

The defendants at the trial admitted that there was a false representation in the description of the property contained in the catalogue of sale and attempted to overcome this by testimony, stating that there was an announcement made at the sale calling the bidders' attention to this description, but the complainant did not have his attention called to this correction, and he bid on the property as described in the catalogue of sale.

An attempt was made at the trial to explain the bidding by the son of one of the owners on the ground that he was bidding on the property for himself. It was developed that he was without apparent means, did not even know that he had any money in bank with which to pay the deposit money, and was depending on his father or uncle to help him out in case he became the purchaser. It does seem, in

view of his relationship to the owners, unreasonable that this young man should be at the sale in the companionship of his father and uncle as a competitive bidder, but more naturally in the capacity of one who by his bidding was endeavoring to create an impression of values, and running the property up on the complainant. No claim was made either in the pleadings or at the hearing that the property was not sold clear and free of all encumbrance. It was not disputed in the pleadings or at the hearing that the premises in question were advertised and sold as a business site, located on the best business street in Wildwood, being the best business location on the Boardwalk and along Wildwood Avenue, and on the main thoroughfare from the stations to the Boardwalk, on which the leading business houses and hotels in Wildwood were located.

The restrictive covenants largely refer to a residential section of a community, and are detrimental and burdensome and tend to depreciate the value of a business site. The erection of buildings "artistic in design and attractive in finish" undoubtedly refer to residential properties. The prohibition of "livery stable, public garage, fish market," etc., forever upon the premises is an undue restriction for a business site and lessens its value. The condition that no buildings shall be erected on the ocean side of the Boardwalk excepting "ocean piers and no ocean pier shall be built before August 22nd, 1919, on the ocean front" is an undue restriction on land sold as a business site and for business purposes. The covenant "nor shall free bathing ever be prevented on the beach or in the surf in front of the land" is a burden which was not in contemplation on land sold "free and clear of all encumbrances." This restriction would forever prevent any portion

of the land from the Boardwalk oceanward to the exterior line fixed by the riparian commissioners from being used for any purpose by the purchaser. The reservation of the right to take sand from the ocean side of the Boardwalk is a burden upon the land not in contemplation in the sale of land "free and clear of all encumbrances." There is nothing in the nature of the land sold, the location of the land or the purpose for which it was sold, to show that any of these conditions, restrictions or reservations were in contemplation of the parties at the time of the sale, but on the contrary, all of these restrictions and reservations go to make more enjoyable a strictly residential section of a community and tend to depreciate and make less valuable a business site, which these premises were represented to be.

The learned Vice-Chancellor denied relief to the complainant upon the following grounds, taking up the question as discussed in the conclusions. (C. p. 28.)

1. That the question on restrictive covenants had been before him, fully argued and determined, and that the restrictive covenants contained in the deed tendered are not encumbrances as such term is familiarly used and understood between laymen. The learned Vice-Chancellor referred to an unreported case before him of *Ott vs. Eisenhower*, and cited the case of *Campbell vs. Parker*, 14 Dick. 342.

2. That an error in distance contained in the catalogue had been explained; that the distance stated in the agreement is followed by the words "more or less" and for this reason he could not believe that complainant is substantially injured or substantially

disappointed by the circumstance that the catalogue called for eighty feet before high-water mark was reached, whereas in truth less than that distance actually appears upon the ground.

3. Notwithstanding the admissions made by the father at the conference at Holly Beach that were embarrassing, the testimony was strong enough to justify a finding that the young man did bid upon the property in his individual and sole behalf, and that there could be no valid objection to the contract of sale by reason of the fact that the auctioneer had a contract whereby he was limited in his agency to the right to sell the property below a certain amount, a contract in which he was only privileged to sell above certain figures, and yet, with such a contract with only such an agency, he offered the property in an unrestricted way to the public at public sale.

GROUND OF APPEAL.

The petition of appeal sets forth various reasons for reversal (Case, p. 42), but it is submitted that neither of the grounds assigned by the learned Vice-Chancellor as a basis for the decree can be vindicated by the evidence and the authorities.

First. A proper interpretation of the representation made in the catalogue of sale and in the formal agreement of sale, namely, that the land sold was "free and clear of all encumbrances" requires the finding that the covenants, conditions, restrictions and reservations as to the use of the land in question were included within the terms of the represen-

tations made in the catalogue of sale, and the formal agreement of sale, or at least some of them were so included, so that the land agreed to be purchased was not free and clear of all encumbrances.

Second. That the proper conclusions to be drawn from the evidence is that the bidding of the son and nephew of the owners of the property was for the purpose of creating a false and fictitious value of the land and made void the sale, and that the secret agreement between the auctioneer and the owners whereby the auctioneer was limited in his agency was a valid objection to the sale.

Third. That the variance in the description between the land as sold under the terms set forth in the catalogue and the agreement of sale and also in the deed tendered was such a variance that the complainant was not required as a matter of law to accept it.

ARGUMENT.

First. The covenants, conditions, reservations and restrictions contained in the deed tendered are encumbrances on the land.

In effect, the learned Vice-Chancellor held that it must be conclusively presumed that the parties to the contract of sale, did not by the use of the words "free and clear of all encumbrances" intend to refer to the restrictive covenants, conditions and reservations. In support of this conclusion, he cited the opinion of Vice-Chancellor Pitney in *Campbell vs. Parker*, 59 N. J. Eq. 342. We submit that the situation

in that case was radically different from the one here presented. Here, the words are used in a formal written agreement and after the representation that the property was a business site and sold for that purpose. There, the statement as to the property being clear was made after it was sold at sheriff's sale and before the purchaser signed the bid, and with no representation as to the purpose for which sold. Vice-Chancellor Pitney held that the person who made the representation, by the use of the word "encumbrance" meant such encumbrances as might be satisfied by the payment of money, and that the other party to the conversation must have so understood it. The effect of this decision is to hold that a representation of the character alleged operates to restrict the force of the rule of Caveat Emptor.

The decision of Vice-Chancellor Pitney is based upon another one of his opinions in *Boorum vs. Tucker*, 51 N. J. Eq. 135. In this case, an attempt was made to escape from the purchase of property bought at a sheriff's sale, upon the ground that the agent of the complainant represented to the purchaser that the property to be sold was free from all encumbrances, and the learned Vice-Chancellor held that such statement did not include a building restriction, in the sense that the word was used by the agent of the complainant, and must have been understood by the purchaser. The restriction referred to in this was a general statement not to erect a building other than designed for private families or do anything to make the locality less desirable for private residences.

It will be observed that in both of these cases, the statements as to the non-existence of the encumbrances were verbal, and did not assume to partake of the character of a declaration in a formal written

agreement. As we have examined these two decisions, we can find no testimony to show that the person who was alleged to have been misled by the misrepresentations did not, in fact, understand the statements to imply a situation other than as subsequently found by Vice-Chancellor Pitney. In neither of these cases, nor in the case of *Ott vs. Eisenhower*, referred to by Vice-Chancellor Leaming, was the land sold as a valuable business site, on the principal business street in the community.

In the case under consideration we are dealing with a valuable ^{business} building site, on the principal business street in Wildwood, and sold for that purpose. The restrictions largely apply to a residential community. The lot cannot be used for the purposes for which sold and how can it be said that this purchaser had in mind only ordinary liens, judgments and mortgages in the use of the word "encumbrances" in this agreement?

a— The restriction as to public garage restricts its use and lessens the value of the land (C. p. 95, l. 19).

b— The easement to take sand from the lot depreciates its value (C. p. 95, l. 24).

c— The restriction on building oceanward of the Boardwalk took from its value (C. p. 95, l. 34).

d— The restrictions applied to residential streets (C. p. 96, l. 8).

e— The right of way for the present boardwalk and a right of way for any future boardwalk is an easement and burden on the land.

A vendee who has a right to a good title cannot be forced to take the property when it is subject to covenants or conditions restricting its use. 36 *Cyc.* 639.

Shea vs. Evans, 109 Md. 229; 72 Atl. Rep. 600.

Restrictive covenants are in the nature of a servitude or easement upon the land that the vendor retains for the benefit of that which he sells and is an encumbrance upon the land upon which it is imposed, and the title of the owner of the land is not clear.

Peabody Heights Co. vs. Wilson, 82 Md. 186; 32 Atl. Rep. 386.

And this is true although the restriction does not lessen the value of the land.

Goodrich vs. Platt, 114 N. Y. App. Div. 771.

An "encumbrance" has been correctly defined to be "every right to or interest in the land which may subsist in third persons to the diminution of the value of the land; but consistent with the passing of the fee by the conveyance."

Rawle Cov. Sec. 25.

It has also been defined as "a burden on land depreciative of its value such as a lien, easement, a servitude, which, though adverse to the landowner, should not conflict with the conveyance of the land in fee."

10 *Am. & Eng. Enc. Law*, 361.

The easement of light is an encumbrance and is so held by the weight of authority.

Dennen vs. Mentz, 63 N. J. Eq. 613.

In this case, the right to take sand from the lot, the right in the public to forever use the land in front of the Boardwalk for bathing purposes, and the right of way for the present boardwalk or the right of way for any future boardwalk are easements or servitudes burdening or encumbering the land in question, and the same is not free and clear of encumbrances.

The latest reported case upon this question is *Krah vs. Wassamer*, 75 N. J. Eq. 109. Vice-Chancellor Howell there held that when the complainant bargained for the premises in question, he did so with the idea that he was to receive a title to the property free and clear of all encumbrances, and that he was entitled to insist upon a conveyance without the restrictions which the defendants were attempting to impose upon him. These restrictions were in relation to the use of the property, and that no house should be built within a certain line of some of the streets. The learned Vice-Chancellor there held that the use of the word "encumbrance" included restrictive covenants. This authority seems to be at variance with *Campbell vs. Parker* and *Boorum vs. Tucker*. The decree in *Krah vs. Wassamer* was subsequently affirmed by this Court upon the opinion of the Vice-Chancellor.

Krah vs. Radclift, 78 N. J. Eq. 305

In this state of the judicial declaration upon the point, it would seem that the opinion of this Court in the case of *Krah vs. Wassamer* is controlling, and the principle involved in the case under consideration should be governed by it.

It is to be observed that the lot in the case under consideration was advertised and sold as for a

particular purpose—a valuable business site—and the restrictions, reservations, covenants and conditions in the deed tendered depreciate its value for that purpose and therefore the cases decided by Vice-Chancellor Pitney should not control this case.

The cases in other jurisdictions have been examined and they seem to universally support the contention of the complainant in this suit. The following are some of the cases :

Building instructions in grants of real estate are encumbrances on the title.

Whelan vs. Rossiter, 1 Cal. App. 701.

Where land is subject to a covenant restricting the use to which the land might be put, the land is not free from encumbrance, since any right existing in another, whereby the owner is restricted in his enjoyment of his property, is an encumbrance.

Van Schaick vs. Lese, 66 N. Y. S. 64.

Under a contract to sell land free from all encumbrance, the purchaser will not be compelled to accept title where the land is subject to an easement of a party wall and certain restrictive covenants.

Bacot vs. Fessenden, 130 N. Y. App. 819.

A vendee who has a right to a good title cannot be forced to take property when it is subject to covenants or conditions restricting its use.

Shea vs. Evans, 109 Md. 229;

Peabody Co. vs. Willson, 82 Md. 186;

Altman vs. McMillin, 115 N. Y. App. Div. 234;

Goodrich vs. Pratt, 114 N. Y. App. Div. 771.

A deed to a lot contained a restriction forbidding the erection of buildings within five feet of the line of the street. An ordinance subsequently forbade the erection of any building within such limits. Held, that the owners could not make a marketable title to the lot under an agreement to convey free from all restriction.

Conis vs. Hallahan, 209 Pa. 224.

A mutual covenant by the owner of a lot with the adjoining owners that 12 feet in front of each of their lots shall not be built upon, but shall be left open for courtyards constitutes an encumbrance on the lot, and if it impairs its value, it will excuse specific performance of a contract for the purchase of the lot, which was to be conveyed free and clear of all encumbrances.

Witmore vs. Bruce, 118 N. Y. 319.

A covenant against encumbrances in a deed from a grantor who is restricted in or has assumed obligations as to the use of the property conveyed, is broken by reason of the existence of such restrictions or obligations.

11 *Cyc.* p. 1117, Sec. j. & cases cited.

A restriction in a prior deed as to the sale of liquor on the premises is a breach of covenant against encumbrances.

Hatcher vs. Andrews, 65 Ky. 561.

An easement running with the land and charging it with keeping up a fence along the railroad, is a breach of a covenant against encumbrances.

Bronson vs. Coffin, 108 Mass. 175.

Where the grantor with a covenant against encumbrances holds under a deed which restricts him as to the material to be used in constructing buildings on the land, the height to which he can build, and the purpose for which buildings may be used, there is a breach of his covenant.

Ayling vs. Kramer, 133 Mass. 12.

A restriction in favor of other lands in regard to the erection of buildings on the premises is a breach of the covenant against encumbrances.

Kramer vs. Carter, 136 Mass. 504.

A condition in a deed that only one dwelling house and necessary outbuildings, suitable for the occupation of one family, shall be erected on the land conveyed, and shall be used for a dwelling house only, constitutes an encumbrance.

Foster vs. Foster, 62 N. H. 46.

A covenant against encumbrances is broken where the land was subject to a covenant that all buildings erected upon it should be set back a certain distance from the street.

Roberts vs. Levy, 3 Abb. Prac. 311 (N. Y.).

Where a contract is made to sell land, free and clear from all encumbrances, a restriction which prevents the vendee from using a portion of the frontage for anything but a courtyard, though the same restriction is placed upon adjoining proprietors, is an encumbrance, which absolves the vendee from the obligation of completing the purchase.

Wetmore vs. Bruce, 54 N. Y. Supp. 149.

A title conditioned that no mill, factory, brewery

or distillery shall be erected on the premises, is not a good and marketable title, clear of all encumbrances.

Batley vs. Foerdere, 162 Pa. 460.

Knowledge, on the part of the grantee in a deed, of an encumbrance on the property, does not impair his right of recovery for breach of covenant.

Vol. 14 Am. Dig. Cen. Ed. p. 75, and cases cited.

Knowledge, by the grantee, that premises conveyed with a covenant against encumbrances, were subject to an easement permitting a third person to carry water from a spring thereon, makes such easement none the less a breach of the covenant.

Harlow vs. Thomas, 32 Mass. 66.

Constructive notice of the existence of an encumbrance, derived from the registry of a mortgage, does not affect the right of the assignee to recover; and it seems that actual notice would not vary the case.

Suydam vs. Jones, 10 Wend. 180 (N. Y.).

That the grantee had notice of a mortgage on premises conveyed to him with a covenant against encumbrances will not relieve the grantor from liability on his covenant.

Funk vs. Voneida, 11 S. & R. 109 (Pa.).

In an action by the grantee for breach of a covenant against encumbrances, the grantor, who had encumbered the land, cannot invoke the doctrine of notice arising from circumstances sufficient to provoke inquiry by the grantee.

Parish vs. White, 5 Texas Cir. App. 71.

Covenants against encumbrances are broken by any outstanding easements which diminishes the value of the land conveyed, nor will the knowledge by the grantee, of the existence of the easement, make any difference.

11 Cyc. 1115, and cases.

See English Case Flight vs Berth Brief p. 26

Second. The bidding of the son and nephew of the vendors and the secret agreement between the vendors and auctioneer renders the sale voidable, at the option of the vendee.

The only conclusion to be drawn from the evidence is that the son and nephew of the vendor was not a real bidder, and there is no dispute respecting the private agreement between the vendors and the auctioneer. The sale was announced to be "without reserve" and yet no announcement was made of the reservation. (C. pp. 155, 210.) There is no real difference between the employment of a puffer at an auction sale and the making of a secret agreement whereby the selling price of the property is limited. Both are equally a fraud on a *bona fide* purchaser.

By the English common law, puffing was a fraud on the sale, which could be avoided by the buyer. This rule was denied by the English Court of Chancery which at first held that puffing was not a fraud. Later the same court modified this rule by drawing a distinction between puffing for the purpose of preventing a sacrifice of property, and puffing for the purpose of advancing the price. The former purpose was held legitimate; the latter illegitimate. This difference was ended in 1867 by an Act of Parliament which declared: "Whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

In the United States it is clear, both upon principle and the weight of the authorities, that, where a sale is advertised or stated to be without reserve, there is an implied guaranty and each bidder has the right to assume that all previous bids are genuine, and the seller in substance so assures him; and hence the secret employment, by the seller, of puffers is equivalent to a false representation, and renders the sale voidable at the option of the purchaser.

6 C. J. 832; 4 *Cyc.* 1045.

In the case of *Bowman vs. McClenahan*, 46 N. Y. Supplement, page 949, the Court said:

“Upon a consideration of all the authorities and the text writers, we are of the opinion that the only safe rule is the one announced by Lord Mansfield. It is essential, in sales of this kind, that there should be the utmost good faith, and the employment by the owner of underhand means to enhance the apparent value of his property is not warranted by any principle of sound morality. When it appears that any such steps have been taken by him, it is not necessary for the person insisting upon the invalidity of the sale to show that any harm resulted to him from the improper act. If the fact that no harm resulted is material at all—and we cannot see how it is so—the burden of proving it should be upon the person who has employed the puffers to bid up the price of his property. But the sounder rule, as we think, and the only safe rule, to be applied in this transaction, is that a sale at auction must be actually in all cases what is nominally, an offer by the owner to sell the property to the highest

bidder, without any qualification, unless he shall reserve to himself openly at the time of the sale the right to bid upon the property, or shall openly announce a price below which the property shall not be sold."

In the above case, the Court also said:

"There is no doubt that it is competent for the owner of property who puts it up at auction to use some means to protect his interests, and to see that his property is not sacrificed. It is conceded that he may do this either by fixing a price below which the property shall not be sold and announcing that at the sale, or by publicly reserving to himself the right to make one or more bids if his interests shall require it. For the owner to protect his interests in this way, giving public notice of the fact that he has done so, certainly does not operate as a fraud upon anybody, for any one who begins to bid with the knowledge that these precautions have been taken upon the part of the owner does so with notice of precisely what he has to meet. *But that is a very different thing from giving private instructions to the auctioneer, or from privately procuring one to bid upon the sale in the interest of the owner who is not to buy the property if he should be the highest bidder.* The essence of a sale at auction is that the property offered shall go to the highest real bidder."

In the above case a son of the vendor bid upon the property offered for sale. The sale was set aside.

The case of *Curtis vs. Aspinwall*, 114 Mass., page 191, the Court said:

“There is some diversity in the decisions, as to the circumstances under which by-bidding will invalidate a sale at auction. But it is clear, both upon principle and the weight of the authorities, that when the sale is advertised or stated to be without reserve the secret employment by the seller of puffers or by-bidders renders the sale voidable by the buyer.”

The only New Jersey case in point is *The Bank vs. Sprague*, 20 N. J. Eq., p. 159. This case refers to a judicial sale and is not precisely in point. The Chancellor, p. 165, says:

“The proper plan to save a sacrifice of the property in sales not judicial, is, that the owner should reserve the right to make one bid, or should put it up at the lowest price at which he is willing to sell; then it is a fair auction, though perhaps few would be willing to bid. But if the owner or those interested in the sale should announce that puffers for them would bid in the guise of real bidders, no one at all would bid.”

The law concerning sham bidding is very ably discussed by the Supreme Court of Georgia, Cobb, J., in the case of *McMillen vs. Harris*, 110 Ga. 72; 35 Southeastern, 334; 48 L. R. A. 345. In this case the principal English and American cases are collated with great care, and the Court says:

“The only lawful way in which a person can prevent a sacrifice of the property sold is to fix a minimum price, of which public notice shall be given, or make public the fact that he, either by himself or by others, will be a bidder at the sale.”

Third. The variance in description of the land in the particulars of sale and the agreement of sale and the deed tendered, were grounds for the avoidance of the sale. In the particulars of sale the property offered and bid upon by the complainant are described as having a depth of eighty feet on Wildwood Avenue (C. p. 51), while in the deed tendered the property is described as having a depth of fifty-eight and ninety-two hundredths feet, more or less, on Wildwood Avenue (C. p. 13). The particulars of sale do not contain a faithful description of the property offered for sale. The purchaser was led to believe from the particulars of sale that he was obtaining eighty feet of land on Wildwood Avenue, when as a matter of fact, there was only about fifty-nine feet on this avenue. The vendors well knew that they could only deliver three-fourths of the quantity of land described in the particulars of sale. This was a fraud on prospective bidders.

It is usual, in cases where property of considerable value is offered for sale, to reduce a description of it to writing. This description, when relating to real estate, is called "particulars of sale," and when relating to personal property is called a "catalogue." The particulars or catalogue and the conditions of sale together constitute the terms of the contract of sale. Both particulars and catalogues should contain a faithful description of property offered for sale, in language so clear and unambiguous that persons of ordinary understanding will not be deceived as to either its character or identity. A misdescription, in a material matter, upon which the purchaser might reasonably rely and did rely to his damage, is ground for avoidance of the contract. This is so, even though the conditions of sale provide

that errors and misdescription shall not avoid the contract.

6 C. J. 828; 4 Cyc. 1042.

In the case of *Swaishland vs. Dearsley*, 29 Beav. 430, 54 English Reports, Full Reprint, page 694, the Master of the Rolls said:

“It is of the greatest importance and the duty of persons who put up property for sale by auction to describe it with perfect accuracy and not merely in such a way that a person, by drawing proper inferences from everything that is stated in the conditions of sale, may be able to ascertain what it is that is sold.”

In the case of *Dobell vs. Hutchinson*, 3 Ad. & E. 355, 111 English Reports, Full Reprint, page 448, a dispute arose upon a sale at auction of a leasehold interest of land described in the particulars as held for a term of twenty-three years at a rent of 55£, and as comprising a yard, and one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term of 55£, but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect. Held, that this defect avoided the sale, and was not a mistake to be compensated for under the above condition; although, after the day named in the conditions for completing the purchase, and

before action brought by the vendee the vendor procured a lease of the yard for the term to the vendee, and offered it to him.

In the above case Lord Denman said:

“We are of the opinion that the yard being proved to be an essential part of the premises, and being held only from year to year, instead of a term of twenty-three years, as stated in the particulars, and at a separate rent, the defect was clearly not matter of compensation.”

In the case of *Flight vs. Booth*, 1 Bing. (N. C.), page 370, 131 English Reports, Full Reprint, page 1162, the question was whether a vendee at an auction sale was at liberty to rescind a contract of sale because of misstatement or misdescription in the particulars of sale. The particulars of sale of certain leasehold premises in Covent Garden stated, that under the original lease “no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter.” The original lease, when produced, appeared to prohibit the business of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working hatter, and many others, and the sale of coals, potatoes, or any provisions. Held, that there was such a material discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract.

Tindle, C. J., said, (after stating the difficulty in laying down a definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only):

“In this state of discrepancy between the de-

cided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may be reasonably supposed, that but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones vs. Edney*, where the subject-matter of the sale was described to be 'free public house,' while the lease contained a proviso, that the lessee and his assigns, should take all their beer from a particular brewery; in which case the misdescription was held to be fatal."

"In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated; to which it was added, "that no offensive trades are to be carried on: the premises cannot be let to a coffee-house keeper or working hatter." Any person reading this particular, and having no information but what he derives from it, that is, perhaps, every person attending the sale, would conclude, that he was not prevented by the terms of the lease from carrying on any trade in it except those which were of a class generally acknowledged to be offensive, and the two enumerated trades of coffee-house keeper and working hatter. He would never suppose, nor have any reason to suppose, that he was prevented from carrying on the trade of a baker, a fruiterer or a herb-

seller, in a house situated in the piazza of Covent Garden market, much less that the lease was to become void, if the house, so situated, was used as a place for the sale of any provisions whatever. The latter restriction would extend to prevent trades of the most innocent and inoffensive kinds from being exercised on the premises; such as a flour factory, a biscuit-seller, or the like; yet such are the restrictions found to exist in the lease when it is first submitted to the inspection of the purchaser. Under these circumstances, it appears to us, that a lease which is described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades but also against some trades that are inoffensive, are not one and the same thing, but a different subject-matter of contract, and that when a man purchases by the former description, it may very well be supposed that he would not have become the purchaser, whether he bought for the purpose of carrying on trade upon the premises himself, or for a money investment, if he had known the lease had contained the larger and more extensive restrictions; and, indeed, the very terms of the sixth condition of sale scarcely apply to a case where the difference of value is so uncertain and arbitrary as in the present case."

In the case of *Dykes vs. Blake*, 4 Bing. (N. C.) 463, 132 English Reports, Full Reprint, page 866, it was said:

"By particulars of sale, lot 13 was described as building ground, and the adjoining lot 12 as a villa, subject to liberty for the purchaser of lot 1 to go on the premises to repair drains, &c., as reserved in lot 7. The reservation in lot 7 referred to a lease, which gave the occupier of that and several adjoining lots composing a row of houses, a carriage way in common in

front of the lots, and a footway at the back, and also a footway over lot 13. The particulars contained plans, which disclosed the carriage way in front, and the footway at the back of the houses, but not the footway over lot 13. But they stated that the lease of lot 7 might be seen at the vendor's office, and would be produced at the sale. Plaintiff having purchased lots 12 and 13, by one contract in ignorance of the footway over lot 13. Held, that the misdescription was such as to entitle him to rescind the contract as to both."

This was an action to recover a deposit paid upon property bought at auction. The property purchased was subject to an easement, which was not fairly set forth in the particulars of sale.

Tindle, C. J., said:

"The question is, whether the plaintiff is at liberty, under the circumstances stated in the special case, to hold the contract of purchase into which he entered to be altogether void, and to recover back the money paid to the auctioneer, as money had and received to his use. And this will depend on the determination of two questions; first, whether the description of the premises in the printed particulars and plans exhibited at the time of the sale, upon the faith of which the plaintiff made his purchase, was such that a prudent and vigilant man would enter into the contract without discovering the existence of the right of way over the land comprised in lot 13; and, secondly, whether such right of way being found to exist, renders the purchase altogether useless for the purposes for which it was made, or only brings it under the head of misdescription, so as to form the sub-

ject of compensation or equivalent under the ninth condition of sale. And upon the first of these two questions we are of opinion that looking at the printed particulars of sale, and the plans which accompany them, and which are referred to by the particulars, there is not sufficient disclosure of the existence of the right to enable a bidder at the sale by the exertion of ordinary vigilance and sagacity, to discover that such way exists."

He further stated particulars and plans of this nature should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction; and they would only become a snare to the purchaser, if after the bidder has been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand or attend to. He further said:

"We, therefore, think upon the great head of enquiry, the existence of this right of way was not sufficiently disclosed to make it clear to persons of ordinary vigilance and caution, and that the contract is not binding on the plaintiff."

"We, therefore, think the misdescription, however unintentional, has been such as to justify the plaintiff in saying, that the lots which the seller is ready to convey are not the lots which he purchased, and consequently that he may recover back with interest, the sums paid to the auctioneer."

Respectfully submitted,

S. STANGER ISZARD,
WESCOTT & WEAVER,

*Solrs. for and of Counsel with
Complainant-Appellant.*

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

SAMUEL PROPPER,
Complainant-Appellant,

and

ASA L. COLSON & FRANK
DAVIS,
Defendants-Appellees.

ON BILL, &C.
ON APPEAL FROM
COURT OF CHAN-
CERY.

BRIEF OF APPELLEES.

The appellant Samuel Propper filed his bill of complaint praying that a sale of lands made to him at public auction by John A. Ackley, auctioneer, be set aside and the deposit moneys, \$2,500.00, be refunded to him by the defendants Asa L. Colson and Frank Davis, owners of the land in question as tenants in common. The only parties defendant are the owners Asa L. Colson and Frank Davis. The auctioneer, John A. Ackley, is not a party to the suit.

The parcel of land in question was one of numerous other tracts of land sold by the auctioneer at a combination public sale of lands at Wildwood, New Jersey, in the summer of nineteen hundred and four-

teen. Sometime prior to the sale Mr. Ackley issued a catalog briefly describing the various tracts of land to be sold by him, one of which catalogs came into the hands of the complainant, Samuel Propper.

The catalog described the premises in such a manner as to sufficiently identify it; and, further, Mr. Propper, the complainant, had theretofore become interested in other building lots in that locality, for he had made a loan of \$6,500.00 to one Gould, secured by a mortgage on Lot 27 of Block B, which is a short distance below the lands purchased by him at the Ackley sale. (Book, p. 212.) Mr. Ackley described very graphically the manner in which the sale was conducted; and the entire testimony is conclusive that the sale was made in such manner that the bidders were given the most precise information regarding the properties upon which they were bidding. A large map was used at the sale by the auctioneer, upon which map was indicated the various lots sold (page 113). While there were some errors in the catalog, those errors were plainly pointed out by the auctioneer before the lands were cried off and sold. Mr. Propper purchased the lands in question for twenty-six thousand, nine hundred and twenty-five dollars (\$26,925), and paid twenty-five hundred dollars (\$2500) on account of the purchase price to the auctioneer and signed the agreement of purchase, shown at pages 10 and 11 of the book.

The sale was held on August 17th, 1914. On Labor Day, about two weeks later, Mr. Propper attended another of Mr. Ackley's combination sales and purchased certain other lots belonging to one Gruner (p. 65).

On September 18th, 1914, George Bowker, the attorney of Mr. Propper, wrote a letter suggestive that Mr. Propper might not comply with his contract

of purchase (p. 211). Settlement was to have been made on September 25th, 1914, at 12 o'clock noon, at Wildwood, New Jersey. At the time and place of settlement Davis and Colson tendered to Mr. Propper a deed for the premises purchased by him; and at the same time a deed was tendered to Mr. Propper for the Gruner lots which had been purchased by him on Labor Day. Mr. Propper declined to accept either deed on the expressed ground that certain restrictions affected the lands; and as a further excuse for not taking the deed tendered him by Davis and Colson, Mr. Propper alleged that there had been puffing at the sale. He also raised the point that the description of the lots contained in the deed was not in conformity with the description of the lands in the catalog of sale. After some correspondence, he filed his bill in this suit, thereby presenting the following points of controversy:

POINTS.

1. The restrictions are not an encumbrance upon the lands, within the meaning of the contract of purchase.
2. The lots of land were accurately described by the auctioneer when he cried the sale, and at that time he corrected any errors that might have been contained in the catalog of sale.
3. There was no fraud or puffing at the sale.

I.

The Restrictions are not an Encumbrance Upon the Lands, Within the Meaning of the Contract of Purchase.

In determining this question it should be borne in mind that Mr. Propper was in nowise a stranger at Wildwood, and, indeed, had made a considerable loan on a similar lot in the next block, covered by exactly the same restrictions now complained of. Further, his counsel, Mr. Bowker, who hesitates to advise Mr. Propper to take this title, readily passed that on the adjoining block, containing precisely the same restrictions now objected to.

These restrictions were placed upon the lands by the Wildwood Beach Improvement Company, which company unquestionably placed them upon the lands for the purpose of enhancing their value. There is convincing affirmative testimony that these particular restrictions actually do benefit and enhance the value of the lands. (P. 127, l. 17.) Further, in resolving this question it will be noted that the memorandum of sale, upon which complainant relies as an expression of the entire contract between the parties, is a memorandum drawn by the auctioneer in the hurry of preparation for an auction sale and does not in anywise purport to be a carefully drawn and technically correct legal document, but is such a memorandum as a layman, an auctioneer, would draw.

With these facts in mind it must be concluded that the restrictions contained in the deed are not a rea-

son for the avoidance of the sale; and this is so upon several well-established principles.

(1). If the restrictions do constitute a defect in the vendor's title, yet the vendee, Propper, waived such defects, and the circumstances detailed at the hearing of the cause are such that it must be concluded that Propper did actually know of the restrictions when the property was struck off and sold to him. These restrictions are applicable to a large tract of the most valuable lots at Wildwood and they are a matter of notoriety.

“When a vendee, after knowledge of the defects in the vendor's title, waives such defects, he will not thereafter be heard to set up such defects to defeat an action for specific performance. 26 Am. & Eng. 2 Ed. p. 108.”

(2). The restrictions complained of did not affect only the lots of land in question, but on the contrary affected many blocks of land along the beach front. These restrictions appear to enhance the value of the lands instead of decreasing it. The restrictions are those usually affecting all other similar properties along the New Jersey coast, and it is the experience of those interested in beach development that such restrictions are of value and not a detriment. The Vice-Chancellor observed (p. 30) that hardly ever had he known of like properties not affected by restrictions of similar import. This being true, the claim that the restrictions are an encumbrance is not applicable in this case.

“Where certain lots were subject to a restriction as to their use, to which the surrounding property was also subject, and which appears to enhance the value of the property in-

stead of decreasing it, specific performance was decreed." (26 *Am. & Eng.*, 2 Ed., p. 108 and note citing *Riggs vs. Prussell*, 66 N. Y. 193, and *Campbell vs. Parker*, 59 N. J. Eq. 342.)

Vice-Chancellor Pitney wrote the opinion in *Campbell vs. Parker*, 14 Dick. 342, and he had considered the same subject in *Boorum vs. Tucker*, 6 Dick. Ch. 141, affirmed (sub-nom *Hartshorn vs. Boorum*, 7 Dick. p. 587), by the Court of Errors, for the reasons given by the learned Vice-Chancellor. The language used by Vice-Chancellor Pitney in *Boorum vs. Tucker*, and approved by the Court of Errors, was as follows:

Without regard to the restriction in the deed—it was an ordinary building restriction, such as is found in many conveyances, made, undoubtedly, as well for the benefit of the lot sold as for that of the adjoining property, as a part of a general scheme for building purposes, and was of a character such as would not be called an encumbrance in the sense that word was used by the agent of the complainant and must have been understood by the purchasers to refer to money liens, mortgages, judgments and the like. There was no proof that the restriction reduces, in the least, the value of the premises. (6 *Dick.* p. 141.)

In *Campbell vs. Parker*, (14 Dick. 347), Vice-Chancellor Pitney held that while the *Parker* case and the *Boorum* case related to judicial sales, the Court, however, treats a contract made with one of its officers as being made with the Court itself, and will deal with its contractee upon equitable principles—the same principles, indeed, which govern in all

cases of specific performance. In other words, the rule laid down in both cases cited are those applicable to all cases of specific performance and apply to the present case. Further discussing the Parker case, Vice-Chancellor Pitney said:

“The restriction there (*Boorum vs. Tucker*) was quite similar to that here. It was, to be sure, a restriction in the character of the building, and not in the use which should be made of it, but its object was to prevent the erection of any buildings that would be used for any purpose to make the locality any less desirable for first-class private residences. This it aimed at and was intended indirectly to affect the use of the property. In this case the object of the provision is precisely the same, although it is sought to be attained by a direct specification of the uses to which it should not be put. I can see no difference, in principle, for present purposes, between the two restrictive clauses. In *Boorum vs. Tucker*, it was held that, *while the restriction was, strictly speaking, and, using the language of a learned conveyancer, an encumbrance, yet it was not such an encumbrance as is recognized as such in ordinary conversation among laymen*, and included within the general representation by a layman made at public sale that the property was free and clear of all encumbrances.”

And in this case the language used by the auctioneer in his memorandum of sale was not that of a learned conveyancer; and while the restrictions were perhaps, technically, an encumbrance, yet they were not such an encumbrance as is so regarded in any ordinary conversation among laymen and included

within the general representation made by an auctioneer at a public sale that the property was free and clear of all encumbrances.

Therefore, because Propper knew of the restrictions and waived them; because all of the surrounding lots were subject to the same restrictions and these common restrictions actually enhanced the value of the land; and because the language used in the memorandum of sale was not intended nor understood to have a technical meaning, the existence of the restrictions did not warrant Propper in refusing to accept the deed tendered because there was an encumbrance on the lands.

Immaterial defects and technical objections where the purchaser gets substantially what he contracted for will not be allowed to defeat a sale. (26 *Am. & Eng.*, 2 Ed., p. 108, and cases cited in note 8.)

II.

The Lots of Land Were Accurately Described by the Auctioneer When He Cried the Sale, and at That Time He Corrected any Errors that Might Have Been Contained in the Catalog of Sale.

The complainant must have known the actual boundary line of the lots in question. They were the most valuable lots sold that day and were on a prominent corner facing the Boardwalk. Propper had invested in beach front lands in the adjoining block. On this particular lot, before the sale, was a large sign about eight feet wide and about twenty-six feet long (p. 160, line 24, &c.).

Before crying the sale an accurate description of the lots was read by Charles Ackley from the very

memorandum of sale afterwards signed by Propper. The lots were indicated on the large map back of the auctioneer's stand, and an error in the description of the property as contained in the catalog was particularly pointed out by the auctioneer, and reference made by him to the map (p. 114). At the conclusion of the sale Propper signed the memorandum of purchase theretofore read and containing a correct description of the property sold to him. In fact the entire memorandum of purchase including the corrected description was read by Mr. Charles Ackley before the sale commenced. (P. 110; also p. 111, line 30, &c.) As a matter of fact this lot fronts on the ocean and was sold with riparian rights, and the Vice-Chancellor justly points out that there was no evidence in the case whatever showing the depth of the lot. There is nothing to show whether the lot is eighty feet in depth or more or less, and its depth varies with the tides.

Therefore (a) because Propper must have known the actual depth of the lot by observation; (b) the width and depth of it was pointed out to him and all others at the sale; (c) any errors that might have been contained in the catalog were explained and corrected, by the auctioneer before the sale; and (d) finally, a correct description was set out correctly in the memorandum of purchase; for all these reasons this point cannot avail Propper.

III.

There was no Fraud or Puffing at the Sale.

As a final excuse for refusing to abide by the contract of purchase, Propper alleged that there was puffing by Frank Colson, a son of Asa L. Colson and a nephew of Frank Davis. It will be noted that Mr. Propper refused to receive the deed for the Gruner lots without presenting any such objection against that title, or any objection against the description of those lots, making the single point of objection that they were subject to the building restrictions. Reference is made to the Gruner sale only because the complainant in this cause, Samuel Propper, not only failed to accept the deeds from Davis and Colson, but he also refused to accept the deed offered in consummation of the Gruner sale, and the defendants respectfully insist that it is but a fair inference that Propper refused to complete both sales, not for any real reason, but upon mere pretexts and excuses which occurred to him only after a sudden fall in the price of real estate in September, 1914, resulting from the European War.

But recurring to the complaint in this cause that there was puffing by Frank Colson, this young business man testified that he bid in good faith for the purchase of the property; and that he meant to purchase it, and sometime prior to the sale had made overtures to acquire it. And this also satisfactorily appears from testimony of Frank Davis (p. 185).

“Q. Did you make arrangements with your nephew that he should go there and bid for you?

A. I did not.

Q. Now, before he went to the sale or at the sale did he ask you to help him about money, or anything like that?

A. Before the sale.

Q. Just tell what that was.

A. Before the sale we was talking about it up to Mr. Colson's house, and Frank had often talked about wanting to buy the lot, the corner lot, and I told him that if he hadn't the money I would loan him the money, we owned the lots between us, I told him if he wanted money I would let him have the money to buy that lot with. Frank Colson is named after me; I have got no children of my own; I have always thought a good bit of him and I am his uncle, that is, Asa Colson is my wife's brother.

Q. He had talked with you in the spring, some months before that, about buying that lot?

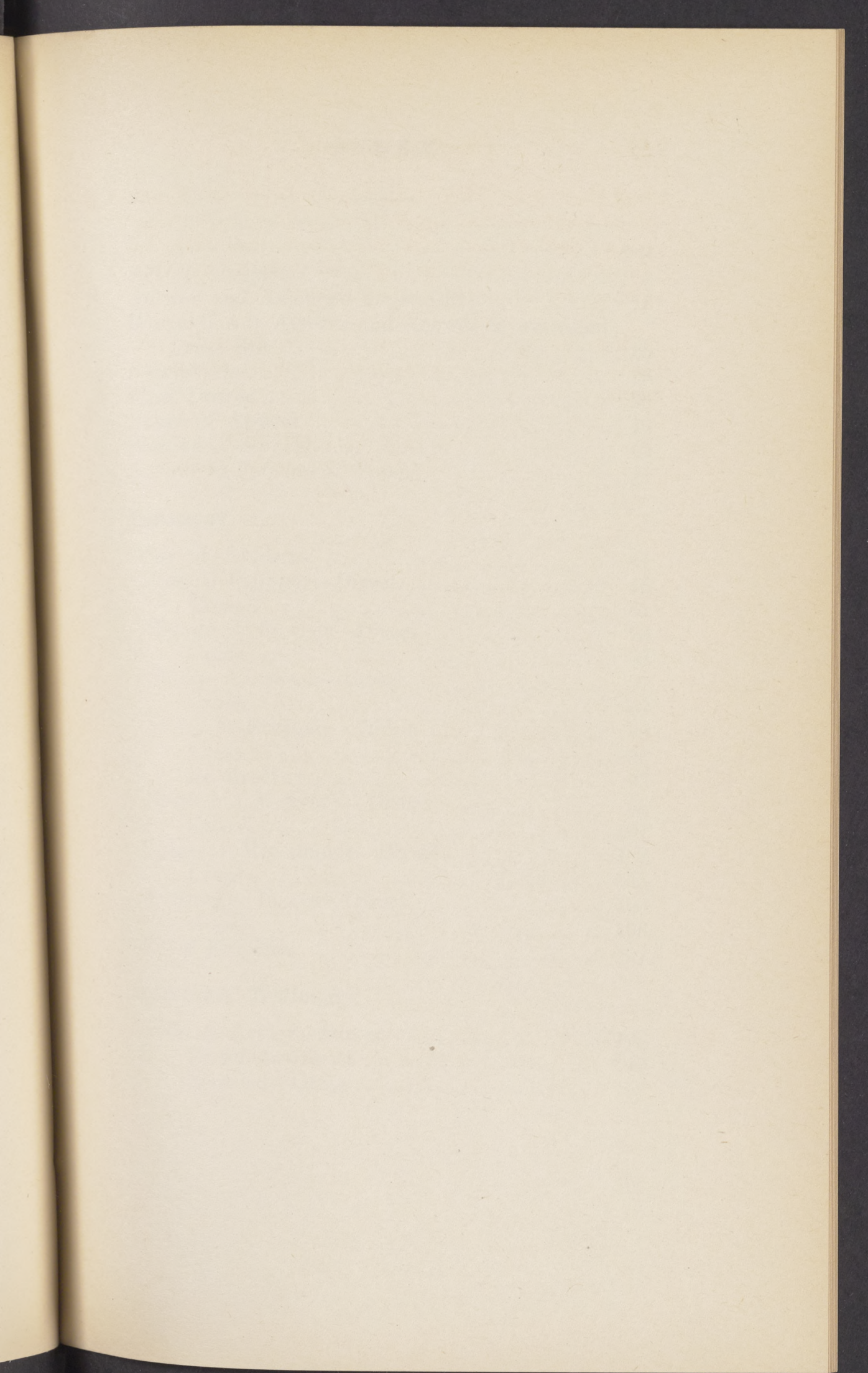
A. He had talked to me about it before, he was up to our house last summer and we were talking about it and he said his father expected to make a little money out of the lot and he thought he could do it too, he wanted to buy the lot, and that is all there is to it. I told him if he wanted to, I was willing to take a chance on him and let him have the money if he hadn't the money."

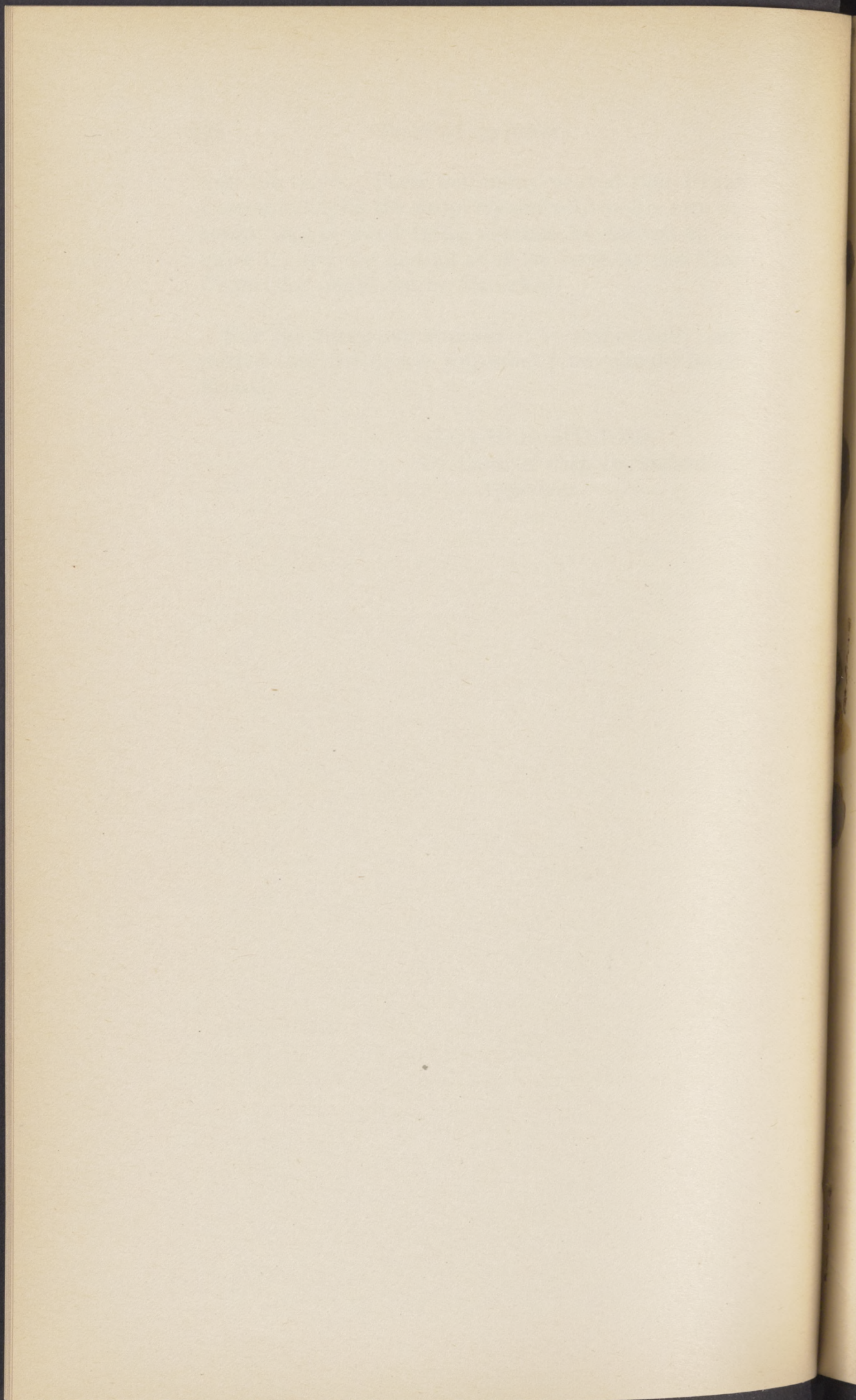
| The testimony of Frank Colson is very positive and straightforward, nor was the witness shaken by the sharp cross-examination of Mr. Weaver. On the contrary his evidence was thus made even more clear and convincing. The learned Vice-Chancellor, who was in a position to observe the faces and demeanor and hear the voices of the witnesses, was convinced that the witnesses Frank Colson and Frank Davis

told the truth. Their testimony proved that Frank Colson bid upon the property entirely on his own account, and in good faith, because he desired to acquire it; and the finding of those facts by the Vice-Chancellor ought not be disturbed.

For the foregoing reasons it is respectfully submitted that the decree appealed from should be affirmed.

LOUIS H. MILLER,
*Of Counsel with Defendants-
Appellees.*





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BILL OF COMPLAINT

(Filed April 30, 1915.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey: 10

Humbly complaining showeth unto your Honor, your orator, Samuel Propper, of the City and County of Philadelphia, in the State of Pennsylvania, that on or about the seventeenth day of August, in the year one thousand nine hundred and fourteen, Asa L. Colson, of Wildwood, in the County of Cape May and State of New Jersey, and Frank Davis, of Woodstown, in the County of Salem and State of New Jersey, were, or claim to be, the owners of certain lands and premises situate in Wildwood, in the County of Cape May and State of New Jersey, on the northeasterly side of Wildwood Avenue, having a frontage of sixty-seven and one-half feet on the Boardwalk with a length or depth of eighty feet on Wildwood Avenue and extending under the Boardwalk into the Atlantic Ocean with riparian rights between parallel lines the width of sixty-seven and one-half feet. 20 30

And your orator further showeth unto your Honor that the said Asa L. Colson and Frank Davis claiming to be the owners of said land and premises above described caused the same to be sold at public vendue on the said seventeenth day of August, in the year one thousand nine hundred and fourteen,

by one John A. Ackley, auctioneer, and that prior to said public vendue caused to be printed, published and circulated among prospective bidders, and others, a catalogue of sale of Wildwood real estate, in which said catalogue the said land and premises is scheduled for sale on page 24 under No. 25; the said land and premises, together with the terms of sale, being set forth in said catalogue as follows:

10

"No. 25

The most valuable boardwalk corner with

Riparian Rights on Five Mile Beach to Be Sold to the Highest Bidder Without Reserve

20 This plot of ground has a frontage of 67½ ft. on the Boardwalk with a length or depth of 80 ft. on Wildwood avenue and extending under the Boardwalk into the ocean with riparian rights in parallel lines the width of 67½ ft.

There Is No Other Plot of Ground As Valuable From a Business Standpoint Which Can Be Obtained By You at the Present Time.

This plot is at the foot of Wildwood avenue,

30 *One of the Best Business Streets on the Island*

It leads direct from the Pennsylvania and Reading railroad stations to the ocean, on which is situated two banks, leading business houses and hotels. It is the keystone of the boardwalk front. This plot we desire to sell as a whole, but if the purchaser so desires, we will divide it.

It Will Positively Be Sold Without Reserve to the Highest Bidder.

Terms:—10 per cent. of the purchase price to be paid in cash on day of sale, 30 per cent. of the purchase price to be paid in cash when deed is given, the balance or 60 per cent. of the purchase price can remain on mortgage if the purchaser so desires. To be sold free and clear of all encumbrances. Taxes of 1914 to be paid by the present owner.” 10

And your orator further showeth unto your Honor that an announcement was made in said catalogue that the same was issued for the purpose of locating said properties to be sold in such manner, so that the buyer could get full information as to their surroundings, condition, utility, valuation, etc., before the day of sale that they may buy intelligently and profitably; and in said catalogue it was further announced, on page 2 thereof, that all properties would be sold free and clear of all encumbrance and that the titles would be perfect or there would be no sale; that the land and premises in question was specifically advertised to be sold free and clear of all encumbrances as appears by reference to the description of the premises in question and the terms upon which the same was sold set forth on page 24 of said catalogue of sale of Wildwood Real Estate above referred to. 20

And your orator further showeth unto your Honor that copies of said catalogue were circulated among prospective purchasers at the auction sale held on the seventeenth day of August A. D. 1914, as aforesaid, and a copy of the same was delivered to your orator as a prospective purchaser at said sale and that your orator having examined said catalogue and seeing therein advertised the land and 30

premises in question under No. 25, page 24 in said catalogue, did attend said public auction sale of real estate on the said seventeenth day of August, and relying solely upon the description of said premises contained in said catalogue and the terms upon which the same were to be sold as therein set forth, did bid upon said premises the sum of twenty-six thousand nine hundred and twenty-five dollars and the land and premises in question was struck off to
10 your orator at that figure.

And your orator further showeth that after said land and premises was struck off to him, as aforesaid, he did on said seventeenth day of August, A. D. 1914, sign an agreement of sale for said land and premises, a copy of which agreement is hereto annexed and marked Exhibit "A" and made a part hereof, in which agreement there is a variance in the description of the land and premises struck off to him, as aforesaid, from the description contained
20 in the catalogue, to which variance the attention of your orator was not called at the time but the representation was expressly made to your orator that it was the identical description of the land and premises contained in said catalogue as No. 25, and your orator therefore did not read the description contained in said agreement of sale but relied upon the representations so made as aforesaid and signed the same without reading; and further that said agreement of sale, under the conditions as set forth
30 therein, the land and premises in question is therein set forth as free and clear of all encumbrances.

And your orator further showeth unto your Honor that in accordance with the terms of sale your orator paid at the time the said land and premises was struck off to him on account of the purchase price so bid by him, as aforesaid, the sum of two

thousand six hundred and ninety-two dollars and fifty cents, being ten per cent. of the purchase price.

And your orator further showeth unto your Honor that a few days prior to the day fixed for the payment of the balance of the purchase money and delivery of the deed under said agreement he discovered that the owners, or one of them had a bidder present at said sale on August 17th, 1914, who did, fraudulently and for the purpose of creating a false and fictitious valuation of the land and premises in question, make fictitious bids thereby inducing your orator to make higher bids to the great damage and injury of your orator, and that had your orator known that there was false and fictitious bidding at the said sale your orator would not have bid upon said land and premises. 10

And your orator further showeth unto your Honor that prior to the said twenty-fifth day of September A. D. 1914, being the day for settlement under the terms of said agreement of sale, he caused to be made application to the West Jersey Title and Guaranty Company of the City of Camden, New Jersey, under application No. 22427, for title insurance on said lands and premises and was by said Title Company informed that the land and premises in question was burdened and encumbered by the following covenants, conditions, restrictions and reservations, namely: 20

“UNDER AND SUBJECT to the covenants and conditions that all buildings shall be artistic in design and attractive in finish and no smithy, factory, livery stable, public garage, slaughter house or fish market shall ever be erected or conducted on the premises conveyed by this deed, and to the right of the grantor herein to fill the lots lying between Atlantic 30

10 Avenue and the Boardwalk as well as the streets
as near to the Boardwalk as shall appear dis-
creet to the grantor, and to gravel the streets
and lay the pavements and curbs and sewer;
and also subject to the reservations that there
shall be no building or buildings erected on the
ocean side of the Boardwalk except ocean piers,
but no ocean pier shall be built before August
22nd, 1919, on the ocean front of Blocks 'B' or
20 'C,' nor shall free bathing ever be prevented
on the beach or in the surf in front of any land
sold by the grantor September 2nd, 1912, at pub-
lic sale. The right of way for the present
Boardwalk and to maintain and operate the
same, and the right of way for any future
Boardwalk on the ocean side of the present
Boardwalk, and to construct, maintain and oper-
ate the same upon surrender and vacation of the
present right of way to the adjoining owners;
and the right to take sand from the ocean side
of the Boardwalk to complete the fill to grade,
are each and all hereby expressly reserved to
the grantor and its successors and assigns."

30 And your orator further showeth unto your
Honor that the said land and premises is not free
and clear of all encumbrances as the same was rep-
resented to be by representations made in said cata-
logue of sale issued for instructions to buyers and in
said agreement of sale and because of said condi-
tions and restrictions the premises in question can-
not be used for the purpose for which they were
purchased by your orator.

And your orator further showeth unto your
Honor that on the twenty-fifth day of September, in
the year one thousand nine hundred and fourteen,

your orator, together with his counsel, met the owners of said premises at the office of William E. Zeller, Esq., in Wildwood, New Jersey, on which day a formal tender of a deed of conveyance for the alleged land and premises purporting to have been sold at said public auction of real estate at Wildwood as No. 25 in said catalogue of sale, a copy of which deed is hereto annexed and marked Exhibit "B" and made a part hereof, and upon an examination of said deed tendered, it was found that in said deed there was a further variance in the description of said land and premises from that contained in said catalogue of sale and in said agreement of sale and further that said deed of conveyance did not convey the property free and clear of all encumbrance in accordance with the terms of sale set forth in said catalogue of sale and said agreement of sale but that the same was burdened and encumbered with the restrictions above set forth, and upon a tender of said deed of conveyance being made, the same was refused and the balance of the purchase money withheld by your orator upon the grounds then and there stated by your orator that the description in said deed was not a description of the land and premises which your orator purchased at said sale described in said catalogue of sale, and further because your orator was falsely and fraudulently led to a belief that the premises in question was of a greater value than it actually was because of the false and fictitious bidding at the sale at which your orator was induced to bid and at which the premises was struck off to him, and further because the land and premises was not free and clear of all encumbrance as the same was represented to be, but was burdened and encumbered by covenants, conditions, reservations and restrictions as aforesaid.

And your orator therefore charges that said agreement of sale so as aforesaid signed by your orator is null and void and ought to be delivered up to your orator for cancellation and that at the time of the execution of said agreement of sale the sum of two thousand six hundred and ninety-two dollars and fifty cents so paid to the said Asa L. Colson and Frank Davis upon the representations made at the time that the said lands and premises were free and
10 clear of all encumbrances and without any knowledge that there was false and fictitious bidding at the said public vendue and upon the representations that the land which your orator would receive under said agreement of sale was the same land and premises referred to in said catalogue of sale known in and designated as No. 25, was paid without any consideration therefor and ought to be returned to your orator.

And your orator futher shows that he has frequently and in a friendly manner applied to the said
20 Asa L. Colson and Frank Davis to surrender said agreement for cancellation and to return said sum of money and your orator well hoped that the said Asa L. Colson and Frank Davis would have complied with such reasonable request of your orator and would have surrendered up and delivered to your orator said agreement of sale for cancellation and returned to your orator the said sum of two thousand six hundred and ninety-two dollars and
30 fifty cents so paid by your orator to the said Asa L. Colson and Frank Davis as aforesaid as in equity and good conscience they ought to have done; but the said Asa L. Colson and Frank Davis not only refused to surrender up to your orator the said agreement of sale for cancellation and return the said sum of two thousand six hundred and ninety-

two dollars and fifty cents so paid as aforesaid by your orator to the said Asa L. Colson and Frank Davis, upon the representations made by the said Asa L. Colson and Frank Davis and without any knowledge of the false and fictitious bidding at said public vendue as aforesaid, but insisted upon all the terms of said agreement of sale being fulfilled by your orator; all of which acts, doings and pretences of the said Asa L. Colson and Frank Davis are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator. 10

In tender consideration whereof and in as much as your orator is without adequate remedy in the premises by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this nature are properly cognizable and relievable: To the end, therefore, that the said Asa L. Colson and Frank Davis, may, with oath, the same being hereby waived, to the utmost of their knowledge, remembrance and belief, full, 20 true, perfect and distinct answers make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here again repeated and they thereto particularly interrogated; and that the said agreement of sale so as aforesaid executed and delivered by your orator to the said Asa L. Colson and Frank Davis may be declared null and void and that the same may be delivered up to be cancelled; that it may be further decreed that said moneys so paid as aforesaid by your orator to 30 the said Asa L. Colson and Frank Davis be returned to your orator; and that your orator may have such further and other relief in the premises as the nature and circumstances of the case may require and to your Honor shall seem meet and agreeable to equity and good conscience:

May it please your Honor the premises considered to grant unto your orator the State's writ of subpoena issuing out of and under the seal of this Honorable Court, directed to the said Asa L. Colson and Frank Davis, therein and thereby commanding them, on a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor in this Honorable Court, then and there to answer the premises and to stand to, abide and perform such decree therein as to your Honor shall seem meet.

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

S. STANGER ISZARD,
*Solicitor for and of counsel with
the complainant.*

EXHIBIT "A."

20

Page 24 #25 Colson ATY per Lineal Ft.
Description

Three lots, Nos. 30-31-32, Block C. in the City of Wildwood, N. J. Situate at the Northwesterly Corner of Wildwood Avenue and Boardwalk, having a combined width or frontage on the Boardwalk of 67½ ft. with a length or depth extending Westerly from the Boardwalk to a ten ft. alley of 60 ft. more or less on the Southerly line (Wildwood Avenue) and a length or depth of 75 ft. more or less on the Northerly line, together with and including the Riparian Rights, and is sold by the lineal front ft., the same being 67½ ft.

Terms

Ten per cent of the purchase price to be paid in cash this day, twenty-five per cent or the balance of

the purchase price to be paid in cash at the office of William E. Zeller, Wildwood, N. J., on or before September 25th, 1914 when a deed will be given for the same. A mortgage for sixty-five per cent of the purchase price will be accepted with interest at six per cent per annum, payable semi-annually if the purchaser so desires.

Conditions

Free and clear of all encumbrances. Taxes for 1914 to be assumed and paid for by the present owner. 10

I, Samuel Propper, Manayunk, Pa. have this day bid at public auction on the above described property the sum of Twenty-six thousand nine hundred and twenty-five dollars, (\$26925.00) dollars, and do hereby agree to comply with the above terms, and failing to do the same I hereby agree to forfeit as liquidated damages any and all monies paid, and do hereby agree to release any claim that I may have acquired upon the aforesaid property. 20

Witness

Samuel Propper.

Palmer M. Way

Received of Samuel Propper, Manayunk, Pa.

\$25,000.00

on account of the above bid.

Dated, August 17th, 1914.

John A. Ackley, 30
per W. E. Zeller.

Printer's error. Should be \$2500.00

EXHIBIT "B."

This Indenture, Made the Twenty-fifth day of September in the year of our Lord One Thousand in the year of our Lord One Thousand Nine Hundred and fourteen, (1914) Between Asa L. Colson, and Anna R. Colson, his wife, of Wildwood, in the County of Cape May and State of New Jersey, and

10 *Frank Davis and Sallie E. Davis, his wife, of Woodstown, in the County of Salem and State of New Jersey, of the first part, and Samuel Propper, of the City and County of Philadelphia and State of Pennsylvania of the second part, Witnesseth, That the said party of the first part, for and in consideration of the sum of Twenty-six Thousand Nine Hundred and Twenty-five Dollars lawful money of the United States of America, well and truly paid by the*

20 *said party of the second part to the said party of the first part, at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns, All those certain Lots or Parcels of land situate, lying and being in Wildwood in the County of Cape May and State of New Jersey, known and designated as*

30 *Lots Numbers Thirty (30), Thirty-one (31) and Thirty-two (32), of Block "C", as shown on Map of Land and Riparian Rights, City of Wildwood, sold at Public Sale September 2nd, 1912, and are bounded and described as follows, to wit:—Beginning at a point on the Northeasterly side of Wildwood Avenue distant Six Hundred and Thirty-three (633)*

feet Southeastwardly from the Southeasterly line of Atlantic Avenue, said beginning point being in the Southeasterly line of a "Ten foot drive for Adjoiners only", and extending thence Northeastwardly along the Southeasterly line of said drive Sixty-seven and Five-tenths ($67 \frac{5}{10}$) feet in front or breadth; thence Southeastwardly between parallel lines of that width or frontage at right angles to said Atlantic Avenue and binding on said side of said Wildwood Avenue a distance of Fifty-eight and 10
Ninety-two One Hundredths ($58 \frac{92}{100}$) feet more or less to the high water line of the Atlantic Ocean, and thence still extending between parallel lines of that width, be the distance more or less to the exterior line established by the Riparian Commissioners. Together with the right to use the "Ten foot drive for Adjoiners only" hereinabove referred to, which is provided by the party of the first part hereto for the use of Adjoiners only. *Being the* 20
same premises which the Wildwood Beach Improvement Company by Indenture bearing date the Twenty-sixth (26th) day of August, A. D. 1913, and recorded September 26th, 1913, in the Clerk's Office of Cape May County aforesaid at Cape May Court House, New Jersey, in Deed Book No. 293, pages 216 &c., granted and conveyed unto the above named Asa L. Colson and Frank Davis in fee. This deed of conveyance is made under and subject to the several Covenants, Conditions, Restrictions and Reservations as to sanitation and improvements contained 30
in said recited Deed, reference thereunto being had will cause more fully and at large to appear.

Together with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in any wise appertaining, and the re-

version and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof; *And Also*, all the estate, right, title, interest, property, possession claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances: *To Have and To Hold* the said premises, with all and singular the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, and his heirs and assigns forever.

And the said parties of the first part, for themselves, their heirs, executors and administrators, do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they the said parties of the first part, for themselves, their heirs, all and singular the hereditaments and premises hereinabove described and granted, or mentioned and intended to be so, with the appurtenances, unto the said party of the second part, his heirs and assigns, against them the said parties of the first part, and their heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, from, through or under him, them or either or any of them *Shall and Will Under and Subject as Aforesaid Warrant and forever Defend*.

In Witness Whereof, the said parties of the first part to these presents have hereunto set their hands and seals dated the day and year first above written.

(Signed),

ASA L. COLSON (Seal)

ANNA R. COLSON (Seal)

FRANK E. DAVIS (Seal)

SALLIE E. DAVIS (Seal)

Signed, sealed and delivered
in the presence of
WILLIAM E. ZELLER.

State of New Jersey }
Cape May County } ss.

Be It Remembered, That on this Twenty-fifth day
of *September*, in the year of our Lord One Thousand 10
Nine Hundred and Fourteen (1914), before me, the
subscriber, a Master in Chancery of New Jersey,
personally appeared the above named Asa L. Col-
son and Anna R. Colson, his wife, and Frank Davis
and Sallie E. Davis, his wife, who, I am satisfied,
are the grantors mentioned in the above Deed of
Conveyance and I having first made known to them
the contents thereof they acknowledged that they
signed, sealed and delivered the same as their vol-
untary act and Deed; and the said Anna R. Colson 20
and Sallie E. Davis, being of full age, on a private
examination apart from their said husbands before
me acknowledged that they signed, sealed and deliv-
ered the same as their voluntary act and deed, free-
ly, without any fear, threats or compulsion of their
said husbands. All of which is hereby certified.

WILLIAM E. ZELLER,
Master in Chancery of New Jersey.

ANSWER AND AMENDED CROSS-BILL.

(Filed May 22, 1915.)

IN CHANCERY OF NEW JERSEY.

10

Between

SAMUEL PROPPER,
Complainant,
 and
 ASA-L. COLSON, *et als.*,
Defendants.

ON BILL, &C.
 ANSWER AND AMEND-
 ED CROSS-BILL.

20

Answer.

The answer of ASA L. COLSON and FRANK DAVIS to the bill of complaint of SAMUEL PROPPER, complainant.

These defendants, for answer unto the complainant's bill of complaint, or unto so much as they are advised is necessary that they make answer unto,
 30 answering say:

1. They admit the facts stated in paragraphs one, two, three and four.

2. They admit that copies of the catalogue referred to in the bill of complaint were circulated

among prospective purchasers at the auction sale held on the seventeenth day of August, nineteen hundred and fourteen, as aforesaid, but whether a copy of the same was delivered to the complainant as a prospective purchaser at said sale these defendants are not advised; nor are these defendants informed whether or not the complainant after having examined said catalogue and seeing therein advertised the lands and premises in question did attend said public auction of real estate on the said 10
seventeenth day of August, nineteen hundred and fourteen, and these defendants deny that the complainant relied solely on the description of said premises contained in said catalogue and the terms upon which the same were to be sold as herein set forth, and they aver that, at the time of sale and prior to the offering of said premises for sale at auction, John A. Ackley, the auctioneer named in the bill of complaint, gave a true and perfect description of said premises, and also gave particular in- 20
formation to each and every purchaser, including complainant, of the contract required to be entered into by complainant and all other purchasers of said lands and premises, and the form of contract thereafter subscribed by complainant, was read at length in a public manner; and these defendants aver that the aforesaid statements and descriptions by the auctioneer, publicly made, at and before said time of sale, constituted part of the offer made by these defendants for the sale of said lands and premises. 30
And these defendants further answering paragraph five aver that the complainant did bid upon said premises the sum of twenty-six thousand nine hundred and twenty-five dollars (\$26,925) and the lands and premises in question were struck off to complainant at that figure.

3. For answer unto paragraph six these defendants say that, after said lands and premises were struck off to complainant, complainant did immediately sign an agreement of sale of said lands and premises in the form of that which had been read prior to the time of said sale, a copy of which agreement is annexed to the bill of complaint; and these defendants deny that said agreement in anywise varies from the description of said lands and premises struck off to complainant from the description contained in the catalogue and supplemented by the public declaration, statement and notice of the auctioneer as aforesaid at and before said lands and premises were cried off and sold; and these defendants deny that there was any variances except variances to which the attention of complainant was called by the auctioneer prior to the sale as aforesaid; and these defendants deny that complainant did not read description of said lands and premises contained in said agreement of sale, but if it be true that he did not read it, nevertheless the same had been read as aforesaid, at length, publicly, in a loud, clear manner by the auctioneer, prior to the said sale; and they deny that the complainant relied wholly upon the details and description of said lands and premises contained in the catalogue, but they do admit that a true copy of the agreement of sale is annexed to the bill of complaint and that they did agree to convey the same free and clear of all encumbrances.

30

4. These defendants admit the payment of ten per cent (10%) on account of the purchase price as stated in paragraph seven of the bill of complaint.

5. These defendants deny the facts alleged in paragraph eight, and they deny that the owners or

one of them had a bidder present at the said sale on the seventeenth day of August, nineteen hundred and fourteen, who did fraudulently and for the purpose of creating a false and fictitious value of the lands and premises in question to make fictitious bids, thereby inducing complainant to make higher bids; they deny that there was any fraudulent and fictitious bidding at the sale.

6. These defendants have no knowledge as to the truth of the facts alleged in paragraph nine of the bill of complaint, but they admit that the title to said lands is held by them, under and subject to the covenants and conditions set out in said paragraph and alleged to have been reported by the West Jersey Title and Guaranty Company of the City of Camden, New Jersey. 10

7. Answering paragraph ten, these defendants aver: (a) That said restrictions did not constitute any encumbrance, and (b) complainant was fully appraised, and had knowledge at the time said lands and premises were struck off and sold to him, that said restrictions affected the lands in question, as well as a large number of other lots adjoining; and in that behalf these defendants aver that said restrictions were a matter of common knowledge, and that the complainant had a knowledge of such restrictions for that the complainant had acquired title or made loans of large sums of money on adjacent lots, and, in general, was familiar with the covenants and conditions under which the lands and premises in question and a large number of other lots had been alienated by the founders of that part of Wildwood, New Jersey; and these defendants aver that said lands and premises were free and 20 30

clear of all encumbrances, within the intent and meaning of the contract of sale entered into by complainant.

8. Answering paragraph eleven, these defendants admit that they tendered a deed, a copy of which is annexed to the bill of complaint and marked Exhibit "B" as stated in the bill of complaint, and they aver that the same was a good and sufficient deed of conveyance of the lands and premises in question, and these defendants aver that the said deed did not contain any variance in the description of said lands and premises from that contained in the agreement of sale; and they aver that at the time and place agreed upon, they tendered themselves ready to execute and deliver said deed or any other proper adjustment of their title to said lands in fee simple, and that the complainant refused to accept the same, but these defendants aver that the defendant did not, in truth, refuse to accept the deed tendered to him as stated in the bill of complaint on the grounds in the bill alleged, but on false and pretended claims, for the purpose of avoiding his contract, and these defendants further respectfully show that they could not well consent to a rescision of said contract of sale, because of the breach made by complainant in his contract these defendants lost a market for the sale of said property, which is of a kind that is not readily sold except at the latter part of the summer season, and they aver that by reason of the actions and doings of the complainant in breaking his contract of purchase they were damaged in an amount of money largely in excess of the sum paid them by the complainant on account of the purchase price; and they aver that their money damage by reason of complainant's breakage of con-

tract is the sum of ten thousand dollars (\$10,000), which damage they pray may be ascertained and determined by this honorable court and recovered by them, as prayed in their cross-bill, and these defendants further generally answering paragraph eleven deny all the statements and charges of fraud therein contained.

9. Answering paragraph twelve of the bill of complaint these defendants deny that the agreement of sale is null and void; and they deny that it should be delivered up to the complainant for cancellation, but on the contrary they aver that the same is a valid and subsisting instrument and that these defendants are entitled to recover the damages inuring to them from complainant for his breach of covenants therein contained and agreed by him to be kept and performed and these defendants further answering said paragraph deny all the facts and inferences in said paragraph contained. 10 20

10. These defendants deny that the complainant has ever applied to them for the surrender of said agreement for cancellation or that he has ever applied to them for re-payment of the moneys, two thousand six hundred ninety-two dollars and fifty cents (\$2,692.50), paid by him to defendants; but they admit that they have never surrendered up to complainant said agreement of sale in said paragraph mentioned. 30

Amended Cross-Bill.

By way of amendment to the cross-bill exhibited by the defendants against the complainant, these defendants respectfully show unto this Honorable Court:

1. The complainant, Samuel Propper, purchased
10 the lands and premises in the bill of complaint mentioned on the terms set out in the contract of sale, annexed to the bill and marked Exhibit "B," and paid on account of the purchase price the sum of two thousand six hundred ninety-two dollars and fifty cents (\$2,692.50).
2. These defendants at the time and place appointed in said contract of sale, offered to deliver to complainant a good and sufficient warranty deed of
20 said premises in accordance with the terms of said contract of sale.
3. Defendants offered themselves ready and willing to perform and did keep and perform all of the covenants contained in said contract of sale and agreed by them to be kept and performed.
4. The complainant, Samuel Propper, failed and refused to perform said contract of sale on his part,
30 in that he did not, at the time and place appointed, or within a reasonable time thereafter, pay to the defendants the balance of the purchase price of said lands, and wholly refused and neglected so to do.
5. By reason of the premises averred in this

cross-bill defendants lost the sale of said property, and they aver that by reason of the depression in the real estate marked at Wildwood, New Jersey, resulting from the European war and other causes said lands have not now a fair market value equal to the price agreed to be paid as aforesaid by complainant to them.

6. These defendants aver that their said damage in the premises amounts to the sum of ten thousand dollars (\$10,000). 10

7. Defendants have at all times tendered themselves ready and willing, and yet are ready and now do themselves willing to convey said premises to complainant, treating the time of performance of said contract for this purpose not as of the essence thereof; and on their part they have often requested complainant to carry out and perform his said contract on his part, but that hitherto complainant has neglected and refused so to do. 20

8. In consideration whereof these defendants respectfully pray that the aforesaid damages by them sustained by reason of the non-performance by complainant of his contract with defendants may be ascertained and determined by this honorable court, and that the complainant may be decreed to pay to defendants their aforesaid damages resulting from the aforesaid breach of complainant of his said contract; and that the complainant may be decreed in addition to the payment of said damages, to carry out and perform his said contract with defendants or that they may have such relief in the alternative, in either aspect; and that they may have such other 30

or further relief in the premises as the nature and circumstances of the case may require.

9. And these defendants will ever pray, &c.,

WM. H. MILLER,
Sol'r for and of Counsel with Defendants.

10

[ENDORSED]

I consent that the within answer and amended cross-bill be filed and stand in the place and stead of the original answer and cross-bill without any order for that purpose.

S. STANGER ISZARD,
Solicitor of Complainant.

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30

REPLICATION TO ANSWER AND ANSWER TO AMENDED CROSS-BILL.

(Filed Aug. 12, 1915)

IN CHANCERY OF NEW JERSEY. 10

Between
SAMUEL PROPPER,
Complainant,
and
ASA L. COLSON, *et als.*,
Defendants. } ON BILL, ETC.
REPLICATION TO ANSWER AND ANSWER
TO AMENDED
CROSS-BILL.

20

The complainant joins issue on so much of the defendants' answer as is not in the nature of an amended cross-bill, and as to that part of said answer which is in the nature of an amended cross-bill, he says:

1. In answer to the facts set forth in paragraph one in the defendants' amended cross-bill, the complainant admits that he paid on account of his bid, made at an alleged sale set forth in the complainant's bill of complaint, the sum of two thousand six hundred and ninety-two dollars and fifty cents, but denies that said payment was made under contract of sale, as alleged in said paragraph one. 30

2. In answer to paragraph two and three of said amended cross-bill, he denies the facts therein alleged.

3. In answer to paragraph four of said amended cross-bill, the complainant says that he did not pay to the defendants the balance of the purchase money under the contract of sale because the defendants re-
10 fused to give a good and sufficient warranty deed conveying title to the premises which the complainant purchased at the sale set forth in his bill of complaint filed in this cause, free and clear of all encumbrance in accordance with the terms of said sale; and further because of the false and fictitious bidding at said sale as alleged in his said bill of complaint.

4. In answer to paragraph five of said amended
20 cross-bill, the complainant denies that the defendants lost the sale of said property as therein alleged; and further answering said paragraph says that he has no knowledge of any depreciation in the value of the real estate market at Wildwood, New Jersey, and leaves the defendants to make such proof thereof as they may deem necessary.

5. For answer to paragraph six in said amended
30 cross-bill, the complainant denies that the defendants have suffered any damages whatever because of any matter, act or thing done by the complainant.

6. In answer to paragraph seven of said amended cross-bill, the complainant denies that the defendants have ever been ready and willing to convey the premises which the complainant bought at the sale

set forth in his bill of complaint filed in this cause and further denies that said defendants ever requested said complainant to carry out and perform said contract of sale, but avers the fact to be that the description of the premises set forth in the deed tendered by the defendants to the complainant in consummation of said sale did not describe the premises purchased at said alleged sale; that the alleged sale was induced and brought about by false and fictitious bidding as alleged in this complainant's bill of complaint, and further that the deed tendered did not convey the premises purchased by the complainant at said alleged sale clear and free of all encumbrance in accordance with the terms of said sale. 10

S. STANGER ISZARD,
Solicitor for and of Counsel
with complainant.

A True Copy, 20
ROBERT H. MCADAMS,
Clerk.

[ENDORSED]

I hereby consent to filing the within
Replication to Answer and Answer to
Amended Cross-Bill out of time this 30
10th day August, 1915.

LOUIS H. MILLER,
Solicitor for
Asa L. Colson
and Frank Davis,
defendants.

CONCLUSIONS

(Filed Jan. 20, 1916)

IN CHANCERY OF NEW JERSEY.

10

Between

SAMUEL PROPPER,
Complainant,

and

ASA L. COLSON, *et als.,*
Defendants.

ON BILL, ETC.
FINAL HEARING.
CONCLUSIONS.

20

S. STANGER ISZARD and FRANCIS D. WEAVER, for complainant.

LOUIS H. MILLER, for defendants.

LEAMING, V. C. (Orally):

30 I am unable to believe that I will ever be better prepared to dispose of this case than now. The facts are entirely fresh in my memory, and I entertain no substantial doubt touching the law that flows from the facts.

The complainant, vendee in a contract of sale of land, seeks to be relieved from the written contract upon several grounds. The first ground is the claim

that by the terms of the contract under which complainant agreed to purchase these lots it was stipulated that the title which the defendants should give to the complainant should be a title free from all encumbrances, whereas the proofs disclose that there are several restrictive covenants which have attached to this land by reason of a general building and development scheme adopted and carried out by the former owners of this tract, complainant's claim now being that the defendants cannot deliver the title they agreed to deliver and that complainant should therefore be relieved from the contract. 10

I am committed on this question. The identical question has been before me and fully argued and determined. I have, however, endeavored in this case to keep an open mind in the matter and have accordingly listened attentively to the arguments of counsel on this question and have given to those arguments full consideration. The arguments have embodied essentially the same scope as did the arguments which have heretofore been presented to me, and, so far as I can recall, substantially the same authorities have been here relied upon upon both sides of the question. The view which I have heretofore entertained and which I have, after listening to a further argument of the same subject, been unable to modify, is that while the word "encumbrance" in its technical sense includes a right of the nature of that which is imposed upon a lot by a restrictive building covenant yet when that term is used by a layman in an agreement of sale it must be construed as it would be appropriately understood by the parties to the agreement; that it must be understood and treated by a court as two men not skilled in technical language would use and in- 20 30

tend the word "encumbrance;" and if the technical encumbrance which is found upon the land is not such an encumbrance as was contemplated, if not such an encumbrance as was in the minds or reasonable contemplation of the contracting parties in the use of the word, then the Court will not deny the enforcement of the agreement because of the use of the word.

- 10 It is well known that restrictive covenants which relate not only to the nature of the buildings which shall be erected upon the lots but frequently and almost uniformly include restrictions touching the uses to which the lots shall be employed, have been adopted and in use in this State for a long period of time almost uniformly in the development of seaside resorts. It is the rarest exception to find a tract of land which is being developed by its owners, especially at seaside resorts, where there has not been adopted a uniform system of building restrictions and restrictions touching the use of the lots.
- 20 Promoters usually determine upon the specific nature of restrictions which are to be imposed and adopt that plan of development and perpetuate it by inserting the covenants in all the deeds which they execute and thus impress the covenants upon the land in such manner that they can be enforced for all time by the owners of all the lots, each against the other. The purpose of such restrictive covenants is beneficial; they are deemed to add to the value of the enterprise. It is believed by the
- 30 original owners of the land that by the adoption and enforcement of those covenants the land will have an increased value as a whole and all the lots will have an enhanced value. That is the theory, the general theory, upon which the covenants are adopted, and in practice, it is found that that theory

is sustained. The result is that almost every enterprise of this nature, almost every development of a town site, especially at the seaside resorts, has adopted covenants of this general nature for the purpose stated, and it is a little difficult to conceive how any man who has had any experience in buying seashore lots does not reasonably expect to encounter this class of covenants. But without undertaking to determine what complainant in this case may have reasonably anticipated touching covenants of this nature, without undertaking to pass upon whether the extent of his experience was such that he would reasonably have anticipated that these lots were subject to covenants of this kind, my view is that no average layman dealing with another in making an agreement for the sale of land and in covenanting that it shall be free from encumbrance will have in mind, either as a purchaser or seller, covenants of this class. The encumbrances within the contemplation of the layman in such cases are encumbrances in the nature of ordinary liens, judgments and mortgages and the like, and do not include what is commonly known as restrictive building covenants.

I do not know whether I could express my views more clearly or concisely than to read a paragraph upon that subject from the opinion which I filed in the case of William J. Ott against Jacob Frank Eisenhower and others. Omitting that part of the opinion which is preliminary to the main question I said: "The real controversy, therefore, is over the existence of these restrictive covenants and that is the question to which I wish to direct my decision in this case. I am convinced that a restrictive covenant of the nature of the covenants in the title deed to defendant are not what is popularly called encum-

branches. I am convinced that when a layman makes an agreement that he will convey a property free and clear of all encumbrances he does not mean, nor does a purchaser who is seeking to acquire that property understand him to mean, that it shall be free from the operation of restrictive covenants, already forming part of the title of the nature of the covenants here in question. These restrictive covenants have become so common that now, in the modern development of new tracts of land, they are almost universal. It is seldom in recent times that any promoters attempt the development of a new tract of land and the establishment of a new town side without first determining upon and adopting a general plan or system of restrictive building covenants for the benefit of the tract at large, in order to enable them to develop a town of the type they set out to accomplish; so we now almost uniformly look for restrictive building covenants in all of these new enterprises of this nature, and when we refer, especially as laymen, to encumbrances upon a lot of this nature and put in an agreement for the sale of such lot that it shall be free from encumbrances we do not ordinarily have any reference to covenants or restrictions of this kind which have been theretofore embodied in the title. My views in this respect are in entire harmony with the views expressed in *Campbell vs. Parker*, 14 Dick. 342." That is the case which I think counsel cited, and in that case there will be found the citation of an earlier opinion by the same Vice-Chancellor. In this opinion from which I have quoted I next take up other branches of the case that are not here involved but which were more difficult of disposition, namely, the significance of the word "easement;" whether or not a covenant against "encumbrances or easements" would in-

clude restrictive covenants of this nature. But that question is not here involved.

It seems to me that the mind of the average layman and of the complainant in this case could not have contemplated covenants of this nature as encumbrances within the spirit of that agreement.

The next ground of relief from the operation of the agreement which is urged in behalf of complainant is the circumstance that the length of the side line of the lot, the line along the avenue, is less than 10 is called for in either the catalogue of the sale or the agreement which was signed. There is a considerable conflict of testimony on this subject. The testimony upon the part of the defendant is to the effect that at the sale it was expressly explained that that measurement was not accurate as stated in the catalogue and that the distance which would control the parties would be the distance contained on the map which was exhibited. A large map, some six feet 20 long, was unquestionably in use at that sale. Whether complainant examined it closely may well be doubted. It seems to me, however, that it is not very material to ascertain whether the statements of defendants' witnesses touching these announcements at the sale are true or not. I cannot believe that the variation in distance from the rear alley to high-water line is very material. It must be borne in mind here that what was sold was an ocean front lot extending back or landward to an alley. That map unquestionably showed the alley, if it was an 30 accurate map, and it is difficult to suppose that any person in buying lots of such value has not informed himself of the general surroundings even though the rear alley may not appear on the ground. What defendants proposed to sell was a seashore lot extending to high-water mark, and, in addition to that, the

riparian right which the owners had acquired from the State extending from high-water mark out into the ocean to the Riparian Commissioners' exterior line. Now, a slight error in the distance between ordinary high-water mark and the rear alley amounts to little or nothing. High-water mark is such a variable location that a person may almost reasonably expect more or less uncertainty in any dimension that calls for high-water mark; and when you

10 consider that in this case high-water mark was not to be the limit of the territory that was sold but that the title was to continue straight on out into the ocean to the Commissioners' exterior line the mere circumstance that the distance from the rear of the lot to the point where high-water mark is crossed when you pass on to the riparian lands varies seems to me to be of very little importance, to say the most. The distance stated in the agreement is in fact followed by the words "more or less." I cannot believe

20 that complainant is substantially injured or substantially disappointed by the circumstance that the catalogue called for eighty feet before high-water mark was reached, whereas in truth less than that distance actually appears upon the ground.

It is unnecessary for me to undertake to ascertain the motive of complaint in desiring to be relieved from this contract. I confess I am inclined to the view that a shrinkage of values, which has not been referred to as a motive, would perhaps come nearer

30 to defining the real motive than anything else, although I will not act upon that assumption. It may be that the very grounds that are put forward here as the reasons for desiring to be relieved from this contract are the real grounds that inspire the complainant in this suit.

So we come next to the question of what trans-

pired at the sale with reference to the bidding. I entertain no manner of doubt that if the defendants employed by-bidders or puffers to bid up this property and thereby procure more money for it than could be procured without resorting to that means it was a fraudulent imposition upon the bidders and would entitle the purchaser to be relieved from the contract which he signed without knowledge of the fact. There cannot be much doubt about that. It is certainly a fraud upon a bidder to have such a course adopted at a public sale, and I should not hesitate, I think, to adopt that view even though it were not a fact that the last bid preceding the purchase was the bid of the puffer; but in this case if the bid of the young man was the bid of a puffer the last bid which preceded the purchase by complainant in both instances was the bid of a puffer. I confess that there are very suspicious circumstances surrounding this bidding. The fact that the young man, son of one of the owners of the land and a nephew of the other, was the last bidder in both cases, and that he sat beside his uncle while bidding and was in communication with his uncle while bidding, and the additional circumstance that he is yet a comparatively young man and that his bid was a large amount of money, all go to very strongly indicate that he was not bidding in good faith and that had the property been struck off to him it would not have been a real sale.

On the other hand, the father and the uncle swear absolutely that the young man was interested in this property on his own account, that they had nothing whatever to do with his bidding. The son has testified that he made these bids on his own account in absolute good faith and without any pre-arrangement with his father or uncle. The circumstance to

which he has testified, and to which his uncle has testified, that his uncle told him that if he did determine to buy this property he would help finance the transaction for him, cannot militate against the validity of a sale. The owner of the land had a perfect right to loan money to his nephew if he saw fit. The uncle may have been anxious to get as high a price as possible, and may have been anxious to have the young man bid, and may have been for that reason more willing to loan him the necessary money on the property to finance the transaction than he would otherwise have been. Whatever his motives may have been in offering to loan the money, if he had no real connivance with his nephew, if it was a *bona fide* bid upon the part of the young man in his own behalf, there can be no fraud upon the public or upon the person who made the purchase.

While there are many suspicious circumstances connected with this bid, and while I think it was the height of imprudence to have the young man bid at the sale of his father's and uncle's property, yet I am not prepared to say and I cannot find as a fact that this young man and his uncle and father have testified falsely. I was strongly impressed with the testimony of all of them. My belief is that they testified to the truth. And while there may have been some admissions made by the father at the conference at Holly Beach that were embarrassing, my own judgment is that the testimony is not strong enough to justify a finding that this young man did not bid on this property, as he said he did, in his own individual and sole behalf. This young man is a man of family and of property and is engaged in active business, and with the assurance of the help with his uncle proffered there is no reason why he might not have appropriately purchased for himself.

I cannot think that there is any valid objection to the contract of sale by reason of the fact that the auctioneer had a contract whereby he was limited in his agency to the right to sell this property below a certain amount, a contract in which he was only privileged to sell above certain figures, and yet, with such a contract with only such an agency, he offered the property in an unrestricted way to the public at public sale. If the property had brought less than the limit some very complicated and troublesome questions might have arisen; if the auctioneer, in order to protect his contract and bring the price up to the limit, had made bids even more interesting questions might have arisen. But where the property was clearly worth much more than the minimum limit, and where the bidding in good faith carried the property away beyond those figures, I cannot see how that contract limiting the amount for which the property could be sold can in any way affect the rights of the complainant in this case.

That, I think, includes all of the objections that have been made the ground of relief on the part of the complainant under the provisions of this agreement, and I am unable to reach the conclusion that complainant can escape complying with the agreement.

So far as the cross-bill is concerned, I am convinced that no relief can be granted under that. In the first place, I do not think that the cross-bill could be sustained in any event. I do not think this Court would undertake to place itself in the position of a jury and try a damage suit against the complainant for breach of contract. If the cross-bill had been a bill for specific performance it would have been entertained in this suit, but if defendants desire damages from complainant for breach of con-

tract rather than a decree of specific performance I think the law courts are the proper courts to entertain a claim of that nature. But even though this Court might have jurisdiction arising from the circumstance that the complainant has brought this controversy here, the evidence is not adequate to enable this court to assess damages in the manner claimed by the cross-bill. It would be impossible under the evidence to undertake to ascertain with anything like accuracy what damage defendants may have suffered by reason of any breach of this contract that has so far occurred.

I will advise a decree dismissing complainant's bill, and dismissing defendants' cross-bill.

Mr. Weaver: If your Honor please, is that with costs to either party, under the circumstances?

The Vice-Chancellor: I will hear you on the subject of costs. That can be determined better when we come to settle the decree, perhaps.

Heard and Determined: December 29, 1915.

FINAL DECREE

(Filed Jan. 7, 1916)

IN CHANCERY OF NEW JERSEY.

10

Between SAMUEL PROPPER, <i>Complainant,</i> and ASA L. COLSON, <i>et als.,</i> <i>Defendants.</i>	}	ON BILL, &C. FINAL DECREE.
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This cause coming on to be heard on bill, cross-bill, answers, replications and proofs, and the Court having examined the pleadings herein and having heard the testimony and other evidence offered by the parties, and having heard and considered the argument of counsel thereon; and it appearing to the Court that the material facts proved to the satisfaction of the court would not entitle the complainant to the relief prayed for in his bill of complaint; and that the defendants ought not have the relief in either aspect prayed for in their cross-bill; Therefore,—

30

It is, on this fifth day of January, nineteen hundred and sixteen, ordered, adjudged and decreed and the Chancellor by virtue of the power an authority of this court doth order, adjudge and decree that the

complainant's bill of complaint and the defendants' cross-bill be and the same hereby are dismissed without costs to be taxed by either party against the other.

E. R. WALKER,
C.

Respectfully advised,
E. B. LEAMING, V. C.

10

NOTICE OF APPEAL.

(Filed Feb. 5, 1916)

IN CHANCERY OF NEW JERSEY.

20

Between
SAMUEL PROPPER,
Complainant,
and
ASA L. COLSON and FRANK
DAVIS,
Defendants.

ON BILL, ETC.
NOTICE OF APPEAL.

30

The complainant hereby appeals from so much of the final decree made in this Court, in the above-stated cause, bearing date the fifth day of January, nineteen hundred and sixteen, as adjudges that the complainant's bill of complaint be dismissed to the

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

S. STANGER ISZARD,
Solicitor for and of
Counsel with Complainant.

Dated—January 31st, A. D. 1916.

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

10

S. STANGER ISZARD,
Of Counsel with the Complainant.

A True Copy,
ROBERT H. McADAMS,
Clerk.

[ENDORSED]

Service of the within notice hereby
acknowledged this 1st day of February,
A. D. 1916.

20

LOUIS H. MILLER,
Solicitor for Defendants.

30

PETITION OF APPEAL.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

Between
SAMUEL PROPPER,
Complainant-Appellant,
and
ASA L. COLSON and FRANK
DAVIS,
Defendants-Appellees.

ON BILL, ETC.
ON APPEAL.
PETITION OF APPEAL.

20

*To the Honorable Court of Errors and Appeals in
the last Resort in all Causes:*

The petition of Samuel Propper, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the fifth day of January, nineteen hundred and sixteen, wherein the said Samuel Propper was complainant, and the said Asa L. Colson and Frank Davis were defendants in this respect to wit: that the said decree adjudges that the complainant's bill of complaint be dismissed.

And your petitioner humbly appeals from that

part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the said complainant was entitled to have said agreement of sale, set forth in his bill of complaint, declared null and void, and the same delivered up for cancellation, and the purchase money paid thereunder returned by reason of the variance in the description of the said lands and premises in said agreement of sale from the description of said lands and premises contained in the catalogue of sale, relying upon which your petitioner agreed to purchase, and by reason of the false and fictitious bidding of the defendants at the sale, creating a false and fictitious valuation of the lands and premises, and by reason of said lands not being free and clear of all encumbrances as said lands and premises were represented to be at the time of the sale and in said agreement of sale. 10

Your petitioner therefore prays that the said decree of the Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet. 20

S. STANGER ISZARD,
*Solicitor for and of Counsel
with Appellant.*

30

[ENDORSED]

Service of copy of the within petition
hereby acknowledged this 7th day of
February A. D., 1916.

LOUIS H. MILLER,
Solicitor for Defendants.

ANSWER TO PETITION OF APPEAL.**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

10

Between	}	ON BILL, &C. ANSWER TO PETITION OF APPEAL.
SAMUEL PROPPER,		
<i>Appellant,</i>		
and		
20 ASA L. COLSON and FRANK DAVIS,	}	
<i>Respondents.</i>		

30 The answer of the above-named respondents, Asa L. Colson and Frank Davis, to the petition of appeal of Samuel Propper, appellant.

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless say and admit that a decree was on the fifth day of January, nineteen hundred and sixteen, made and entered in the Court of Chancery in the cause

for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree is agreeable to equity and pray that the same may be affirmed with costs to be adjudged to these respondents.

Dated this twenty-first day of March, nineteen hundred and sixteen.

10

LOUIS H. MILLER,
*Solicitor for and of Counsel
with Respondents.*

20

30

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

10	Between	}	ON BILL, &C. FINAL HEARING.
	SAMUEL PROPPER,		
	<i>Complainant,</i>		
	and		
	ASA L. COLSON, <i>et als.</i> ,		
	<i>Defendants.</i>		

20 Before his Honor, E. B. LEAMING, Vice-Chancellor, at the Chancery Chambers, Camden, New Jersey, on Wednesday, December 29th, 1915.

APPEARANCES:

S. STANGER ISZARD, ESQ., and FRANCIS D. WEAVER, ESQ., for complainant.
LOUIS H. MILLER, ESQ., for defendants.

30 Mr. Iszard: The complainant offers in evidence "Catalogue of Ackley's 12th Annual Combination Auction Sale of Wildwood Real Estate, Monday and Tuesday, August 17th and 18th, 1914, at the Casino Band Stand on the Boardwalk, Wildwood, New Jersey," so far as it relates to the terms and conditions of this sale and the property in question.

The Vice-Chancellor: Is it admitted that that is the catalogue that was in use?

Mr. Miller: We admit that.

The Vice-Chancellor: Let it be marked.

(Said book marked Exhibit C1.)

Mr. Iszard: Complainant offers as an exhibit a 10 paper writing dated August 17th, 1914, signed by Samuel Propper, with a receipt endorsed thereon for \$2,500, signed by John A. Ackley, per W. E. Zeller, which is the paper writing referred to as the agreement signed after the sale.

The Vice-Chancellor: Let it be marked, if there is no objection.

(Said paper marked Exhibit C2.)

20

Mr. Iszard: Complainant offers in evidence a deed, produced on notice from the other side, made by Asa L. Colson and Anna R. Colson, his wife, and Frank Davis and Sallie E. Davis, his wife, to Samuel Propper, dated September 25th, 1914, which is the deed tendered at a settlement under the alleged sale and refused by the complainant.

(Said paper marked Exhibit C3.)

30

Mr. Iszard: This deed is marked with the initials "S. S. I." and "W. E. Z." for identification.

The Vice-Chancellor: Is it stipulated that that is the deed that was tendered and refused?

Mr. Miller: That is the one.

Mr. Iszard: The complainant offers certified copy of deed from the Wildwood Beach Improvement Company to Asa L. Colson and Frank Davis, dated August 26th, 1913, and recorded in the Clerk's Office of Cape May County in Book 293 of Deeds, page 216.

10 (Said paper marked Exhibit C4.)

SAMUEL PROPPER, the complainant, being duly sworn according to law, on his oath says:

By Mr. Iszard:

Q. Mr. Propper, where do you reside?

A. Manayunk, Philadelphia.

20 Q. Mr. Propper, did you attend a public sale or auction of lots in Wildwood during the summer of 1914?

A. Yes, sir.

Q. Do you recall the date?

A. August the 17th.

Q. How did you come to go to that sale?

A. I heard about it for the last few years, and then I seen it one day advertised in one of the Philadelphia newspapers and I thought "I am going to
30 attend the sale."

Q. Did you attend the sale on August 17th, 1914?

A. Yes, sir.

Q. Witness is shown Exhibit C1 and asked whether he received that catalogue prior to the sale?

A. Yes, sir; as soon as I got there they give me the catalogue.

Q. Did you look over this catalogue when you received it?

A. I looked it over; yes, sir.

Q. Is the property set forth in No. 25, on page 24 of that catalogue, the property in question in this suit?

A. Yes, sir.

Q. Did you bid upon that property at the sale?

A. Yes, sir.

Q. Before bidding on this sale did you look over the terms and conditions as set forth in the catalogue marked Exhibit C1? 10

A. I didn't look anything over, because I came in there when the sale was already—when they sold lots already, I didn't come in the first of the sale, the train got in late.

Q. Were the terms and conditions announced at the sale in question, Mr. Propper?

A. When they came to that lot they announced, "Gentlemen, we are going to sell lot number so-and-so on that page." Then I looked up that page, the description on that page, that is the lot they was going to sell, and then they pointed out from the Boardwalk the lot which they were going to sell, because it got a mark like a lemon on it, large lemon, lemon stand, looked like a lemon. 20

Q. When this lot known as No. 25 in the catalogue was put up for sale, was the announcement as contained in the catalogue read?

A. As in the catalogue, yes, sir; it was even pointed out. 30

The Vice-Chancellor: What he wanted to know was whether the catalogue was read publicly by the auctioneer or by any one.

Q. Did you read over the announcement in the catalogue before the bidding?

A. When they announced a certain lot I read that over, yes, sir; when they announced that lot I read it over, the dimensions, the size of the lot.

By the Vice-Chancellor:

Q. And the terms of sale,—did you read over the terms?

A. The terms, no.

10

By Mr. Iszard:

Q. Were the terms, as set forth on page 24 in the catalogue, read at the sale?

A. That I couldn't say.

Q. At the time of the sale and prior to the property being struck off to you were the terms and conditions at the front of the catalogue, on page 1 and 2 and 3, stated at the sale? In order that you may know what they are I show you Exhibit C1.

20

A. That I don't know, because Mr. Ackley held a speech there for such a long time about it, I don't know anything what he said then.

Q. Mr. Propper, what announcement was made, if any, as to encumbrances upon this property at the sale?

A. He announced at that time it would be sold free and clear of all encumbrances, a clear title, and they will give free papers, no charge for the papers.

30

Mr. Iszard: Now, it seems to me, your Honor, that the terms of the announcement in their own catalogue as regards this particular piece of property which was struck off to the complainant should be read in as part of the evidence in this case, as the terms upon which they sold the property.

The Vice-Chancellor: There is no question pending now.

Mr. Iszard: I wish to read the announcement into the testimony so that it will be a part of the record, as to this particular lot.

The Vice-Chancellor: The catalogue is offered.

Mr. Iszard: The catalogue is offered as a whole, 10
but it will be pretty bulky to have the whole thing
go up as a record.

The Vice-Chancellor: You can refer to whatever pages you want to call attention to, which can be made a part of the record.

Mr. Iszard: I call attention to page 24 of the catalogue marked Exhibit C1, which reads as follows: "No. 25. The most valuable Boardwalk corner with Riparian Rights on Five-Mile Beach to be sold to the highest bidder without reserve. This plot of ground has a frontage of 67½ ft. on the Boardwalk with a length or depth of 80 ft. on Wildwood Avenue and extending under the Boardwalk into the ocean with riparian rights in parallel lines the width of 67½ ft. There is no other plot of ground as valuable from a business standpoint which can be obtained by you at the present time. This plot is at the foot of Wildwood Avenue. One 30
of the best business streets on the island. It leads direct from the Pennsylvania and Reading Railroad stations to the ocean, on which is situated two banks, leading business houses and hotels. It is the keystone of the Boardwalk front. This plot we desire to sell as a whole, but if the purchaser so desires,

we will divide it. It will positively be sold without reserve to the highest bidder. Terms:—10 per cent. of the purchase price to be paid in cash on day of sale, 30 per cent. of the purchase price to be paid in cash when deed is given, the balance or 60 per cent. of the purchase price can remain on mortgage if the purchaser so desires. To be sold free and clear of all encumbrances. Taxes of 1914 to be paid by the present owner.”

10

Mr. Iszard: I also call attention to the announcement by John A. Ackley as printed in said catalogue on page 1, which reads as follows: “Important to Buyers. This catalogue is issued for the purpose of locating the properties to be sold in such a manner that you can get full information in regard to their surroundings, condition, utility, valuation, &c., before the day of sale, that you may buy intelligently and profitably. Take it, locate and inspect the property, mark your catalogue and bring it with you to the sale prepared to buy. Will be pleased to show and give full information in regard to any and all properties to be sold, before day of sale. John A. Ackley, Auctioneer and Appraiser, Office, Boardwalk and Magnolia Avenue, Wildwood, N. J.”

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Mr. Iszard: Also terms and conditions of sale as set forth on page 2 of the catalogue, which read as follows: “Terms and Conditions of Sale. A deposit of ten per cent. of the purchase price must be paid on the day of sale when property is struck off or in default of which the property will be put up again and resold to the next highest bidder, the balance of the purchase moneys to be paid as may be agreed upon on day of sale. All properties sold to be free and clear of all incumbrance and taxes for

30

1914 paid unless otherwise stated. Titles perfect or no sale. N. B. Every lot to be sold will have marker upon it with lot and block number. Go and see them, mark your catalogue and come prepared to buy intelligently.”

Mr. Iszard: And the announcement on page 3 of the catalogue, which reads as follows: “Announcement. In this, my Twelfth Annual Auction Sale, I have entered more Properties to be Sold absolutely without reserve than ever before offered, and among them are the very cream locations of the Resort. I need not tell you of the weather conditions that have been so unprecedented during July of this year, but I must tell you that by reason of this you will have the opportunity to buy many choice locations at your own price. I believe there is no more safe investment in this country today than Seashore Real Estate. The future of Wildwood is assured. John A. Ackley.”

10

20

By Mr. Iszard:

Q. Mr. Propper, when this lot in question, numbered 25, was put up for sale, what did you do?

A. I bid on that property.

Q. Was there any competition in bidding?

A. Yes, sir, must have been competition, because I bid the highest price; the auctioneer went right along; I don't know whether he got each bid.

30

Q. There was several bids made before it was struck off to you?

A. Yes, sir.

Q. At what bid was the property struck off to you?

A. When it reached the sum of \$26,925, being sold

by the front foot,—it amounts in value to that much for the whole property.

Q. You said “being sold by the front foot”?

A. Yes, sir.

Q. How was this property sold?

A. Well, I paid about \$460 a front foot on the corner lot.

Q. Then do I understand that you bid per front foot?

10 A. Yes, sir.

Q. And you arrive at the sum total of your bid by the bid per front foot?

A. Yes, sir.

By the Vice-Chancellor:

Q. How much a front foot did you bid?

A. \$460 on a corner lot, and the next lot to it brought less, about three hundred and something,
20 three hundred and fifty or three hundred and sixty, something like that.

The Vice-Chancellor: Are both lots in question here?

Mr. Iszard: Yes; there are three lots in question.

By Mr. Iszard:

30 Q. What was done after the lot was struck off to you, Mr. Propper?

A. After it was struck off to me Mr. Zeller called me over to the stand to sign the agreement of sale, and I asked Mr. Zeller, “Is that the lot I bought as in the catalogue on that page?” He said, “Yes,” and I signed the book and I give \$2,500 deposit.

Q. Witness is shown Exhibit C2 and asked if that is the paper writing or agreement he signed immediately at the close of the sale.

A. That is the agreement of sale; yes, sir.

Q. Was anything said at the time Exhibit C2 was signed about the encumbrances upon this property?

A. No, I didn't say anything about—clear of all encumbrance, that is what they announced, the auctioneer.

Q. And the agreement so states, that it was free and clear of encumbrance? 10

A. Yes, sir.

Q. Now, Mr. Propper, was this agreement read to you or did you read it before you signed it?

A. I didn't read nothing at all, because they called me up to the stand, I signed it right away and I gave the deposit right away.

Q. Did you ask any questions before you signed the paper?

A. The only question I asked,—when I got on the stand I asked “Is that the lot I bought there?” And he pointed out this lot I bought. “Where that lemon is?” He said “Yes,” and I signed it right away. 20

Q. Was the sale still going on?

A. Oh, yes, sir; I remained there until my next train went up, because it was interesting to listen to the sale.

Q. What is the next step you took in regard to the lots in question?

A. The next step I took when they had the next sale on September—on Labor Day, September 7th,— 30

Q. I am speaking now in reference to this particular property: What did you do after you had bought this particular property at the sale?

A. The next I did after Labor Day, I gave to Mr.

Bowker, my lawyer, gave him the receipt that he should get me the title to the property, should look it up.

Q. What was the next thing you heard through Mr. Bowker in regard to the property in question?

10 A. The next Mr. Bowker notified me that he heard—he was notified by the title company that there was a lot of restrictions against it and I can't build such and such thing, there is different restrictions on it, and I said to Mr. Bowker, "If there is so many
restrictions I don't want the property, because I bought it clear and I bought it for investment purposes."

Mr. Miller: If your Honor please, I don't suppose that has any particular evidential value, this conversation between himself and his lawyer.

20 The Vice-Chancellor: It has no force at all except to show that he found it out then.

Mr. Miller: I make a formal motion to strike it out.

The Vice-Chancellor: No; I think it might go to show his mental attitude.

Mr. Miller: If that is the reason I object to it.

30 The Vice-Chancellor: I apprehend it will be followed up by what he did. Conversation between him and his attorney is not competent.

Mr. Miller: Here is the psychological idea back of this thing to impress your Honor that while he bought this property August 17th—

The Vice-Chancellor: If you insist on it it may be stricken out.

Mr. Iszard: Just how much is stricken out? The fact that he referred the matter to his attorney is competent.

The Vice-Chancellor: Well, that can stand, and the fact that he first ascertained that these building restrictions were on the lot when the title company reported their existence is competent. 10

By the Vice-Chancellor:

Q. Is it true that you did not know of these restrictions until——

A. I didn't know it before.

Q. ——until the title company informed you?

A. Yes, sir.

Mr. Iszard: I would like to put the restrictions in now. I wish to read into the record the restrictions as contained in Exhibit C4, which restrictions are in the deed from Wildwood Beach & Improvement Company to Asa L. Colson and Frank Davis, conveying this particular property to the vendors at this sale. 20

The Vice-Chancellor: Are they not set forth in your bill? 30

Mr. Iszard: They are set forth, yes; I don't know whether they are fully set forth, but they are referred to and set forth, though perhaps not in detail.

Mr. Weaver: You have got those in your bill, Mr.

Iszard, and they are also referred to in this agreement, so it is hardly necessary to further encumber the record, and, in addition, the deed to Colson is offered in evidence.

The Vice-Chancellor: I do not understand that that is a matter of dispute at all.

Mr. Iszard: None whatever, as I understand it.

10

By Mr. Iszard:

Q. When did you first receive knowledge that these conditions and restrictions covered the premises in question?

A. I received it about a few weeks before the time was for the settlement, I was notified then.

Q. Before the settlement?

A. Yes, sir.

20

Q. From whom did you receive that information?

A. From Mr. Bowker.

Q. Your attorney, who was looking up the title for you?

A. Yes, sir.

Q. Now, Mr. Propper, did you at the time of the sale know who was bidding against you when you were bidding upon the property in question?

A. No, sir.

30 Q. When did you first receive any knowledge or notice of who was bidding against you at that sale?

A. About three weeks after the sale, being notified by Mr. Kearney that the owner was bidding against me.

Q. From whom did you receive knowledge of who was bidding against you at this particular sale?

A. A Mr. Kearney.

Q. Was there any day fixed for settlement in regard to this lot in question?

A. Yes, sir.

Q. When and where?

A. Settlement was fixed at Mr. Zeller's office in Wildwood, and I don't know now the date, what date it was, I guess,—you was there, Mr. Iszard, you can tell.

Q. You attended that settlement?

A. Yes, sir.

10

Q. Who was with you?

A. Mr. Iszard was there, Mr. Bowker, Mr. Kearney and Mr. I. J. Rigelhaupt.

Q. Just state what occurred at that settlement in your presence, so far as you have personal knowledge of it.

Mr. Miller: If your Honor please, I thought that was admitted, we tendered this deed and it was refused, that is all there is to it.

20

The Vice-Chancellor: There is a denial in the answer that it was refused on the grounds that are stated in the bill. I assume that is what he is approaching.

Mr. Iszard: That was the purpose of asking the question.

Q. Who represented you at that settlement, Mr. Propper? 30

A. At that settlement Mr. Iszard and Mr. Bowker, and when Mr. Iszard said to Mr. Zeller that the property has been bid up the gentleman admitted—Mr. Colson admitted that he bid on this property himself.

Q. Do you recall what Colson said at that time?

A. Mr. Colson admitted that he bid on the property.

Q. Just what did he say?

A. Well, that I can't remember, all the words, but he was there, and Mr. Kearney was there, and Mr. Rigelhaupt, and Mr. Ackley, and Mr. Miller was there, and all of the other gentlemen, and he admitted in all their presence that he bid on the property.

10

By Mr. Miller:

Q. Which Colson are you talking about?

A. That gentleman there (indicating).

Q. This man said that (indicating)?

By the Vice-Chancellor:

20 Q. You said Mr. Colson. Do you mean Mr. Colson, the defendant here, one of the owners of the property?

A. One of the owners, he was there and admitted that he bid on the property.

By Mr. Miller:

Q. And you are certain that that was said in my presence?

30 The Vice-Chancellor: Now, Mr. Miller, wait until your cross-examination. He has said that in your presence that statement was made. There is no uncertainty about the record.

A. Maybe at that time you might have stepped out there into the next room, but all the gentlemen

were all there, there was plenty of them there, the full room was there who heard it.

By the Vice-Chancellor:

Q. This is the man you mean, sitting there on the seat (indicating defendant, Asa L. Colson)?

A. Yes, sir, that is the gentleman that was there.

Q. And he is the one that made the admission?

A. Yes, sir.

10

By Mr. Iszard:

Q. Why did you refuse to accept the deed tendered at that time—that settlement?

A. On account of the restrictions in the deed.

Q. Any other ground?

A. And also that the size of the lot was not the same as I bought or according to the catalogue.

Q. Was any other ground named? Was there anything said about the bidding at the sale at that time? 20

A. Oh, on account of the bidding, as I stated before, on account of the bidding.

Cross-examination.

By Mr. Miller:

Q. State again who was present when Colson admitted to you that he bid on the sale. I mean Asa L. Colson, this man sitting here. Now, who was present when he told you that he bid at this sale? 30

A. Well, we were all present there, the room was full.

Q. State the names.

A. Well, Mr. Iszard was there, Mr. Bowker was there, Mr. Kearney, Mr. I. J. Rigelhaupt.

Q. Iszard, Bowker and who else?

A. Mr. Colson was there.

Q. Yes?

A. And you were running in and out, and Mr. Ackley, and I don't know if you were just at the same time—you was in the room there, you was in and out, because there was a room and a door opened there one with the other.

Q. Was Senator Ackley there?

A. What?

Q. Was Senator Ackley there?

A. Mr. Ackley was there. Well, he was right there in the room, but I don't know whether he was in his presence, because he was in and out.

Q. Was Zeller there?

A. Mr. Zeller was also.

Q. Now, who were those other men you named?
20 Kearney, did you say?

A. What say?

Q. You named another man, Mr. Kearney?

A. Kearney, yes, sir.

Q. Anybody else?

A. I don't know who else was there at that time.

Q. Do you know Mr. Nickerson?

A. No.

Q. Baker Brothers' stenographer,—was he there?

A. That I don't know.

Q. Senator Baker was there, wasn't he?
30

A. I wouldn't know, I never seen Mr. Baker; I don't know which one was Senator Baker because I don't know him.

Q. Now, to come back to this sale: You had the catalogue in your hand at the time of the sale and you got the description of these lots from the catalogue,—is that correct?

A. Yes, sir.

Q. You knew nothing of the lots except from the catalogue?

A. Yes, sir.

Q. Well, now, did you buy from the catalogue description?

A. Yes, sir.

Q. Well, isn't the catalogue description of a tract of land comprising three several lots?

A. Yes, sir.

10

Q. Now, you first bought lot 30, did you not?

A. I bought first the lot—that corner lot.

Q. Corner lot, lot 30?

A. Yes.

Q. Now, did you have a map of that lot there?

A. Map? I didn't see no map.

Q. Wasn't there a large map there displayed?

A. Oh, there was a map displayed near the stand but I wasn't near the stand at all.

Q. Well, in indicating lot 30 this lot was referred to, wasn't it, Mr. Propper?

20

A. When they read off the catalogue at the time of this sale they pointed out from the map, I am on the other side, you can't see nothing else, and nobody else could see what is on the map, though I didn't go over there and Mr. Ackley can testify to the fact that I didn't go over there.

Q. Mr. Propper, whatever information you had with reference to lot 30 you got from the map and what was said at the sale, did you not?

30

A. I didn't have anything from the map.

Q. Well, you didn't have anything from the catalogue, did you?

A. From the catalogue?

Q. You didn't have any description from the catalogue?

A. I had a description from the catalogue.

Q. Of lot 30?

A. It was pointed out, the size on the catalogue is all I know.

Q. How big was this map?

A. The map would be about—well, about—I don't know how large, be about between—half of the window there.

10 Q. Mr. Propper, you had been at Wildwood before, had you not?

A. I had before; yes, sir.

Q. And you were interested in investments along that beach, weren't you?

A. I have one investment there; yes, sir.

Q. That investment is in Block B, which is the adjoining block, isn't it?

A. Adjoining block, that is the next corner, yes, sir.

20 Q. And on the next block and on the corner lot you made a loan of considerable size the year before?

A. Yes, sir, \$6,500.

Q. That was to a man named Gould?

A. Yes, sir.

Q. Mr. Bowker looked up that title for you?

A. Mr. Bowker; yes, sir.

Q. And you made the loan after he investigated that title?

A. Yes, sir.

30 Q. And that mortgage you took was subject to the same restrictions as the lots in question?

A. That I don't know, because when I take a mortgage I never look at any restrictions at all; if a man tells me the lot is worth \$13,000, and he have been offered by the same party he bought it from before—is offered \$15,000 for it I think I am safe if I give him \$6,500 mortgage on it.

Q. But your mortgage did have the same restrictions on the land, nevertheless?

A. That I don't know.

Q. Haven't you looked at it since?

A. I never look at any mortgage at all, because Mr. Bowker handles my mortgages for over twenty years, and I never looked a single one up, and I have perfect faith for the last nearly thirty years, and my father.

Q. Now, you went to the sale on Labor Day,—— 10
another sale?

A. Yes, sir.

Q. And you bought the Gruner lots subject to the same restrictions?

A. I bought the Gruner lots free of all encumbrance, free and clear of all encumbrance.

Q. That sale was about—nearly three weeks after the other sale?

A. Three weeks afterwards, yes, sir.

Q. And you tell the Chancellor that having bought 20
this valuable property for \$26,000 you did not look up the title at all until after the Labor Day sale?

A. Because I didn't look at any title, nothing at all, as I was on my vacation at that time and I thought until I come back, because I have plenty of time to make a settlement, and until about a month later yet, over a month time yet, and I didn't want to bother anything while I am on my vacation.

Q. Do you remember the date when you were first 30
informed of these restrictions?

A. No, I can't remember when I have been notified; I guess Mr. Bowker knows; as soon as he was notified by the title company, but I can't remember now.

Q. Mr. Bowker passed on the title to the Gould lot, the lot on which you made the Gould loan?

A. Yes, sir.

Q. Had you owned any other property at the beach or invested in any other property?

A. No.

Q. And you didn't know anything about these restrictions?

A. No; I didn't know anything about the restrictions, and I never look at the restrictions when I take a mortgage.

10 Q. You didn't consider when you took the Gould mortgage—well, you say you didn't even know about the restrictions?

A. No.

Q. Mr. Bowker didn't report to you that there were restrictions there which would impair the value of the property?

A. No; he didn't tell me anything about the restrictions.

20 Q. He didn't say there was any restriction there that would hurt the value, did he?

A. Hurt the value? I don't know. If a man pays thirteen thousand, or eleven thousand,—when a man tells me it is worth thirteen thousand, and he paid \$13,500 for the property, I think I am safe to give \$6,500 on it.

Q. Well, now, you said you didn't read this paper you signed?

A. No, I didn't read that.

30 Q. Will you state whether or not the paper was read by the auctioneer, Senator Ackley, before the lot was offered for sale? Didn't he read this paper?

A. I think he read the catalogue, because he pointed out, "Gentlemen, we are going to sell on page so and so, lot so and so in the catalogue," and I looked up that lot and for that I go by the catalogue, because Mr. Ackley said at the time of the sale they

going to sell on that and that page and said which lot, and that I bought, and for that I look over the page to the lot and I bought on it.

Q. Did he describe this property before it was struck off?

A. He called out the same dimensions, the same size, as on the catalogue.

Q. Well, now, when he sold lot 30 what did he say about that? That wasn't on the catalogue.

A. Lot 30? I can't tell any more now what he 10 said at that time.

Q. Well, he did say something, didn't he?

A. What?

Q. He did say something about it?

A. He said he sell it clear of all encumbrance, and he talked there for about three-quarters of an hour, maybe a half hour.

Q. How big did he say lot 30 was?

A. Lot 30,—I can't remember now, but that lot— I bought this, I looked on the catalogue and bought 20 this lot, just whatever the size of the lot is I bought that lot, that is, the length of the lot.

Q. What did he say when he sold you the adjoining lot, lot 31? What was said about that?

The Vice-Chancellor: I understand the catalogue treats the three lots as one but they were actually sold separately by the front foot, were they?

Mr. Miller: Yes, your Honor. They are num- 30 bered on a certain plan.

The Vice-Chancellor: I apprehend this witness does not know them by numbers, but perhaps he could identify them by the location, the corner lot, for instance.

Q. What did he say about the corner lot?

A. The corner lot, I seen the size of the lot, 80 feet on Wildwood avenue, he announced 80 feet on Wildwood avenue.

Q. Did he say anything about the size of that lot? You say he referred to the corner. What did he say?

10 A. He said, "That is 67½ feet on there, but a man has got the privilege to take the corner lot at a price, he don't have to take the next lot to the corner, he has got the privilege to take one lot or two, that is, lots together." He want to sell one or two with the privilege and I took the corner lot, and then afterwards I bought the next lot to it for a lower price.

Q. And there was a statement made before each particular lot was sold?

20 A. I say I took so many feet goes with the lot, with the corner lot, I can't remember how many feet, whatever it was, and next they sold the other lot.

Q. You have said that you didn't remember whether or not Senator Ackley read this paper that you signed before the lots were sold?

A. No, I don't, I didn't see him read any paper at that time—the catalogue.

Q. Did his son, Charles Ackley, read it? Was there a young man there who did read this paper?

A. I didn't see anybody read that paper, and I know and read off from the catalogue.

30 Q. Before the sale of each tract, didn't the auctioneer or his son read from some paper, not from the catalogue, a particular description of the land to be sold?

A. I didn't see anybody read any paper there, didn't see anybody.

Q. Would you swear he read from the catalogue?

A. Yes, sir.

Q. Well, in connection with the catalogue, did he call attention to the map from time to time?

A. He pointed out the map on the other side, a lot, and he called out the catalogue, now he said, "Now, we going to sell lot so and so on the map." I bought that and that, you know, but I had a catalogue to guide me. They pointed out "that there lot is sold." Mr. Ackley, after he sold one lot then—he didn't sell one lot after the other, then he 10 said, "Well, now, we going to sell on page so and so." Then he went back on the other page, and then he jumped again to the end of the page. He didn't sell one after the other, one, two, three.

Q. Now, you said about two weeks before the settlement you found out about the restrictions in your examination of the title,—is that about right?

A. Well, as soon as I had notice from the title company; I don't know it was two weeks or three weeks before the settlement I found out about the 20 restrictions; before that I didn't know anything about the restrictions.

Q. Three weeks or four weeks before the settlement?

A. About two weeks, I can't remember now what it was.

Q. What title company is it?

A. What title company? Excuse me; I don't know myself even now what title company; I guess my lawyer can tell you to that effect. 30

Mr. Iszard: It is the West Jersey.

Mr. Miller: Have you got there what they reported?

Mr. Iszard: Yes.

Q. These three lots were sold one after the other, were they not—first the corner lot, then the next lot, and then the third lot?

A. First the corner and the next lot to it, the one back of it, the corner and the next lot in one lot, and then the end lot separate.

Q. The corner lot you gave \$460 a foot for?

A. Yes.

10 Q. And the adjoining lot, lot 31, you gave \$350 a foot for, did you not?

A. Yes, sir, something like that.

Q. And then still the next to that you gave \$350 for?

A. That is right.

Q. And they were sold one after the other?

A. One after the other; yes, sir.

The Vice-Chancellor: Three sales?

20 Mr. Miller: Three sales.

The Vice-Chancellor: Sold in three parcels or two parcels?

Q. When you bid in the lot adjoining the corner you say you had the privilege of taking the other lot and you did elect to take it,—that is correct, is it not? You decided you would take the other lot that you bought, the second?

30 A. I don't know what it was, what I did about it, I thought I—

Q. Well, were there two sales or one or three?

A. I don't know any more, I thought two sales.

Q. Two sales?

A. I thought it was two sales, I don't know what in fact—I did say that before, I thought it was two

sales, first the corner and the next lot to it in one lot and then the end lot.

Q. In ascertaining the amount of feet or frontage you really took the measurement along the back end of the lots, did you not, Mr. Propper?

A. What do you mean,—the back end of the lot?

Mr. Miller: May I illustrate?

Mr. Iszard: Certainly.

10

Mr. Miller: The measurement was made along the back end, it is called the front foot, it is really the back foot, isn't it, Mr. Iszard, as you understand?

Q. The measurement was made along the alley, was it not?

A. How do I know? I don't know, because I went to the sale and bid on the property, I didn't look at anything you had measured there, I looked in the catalogue. 20

Mr. Miller: That is admitted, isn't it, Mr. Iszard, that the measurement is along the alley?

Mr. Iszard: I so understand, although the catalogue—well, I will admit just this far: That the width of the lot was supposed to be $67\frac{1}{2}$ feet. I assume that is what he made his calculations on. He knew nothing about an alley and there is no reference to an alley on any of the records, he knows nothing about an alley, but the width of the alley being $67\frac{1}{2}$ feet— 30

The Vice-Chancellor: There is no dispute about

the front distance, the disputed dimension is the depth?

Mr. Iszard: Is the depth; yes, sir.

Mr. Miller: I don't think there is anything showing just what the depth is. It goes down to high-water mark and then down to the exterior wharf line. I don't know what the depth is myself.

10

By Mr. Iszard:

Q. Mr. Propper, under cross-examination you referred to two separate biddings,—is that correct?

A. Yes, sir.

Q. Was there the same competitive bidding at each of those sales?

A. Well, I didn't see anybody bid on the first bid and the second bid only I got witnesses to the fact
20 who notified me that the owner of the lot was bidding against me.

Q. Well, was the property struck off to you upon your first bid or was there further bidding?

A. There were further bidding.

Q. In each instance?

A. Yes, sir.

Q. When the property was struck off was it struck off as a whole?

A. Separately.

30

GEORGE C. BOWKER, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:

By Mr. Weaver:

Q. Mr. Bowker, what is your profession? 10

A. I am a member of the Philadelphia bar and I have a large real estate business in the suburbs and Manayunk, which is looked after largely by my brother, a member of the bar, and who is also a member of the firm.

Q. Were you approached by Mr. Propper here to represent him in the matter of the purchase of some property that he had made at Wildwood in August last?

A. Yes. 20

Q. Did he see you personally?

A. He saw me personally.

Q. Now, what did he state to you at the time he came to your office? What did he want you to do for him?

A. He wanted me to have the title passed to two lots which he had bought that is the lot at Wildwood avenue and the Boardwalk which is in question in this suit, and another known as the Gruner lot. At that time he had bought both lots. 30

Q. Had he bought them at the sale or two different sales?

A. No; the first was bought at the sale on September 14th, or August 14th, I think it was, and the next I believe was on Labor—

Q. August 17th?

A. August 17th, and the next was on Labor Day, so that when he came to me was after Labor Day.

Q. What did you do after he came to your office?

A. In pursuance of that I ordered title insurance with the West Jersey Title Company.

Q. And did they produce to you a certificate of search or a settlement certificate?

A. They produced a settlement certificate.

Q. I am speaking now of the lot sold on the 14th
10 day of August.

A. Yes; they produced a settlement certificate.

Q. Is it the one you have in your hand?

A. This is the settlement certificate, which is dated September 19th, 1914.

Q. Now, as a result of that settlement certificate what did you say to Mr. Propper here?

Mr. Miller: I don't see that that is proper. I object to it.

20

The Vice-Chancellor: He can show that he called his attention to the restrictions, I think.

A. Yes. I sent for Mr. Propper and told him that there were restrictions against these particular lots, which are the same as are set forth in this bill, and he asked me my judgment as to the —

The Vice-Chancellor: Well, that part is not com-
30 petent.

Q. You informed him of the nature of the restrictions?

A. I informed him, I gave him a copy of the restrictions and that was all, I told him what they were.

Q. That was, of course, the first knowledge you had that there were any restrictions?

A. That was the first knowledge I had of any restrictions on the property, yes.

Mr. Weaver: I would like to offer that settlement certificate in evidence.

Mr. Miller: What is the purpose of it?

Mr. Weaver: The purpose is to identify the date when this matter came to the attention of Mr. Prop- 10 per.

Mr. Miller: For that purpose I do not object to it.

(Said paper marked Exhibit C5.)

Q. Now, what followed, Mr. Bowker, after you called Mr. Propper's attention to the restrictions in the title or the reservations running along with the 20 land, in your dealings with Mr. Propper?

A. Mr. Propper informed me that he would not take the property with those restrictions on it. I also called his attention to the variation in the descriptions.

Q. Did you have before you the published notice of sale, as well as his agreement?

A. Yes, I had both of them.

Q. Then you are familiar with those, are you?

A. Familiar with these.

Q. Both of which have been offered here in evi- 30 dence?

A. Exactly.

Q. And did you call his attention then to the variance in the description?

A. I called his attention to the variance in the description.

Q. Then what followed after that?

A. In pursuance of that I saw Mr. Zeller at his office in the Drexel Building, and——

Q. Well, now, who is Mr. Zeller?

A. Mr. Zeller is the attorney, according to my information, for the Wildwood Improvement Company, who represented Messrs. Colson and Davis in this transaction.

Q. Well, did you afterwards meet Mr. Zeller in
10 connection with Messrs. Colson and Davis?

A. I went to Wildwood ——

Q. I want to find out now, Mr. Bowker, whether Mr. Zeller at that time or subsequently was representing Messrs. Colson and Davis in this transaction in any way?

A. Yes.

Q. He was?

A. Yes.

Q. Well, now, when you discovered these reserva-
20 tions or restrictions in the deed you say went to Mr. Zeller then?

A. Yes.

Q. What did Zeller have to say to you?

A. Well, Zeller said he didn't know whether they were encumbrances or not.

Mr. Miller: Objected to, if your Honor please. It is not exactly the proper way to prove the agency of Mr. Zeller.

30

A. (Resuming) I might add in furtherance of that that Mr. Zeller ——

The Vice-Chancellor: Wait a moment. Counsel is speaking. You are interrupting him. Proceed, Mr. Miller.

Mr. Miller: He says he represented Colson and Davis in some way. I think he ought to be more specific. I do not understand that he represented them at all.

The Vice-Chancellor: Before introducing any statements of Mr. Zeller you will have to show his authority.

Mr. Weaver: Yes.

10

Q. Now, Mr. Bowker, subsequently to the time that you went to Mr. Zeller's office,—first, did you meet Mr. Zeller in connection with Messrs. Colson and Davis?

A. Yes, I met him.

Q. Where?

A. In Wildwood, in Mr. Zeller's office, which was the place fixed for settlement; that was on September 25th, 1914.

20

Q. Well, who were present there?

A. There were Mr. Izard, Mr. Propper, —

Q. Well, I am not so particular at this time about all those parties, but was Mr. Colson and Mr. Davis there?

A. Mr. Colson, and Mr. Davis, I think, was there, and, also Mr. Zeller was there, Mr. Ackley was there.

Q. Well, who was speaking for Messrs. Colson and Davis?

30

A. Well, I talked with Mr. Zeller about it.

Q. Well, was he there apparently acting for them and did they permit him to talk for them?

A. They apparently permitted him to talk for them, he was acting for them.

Q. Well, how was he acting for them? What the Court wants to know is how he was acting.

The Vice-Chancellor: Do you claim, Mr. Weaver, that Mr. Zeller has made any important engagement for these defendants or has in any way interfered with their rights? If you do not this is not material. If you do we will have to require strict proof of agency. Of course, I do not know whether you claim that Mr. Zeller has in any way waived the rights of these defendants or not. Do you?

- 10 Mr. Weaver: All I wanted to show was just what happened at this meeting between Mr. Bowker and Mr. Zeller prior to the meeting in Wildwood.

The Vice-Chancellor: But my inquiry is whether or not you are claiming that Mr. Zeller has in any way waived any rights the defendants might have, because if you do claim that it will require strict proof of agency.

- 20 Mr. Weaver: No, I am not claiming that.

The Vice-Chancellor: Well, it is not a matter of any importance, then.

Q. Now, when you went to see Mr. Zeller in the Drexel Building, was there anything said there at all regarding this sale?

A. Mr. Zeller said he had prepared the deed —

Q. Yes?

- 30 A. —to Mr. Propper, and he showed me the deed, and I called his attention to the restrictions which I had discovered by reason of this settlement certificate.

Q. How did it come to your knowledge that Mr. Zeller was preparing this deed for this property?

A. Because the settlement—as I recall the agree-

ment, it provides for the settlement at his office in Wildwood, the agreement which was signed at the public sale.

Q. And you went to his office in the Drexel Building?

A. I went to his office in the Drexel Building so as to take the matter up with him in advance.

Q. Well, then, after that where did you meet the parties?

A. I met the parties in Mr. Zeller's office in Wild- 10
wood, N. J.

Q. Well, now, who was present at that time,—all of the parties?

A. As near as I can recall was Mr. Propper, Mr. Iszard, Mr. Kearney, Mr. Rigelhaupt, Mr. Ackley, Mr. Zeller, Mr. Colson, and I think Mr. Davis, and Mr. Miller, I think, was there.

By the Vice-Chancellor:

20

Q. Were you having another public sale?

A. There seemed to be unusual interest in the matter.

By Mr. Weaver:

Q. Now, what took place there, Mr. Bowker, respecting the purchase of this property which Mr. Propper had proposed taking over?

A. Well, in the presence of Mr. Colson, and, I 30
think, Mr. Davis, I called to Mr. Zeller's attention the fact that there had been bidding by the owners of the property, and Mr. Colson said that he knew that was so but as Mr. Davis was buying it for himself, he did not think that would make any difference.

Q. Now, was that all that was said about the puffing of the sale or the bidding at the sale?

A. That was all that I can recall with any degree of clearness.

Q. Did you object to the purchase price of the property on account of this puffing at the sale?

A. I objected to the purchase price of the property on account of the puffing and on account of the restrictions and on account of the variance in the description.

10 Q. Now, what was said there by any of the parties, or any one representing them or apparently representing them, respecting the reservations in the deed, the restrictions in the deed?

A. I want, just by way of explanation, to say that Mr. Iszard was there really representing the parties in the case, I was simply there in connection with him.

20 Q. Well, what did you hear there in respect to the reservations in the deed, or the objections to taking the deed on account of the reservations in the deed, in a prior deed or in that deed?

A. Well, we produced the copy of the restrictions in the deed from the Wildwood Improvement Company to Messrs. Colson and Davis, and they admitted that they were correct, and in the deed which they tendered to Mr. Propper there was just a general reference to it, saying, "subject to restrictions as to sanitation and buildings," &c., without there being specific, but the full description of the restrictions was taken from the deed to Colson and
30 Davis and they admitted that those restrictions were there and they said they would not convey it clear of those restrictions.

By the Vice-Chancellor:

Q. Can you describe the variance in the descrip-

tion so far as it relates to the dimensions of the lots?

A. My recollection is that the catalogue provides for 67 feet and 5/10ths on the boardwalk with a depth along Wildwood Avenue of 80 feet and extending into the Atlantic Ocean or extending to the high water mark of the Atlantic Ocean. My recollection of the description in the agreement is that there was 67½ feet on the boardwalk with a depth westerly, giving the direction, of 60 feet, more or less, along Wildwood Avenue. In the deed that was tendered the description began at another point, it was given at a distance from Atlantic Avenue, beginning at the easterly side of a certain alleyway for adjoiners only, and extending eastwardly to high water mark of the Atlantic Ocean, together with the riparian rights, &c. 10

Q. Was the distance given?

A. 58 feet, I think. 20

By Mr. Weaver:

Q. Mr. Bowker, are you familiar with the location of these lots of land?

A. Yes.

Q. Have you been on the ground?

A. I went to the ground and examined it.

Q. Now, is there anything physically on the ground to indicate the location of these lots?

A. There is absolutely nothing on the ground, it is just a lot extending back to Atlantic Avenue; there was some buildings further north on the boardwalk. 30

Q. Is the alley in any way indicated by monuments?

A. The alley is in no way defined or were there at that time any monuments on the property at all.

Q. Now, coming back again to the day of settlement, what happened respecting the refusal to take a deed on account of the reservations in the deed and the question of false bidding?

A. In what respect do you mean?

Q. Well, did you refuse to take the deed?

A. We refused to take the deed.

Q. As tendered?

A. As tendered, yes.

10 Q. And for what reasons?

A. For the reason that these restrictions —

Mr. Miller: Well, I object, if your Honor please, that is really a mental process, whether he is testifying or not I don't know —

The Vice-Chancellor: I sustain the objection. He has already stated that he told the parties at that meeting the three grounds on which he refused to
20 accept the deed.

Cross-examination.

By Mr. Miller:

Q. Prior to the receipt of the settlement certificate from the Trust Company had you in mind the rejection of the deed, Mr. Bowker?

A. Had I in mind the rejection of the deed?

30 Q. Yes.

A. Not to my recollection.

Q. And your mind was first directed to the restrictions —

A. I say I had nothing to do with the rejection of the title at all, that is, it wasn't in my mind to reject it.

Q. Well, you were acting for Mr. Propper, weren't you?

A. Yes.

Q. You had been employed before that settlement certificate came to your office?

A. I had never personally done anything. The mortgage which you speak of had been done through our out-of-town office without my knowledge at all, I knew nothing of it at all.

Q. Well, at this time I don't refer to that mortgage, but I say, prior to the time you received this settlement certificate you had in hand for Mr. Propper the attention to this business about these titles down there, hadn't you? 10

A. Yes, before I ordered it, I certainly had, yes.

Q. Well, prior to the time you got that certificate hadn't you made some objection or intimated that you weren't going to take the deed?

A. In talking with Mr. Zeller I spoke to him about the variation in the description and he tried to reconcile the descriptions but I told him I thought it was impossible to do it, because I asked him at that time for a copy of the Colson deed, my recollection is that he had the deed in his possession, from the Wildwood Improvement Company to Colson and Davis, I am sure he had, and he showed me that and I saw the description which they had in that deed, as well as the full—no, it was just the description, the question that arose then was the question of description, I think. 20 30

Q. And you can't fix that time exactly, can you?

A. No, I can't fix that time.

Q. That is the first objection you had? That is to say, the objection about the description.

A. Yes, and that arose, I am sure of this —

Q. Was your next objection the one about the puffing?

The Vice-Chancellor: You cut him right in two, Mr. Miller. Finish your answer.

A. I am confident of this: I had no knowledge of the matter at all, for Mr. Propper or any one else, until after the second sale, which I believe was Labor Day, the first Monday in September, 1914, that is my recollection.

10 Q. Yes, but hadn't you gone into this matter prior to the time you received this settlement certificate? You said that was the first time that you knew there was any restrictions on that property, and I have asked you whether that was the first time you had objected to the title for any reason.

A. It is the first time I knew of the restrictions as they are embodied in the deed to Colson and Davis.

By the Vice-Chancellor:

20

Q. That was when you received the settlement certificate?

A. Yes, sir.

By Mr. Miller:

Q. And the first time you knew of any variance in description was when you were at Zeller's office?

30 A. Yes; that was the first time I took that up.

Q. When was that? Before you received the settlement certificate or afterwards?

A. I think that was before.

Q. Before you received the settlement certificate?

A. Yes.

Q. And when was the first time you objected on

account of puffing,—before or after you received the settlement certificate?

A. That was later, because I didn't get any knowledge of that until a very short time before the date fixed for the settlement, on September 25th, I think.

Q. Do you mean a day or so before?

A. I don't remember.

Q. But it was after you got this settlement certificate?

A. I think so.

10

Q. Hadn't you made up your mind before you got the settlement certificate to devise a method to get out of this sale?

A. Not to my recollection.

Q. Well, didn't you write a letter to John A. Ackley, dated September the 18th, 1914, referring to a letter of his of September 16th, relating to the sale at Wildwood? Did you have such correspondence as that?

A. I had some correspondence with Mr. Ackley, 20 yes.

Q. Have you got copies of your correspondence with the Senator here?

A. No.

Q. I ask you now if that is a copy of a letter you wrote to Senator Ackley (exhibiting paper to witness)? We will produce the originals.

A. Yes.

Q. That is before you got the settlement certificate, isn't it?

30

A. Yes, before I got the settlement certificate; the settlement certificate is dated the 19th, I think, I am not sure.

Mr. Miller: I ask that that be marked for identification.

(Said paper marked Exhibit D1 for identification.)

Q. Now, you say that in the office of Mr. Zeller at Wildwood, in the presence of certain people, Mr. Colson said that Davis had bid on this property?

A. Yes, that it had been bid up, he thought Mr. Davis wanted it.

Q. He thought that Davis wanted it?

10 A. Yes.

Q. Who did he say did the bidding?

A. He didn't say. He said "they" did the bidding; I don't know which one he meant.

Q. Can you recall exactly what he did say?

A. No, because I addressed the question particularly to Mr. Zeller at the time, and Mr. Colson was there and he said they had done the bidding, and they —

20 Q. And you state this was said in Mr. Zeller's presence, notwithstanding your letter of the 18th, written on September 18th, —

A. I say that.

Q. —in which you warned them you were going to object on that ground?

A. Yes; oh, yes; yes.

Q. Was Senator Ackley there in hearing?

A. I don't know whether he was in hearing, he was flitting around the room from one place to another.

30 Q. I know, but was he in hearing?

A. I don't know.

Q. Was I there?

A. I don't think you were here at this point in the room when this was said.

Q. Was Senator Baker there?

A. I don't know Senator Baker.

- Q. He was around there at the time, wasn't he?
A. I wouldn't know him if I saw him.
Q. You have not had this lot surveyed, have you?
A. No.
Q. What is the depth of the lot? Do you know or don't you know?
A. I don't know, no.

10

PHILLIP AUERBACH, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:

By Mr. Weaver:

- Q. Mr. Auerbach, where do you live?
A. 305 Kaighn's Avenue.
Q. Camden?
A. Camden. 20
Q. Did you attend what is known as the Ackley sale at Wildwood on the 17th day of August, 1914?
A. Yes, sir.
Q. Were you there during the bidding?
A. I was.
Q. On the property?
A. Yes, sir.
Q. Do you remember whether any properties were struck off to Mr. Propper or not?
A. I do. 30
Q. Was there a pretty good attendance at the sale?
A. Yes, sir.
Q. Now, did you notice anybody bidding on the property that Mr. Propper bid on?
A. Well, there was a good many bidders on it.

Q. Well, did you notice either Mr. Colson or Mr. Davis bidding on this property?

A. The names of the people I don't know.

Q. Well, do you see them in court here?

A. Not now, no; I saw him here before but he is not here now; a man over there (indicating), stout man, I don't know his name; I don't see him now.

Mr. Weaver: Mr. Miller, that was Mr. Colson
10 sitting over there?

Mr. Miller: Yes.

A. (Continuing) I don't know what the name was, stout man, smooth face, sat over there (indicating).

Q. What did he do at the time—before this property was struck off to Mr. Propper?

A. Well, he was bidding on it, so was I bidding on the property, and Mr. Propper was bidding on it
20 afterwards, I went over to Mr. Propper and I says, "You stop bidding, I will buy the property." "Well," he says, "no," he says, "I want it myself." I says, "Go ahead and buy it."

Q. Well, who bid immediately preceding Mr. Propper's bid, the bid on which the property was struck off to him?

A. Who was done what?

Q. Who made the bid previous to Mr. Propper's bid?

30 A. I couldn't tell you that.

Q. You don't recall that?

A. No, sir; I don't know who started the bidding.

Q. And you don't know whose bid immediately preceded the bid of Mr. Propper?

Mr. Miller: He said he didn't know. I object to that.

A. I don't know exactly who started the bid right after he did.

Cross-examination.

By Mr. Miller :

Q. This is the gentleman (indicating person present)? 10

A. That is the gentleman, yes.

Q. Mr. Colson, you say?

A. I don't know his name. That is the man.

By the Vice-Chancellor :

Q. You say you saw him bidding on this property?

A. Yes, sir.

Q. Against Mr. Propper? 20

A. Mr. Propper, so was I bidding against him.

EDGAR F. FREEMAN, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says :

By Mr. Weaver :

30

Q. Mr. Freeman, what is your business?

A. Real estate.

Q. And how long have you been engaged in the real estate business?

A. About thirty years.

Q. Have you dealt in property in the Borough of Wildwood?

A. No, we have not.

Q. Have you placed any mortgages there?

A. No, we have not.

Q. Well, are you acquainted with seashore property?

A. Oh, yes.

Q. Have you dealt in property in other seashore resorts along the coast?

A. Ocean City and Atlantic City.

10 Q. And to what extent?

A. Not very materially.

Q. Well, you have bought and sold some properties?

A. Oh, yes.

Q. Now, do restrictions running with the land on seashore property tend to depress its value?

A. It depends on the nature of it.

Mr. Miller: I object to that, if your Honor please.
20 I do not think he is qualified as an expert to testify touching these particular parcels of lots, B and C, on which the restrictions are.

The Vice-Chancellor: Well, he has not been asked touching these.

Mr. Miller: Then I object because it is immaterial.

30 Q. Well, now, the next question is this: If a restriction such as I am about to read is imposed on seashore lots fronting on the boardwalk would such restrictions tend to depreciate the value of the land?

The Vice-Chancellor: In Ocean City or Atlantic City?

Mr. Weaver: In Wildwood.

The Vice-Chancellor He says he doesn't know anything about Wildwood property.

A. I have been to Wildwood several times, I know something about values there.

The Vice-Chancellor: If you think you can answer that question I will let you do it. I do not know whether it is permissible or not. 10

The Witness: I want to hear the restrictions read before I answer.

Q. "Under and subject to the covenants and conditions that all buildings shall be artistic in design and attractive in finish and no smithy, factory, livery stable, public garage, slaughter house or fish market shall ever be erected or conducted on the premises conveyed by this deed, and to the right of the grantor herein to fill the lots lying between Atlantic Avenue and the Boardwalk as well as the streets as near to the Boardwalk as shall appear discreet to the grantor, and to gravel the streets and lay out the pavements and curbs and sewer; and also subject to the reservations that there shall be no building or buildings erected on the ocean side of the Boardwalk except ocean piers, but no ocean pier shall be built before August 22nd, 1919, on the ocean front of blocks 'B' or 'C,' nor shall free bathing ever be prevented on the beach or in the surf in front of any land sold by the grantor September 2nd, 1912, at public sale. The right of way for the present boardwalk and to maintain and operate the same, and 20 30

the right of way for any future boardwalk on the ocean side of the present boardwalk, and to construct, maintain and operate the same upon surrender and vacation of the present right of way to the adjoining owners; and the right to take sand from the ocean side of the boardwalk to complete the fill to grade, are each and all hereby expressly reserved to the grantor and its successors and assigns."

10 A. I see in those restrictions two objections that I think would be material: The one referring to the public garage and the one indicating the time in which the pier may be built beyond the boardwalk.

Q. How about the part reserving the right to take sand beyond the boardwalk?

A. That might be a very serious objection.

20 Q. Now, if this was on a business street,—if this property was advertised for sale at this public sale as being on a business street, and it was on a business street, would the fact that the buildings were to be artistic in design and attractive in finish have any bearing?

A. I wouldn't think that would have, that is too general.

Q. But if it was on a business street do you think the restriction as to a public garage would tend to lessen the value of the land?

A. It certainly would.

30 Q. Well, let me call your attention to this particular restriction: "No ocean pier shall be built before August 22nd, 1919, on the ocean front of blocks 'B' or 'C,' nor shall free bathing ever be prevented on the beach or in the surf in front of any land sold by the grantor," &c. Do you think those two reservations, one being restrictive of the other, would impair the value of the land in any respect?

A. I think it would, that is, the pier; I think the

free bathing end would not impair it, I think that ought to be there.

Q. No, but if under this reservation there should always be free bathing, wouldn't that have a tendency to lessen the value for the building of a pier, of an ocean pier?

A. It would to that extent, yes.

Cross-examination.

By Mr. Miller:

10

Q. Mr. Freeman, if these restrictions as to bathing and the extension of the pier on the ocean side of the Boardwalk were part of a general scheme which comprehended six or eight blocks of ocean front, and the restrictions with reference to all of the other lots were of a similar kind, it would enhance the value of your property, would it not?

A. If you take the whole beach front as a whole. 20

Q. I say so.

A. Yes, yes, not the particular lots in question.

Q. And the owner of the property fronting on the Boardwalk is benefitted, is he not, by keeping a free ocean view and free bathing? That is a general benefit, isn't it, if that is a general scheme applicable to the entire ocean front in that section?

A. Yes.

Q. So that if these restrictions are part of a general scheme your conclusion that it would not be enhanced, the value of the property, would be changed? 30

A. I wouldn't so express it, because a person might want to buy an ocean front for the specific purpose of building a pier there, that might be very valuable to the party.

Q. Of course, if you had a particular lot for that,

but that general restriction is beneficial to the entire scheme, isn't it?

A. It is beneficial to the whole city as a whole.

Q. That is it.

A. Yes.

10 Q. Well, let me ask you just one more question, Mr. Freeman. Would that property have been injured or benefitted if that restriction relative to bathing and the erection of piers had not been inserted in the deeds to the entire front so that any person might build a pier?

A. Would have hurt this property as well as the other. I think that is a very wise restriction to limit anything that goes beyond the boardwalk in seaside resorts, a very wise restriction.

By the Vice-Chancellor:

20 Q. Did you say that the restrictions which are contained in this settlement certificate are restrictions that are uniformly enforced against all of the ocean front at Wildwood?

A. Oh, no, I am not aware of that, I don't know.

By Mr. Miller:

Q. You assume that in your answers?

A. Yes. I go to Ocean City every summer.

30 Mr. Miller: I think you will admit that, Mr. Iszard, won't you? We will prove it any way.

By the Vice-Chancellor:

Q. But if they are uniform restrictions inserted in all the ocean front deeds would you say as a whole

that they are detrimental or beneficial to the market value of these lots?

A. It would be hard to answer that question.

By Mr. Weaver:

Q. Mr. Freeman, do I understand you to say that if these restrictions were not imposed on the lots sold at the public sale about which you have been talking, and there were the same quality of restrictions imposed on other lots, that these lots sold at public sales, not having these restrictions, would not be of more value than those with restrictions? 10

A. Well, it is hard to determine that, because some of the restrictions you read to me are valuable and I think they should be in there, and there is one or two or three that I think are detrimental. You would have to give me a specific question.

Q. I call your attention to the public garage: Wouldn't it make these lots sold at public sale more valuable if there was no restriction as to public garages on them and there was restrictions on other lots adjoining? 20

A. Certainly, it would be more valuable.

Q. Let me call your attention to the same effect in regard to the taking of sand on the ocean front: If this lot had no restrictions as to the taking of sand on the ocean front and the other lots did have wouldn't that make this particular lot more valuable? 30

A. It certainly would. I think that is a very serious objection, taking that sand away in front of that.

Q. Now, then, also let me call your attention to the restriction as to the building of buildings on the ocean side of the Boardwalk: If this particular lot

sold at this sale had no such restriction and other lots adjoining had such a restriction, wouldn't this lot be of more value?

A. In that case it would, yes.

Q. And very much more valuable?

A. As to these particular lots it would, certainly, it would be more valuable.

10 Q. Now, would these restrictions apply more generally to residential streets than they would to streets where business was conducted?

A. I think so, from the very wording of the restrictions. "Artistic" would indicate residential section, they no doubt had it in mind when they put it there.

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

By Mr. Iszard:

Q. Mr. Kearney, where do you reside?

A. Why, 1807 South 58th Street, West Philadelphia.

Q. Were you present at the public sale of lots at Wildwood on August 17th, 1914?

A. I was.

30 Q. Were you there during the entire period of the sale, while the sale was going on?

A. Yes.

Q. Did you have in your possession one of the catalogues known as "Catalog of Ackley's," used in this case and marked Exhibit C1?

A. I did.

Q. Do you recall when lot number 25, as set forth in that catalogue, was offered for sale?

A. Yes, I remember that, because —

Q. Just tell the Court what took place at that time at the sale.

A. I remember the time that the lot came up that the auctioneer, Mr. Ackley, said, "We are going to sell the biggest lemon in Wildwood, and it is on page so and so, and lot number so and so, and it is to be with riparian rights," and he went on with the dimensions. 10

Q. Was anything read from the catalogue at the time that that lot was put up for sale?

A. Oh, yes, it was read from the catalogue.

Q. Are you familiar with the catalogue?

A. Why, no, it has been a good while since I saw that.

Q. Were the terms as set forth in the catalogue read?

A. Oh, well, the whole description of that lot was read in the catalogue that day. 20

Q. Including the terms?

A. Including the terms, yes.

Q. Did you hear any bidding in respect to this particular lot?

A. Oh, yes, there was several that were bidding, Mr. Propper, and—I noticed Mr. Propper in particular.

Q. And was this lot sold in one, two or three parcels, do you recall? 30

A. I think the first—the Wildwood corner lot and the one next to it was sold as one, I think, I am not sure about that, and the next lot was sold separately.

Q. There were two separate biddings, then?

A. Yes.

Q. Was there competitive bidding in each instance?

A. Oh, yes.

Q. Did you see who was bidding against Mr. Prop-
per? You are acquainted with Mr. Samuel Prop-
per, are you not?

A. Oh, yes.

Q. Did you see who was bidding against Mr. Sam-
uel Propper?

10 A. Yes, there were these three gentlemen over
there (indicating).

Q. Just describe to the Court what took place at
that bidding.

A. These three gentlemen over here sat in front
of me. This elderly man was in the center, and the
young man and the elderly man—Mr. Colson—is
that his name?

By the Vice-Chancellor:

20

Q. Do you mean at your right?

A. Why, your Honor, the man on this end (indi-
cating) was in the middle and those three men just
sat right in front of me.

The Vice-Chancellor: Will it be conceded who the
men he indicates are? One of them I understand is
Mr. Colson, one of the defendants. The others are
who?

30

Mr. Miller: The elderly gentleman is Mr. Davis,
and Frank Colson and Asa Colson.

Q. Did you see them all bid?

A. No, they didn't all bid, Judge.

Q. I misunderstood you, then.

A. This young man done the bidding.

Q. The middle one?

A. Yes.

Q. That is Mr. Colson's son?

Mr. Miller: Yes, sir.

Q. He did the bidding?

A. Yes, your Honor.

10

By Mr. Iszard:

Q. Now, just describe to his Honor what took place at the time he did the bidding.

A. Well, the only thing is that they kept on bidding. Of course, when it was down around the two hundred price a foot everybody was bidding, there seemed to be several bidders, but when it got up around between three hundred and fifty and four hundred dollars a foot then it came down, simmered down to Mr. Propper and these gentlemen over here.

20

Q. Was there any consultation between the three at the time the bidding was going on?

A. Well, they seemed to be talking all the time. This elderly gentleman here, I think his name is Davis, isn't it?

The Vice-Chancellor: I understand so.

30

A. (Continuing) I can't recall his name; I think he is hard of hearing and I think that he had an ear trumpet, or something like that, and the young man told him from time to time—or said something from time to time in this ear trumpet.

Q. Then are we to understand that there was con-

versation going on between Mr. Davis, Mr. Colson, Sr., and Mr. Colson, Jr., during the time that they were bidding?

A. Oh, yes.

Q. They were consulting together?

A. Yes, and after it was over, after the property had been knocked down to Mr. Propper, this Mr. Colson —

10 By the Vice-Chancellor:

Q. The one who bid or —

A. Yes, took out a piece of paper and figured it up and they seemed to have a little talk between themselves and seemed to be satisfied, I don't know what it was.

Q. Do you remember whether Mr. Colson, Jr., the middle one, continued bidding up until near the time the property was struck off?

20 A. He was the last one that made the bid before Mr. Propper.

Q. Before Mr. Propper made his last bid?

A. Yes.

By Mr. Iszard:

Q. Did that take place in both instances?

A. Yes.

30 Q. Now, Mr. Kearney, when did you first tell Mr. Propper in regard to this bidding at the sale against him, which you have just referred to for his Honor?

A. I think it was about—well, I don't know the exact time, between two and three weeks after the sale was over.

Q. You were present at the settlement on September 25th, 1914?

A. Yes.

Q. At Wildwood?

A. Yes.

Q. Do you recall what took place at that settlement?

A. Well, the only thing that is in my mind clear now is that this gentleman over here, Mr. Colson, admitted that he done some bidding down there to get the property.

Q. Who was Mr. Colson talking to at that time? 10

A. I think it was you or Mr. Bowker, either one.

By the Vice-Chancellor:

Q. That is, this Mr. Colson, Sr., —

A. Yes, sir.

Q. —admitted that he did some bidding?

A. He said that they ran up the price, they done the bidding because they wanted to buy it in. 20

Cross-examination.

By Mr. Miller:

Q. Did you see the old gentleman bid?

A. No; he didn't bid.

Q. And Mr. Colson, this larger man,—did you see him bid? 30

A. No, the larger—no, I didn't see him bid.

Q. You did see the young man, young Colson?

A. Yes.

Q. The fact is he is the only one of the three who bid on the property, isn't it?

A. Yes.

By Mr. Iszard:

Q. They were consulting together during that time?

A. Yes.

10 IGNATZ J. RIGELHAUPT, alleging himself conscientiously scrupulous of taking an oath, having the affirmation duly administered to him according to law, upon his solemn affirmation saith:

By Mr. Iszard:

Q. Mr. Rigelhaupt, were you present at the auction sale in Wildwood on August 17th, 1914?

A. I have not been.

20 Q. Were you present at Mr. Zeller's office on September 25th, 1914?

A. Well, as to the date I am not absolutely certain; I was present at Mr. Zeller's office on the day when my brother-in-law, Mr. Propper, tendered settlement for his purchase.

Q. Did you hear any conversation at that settlement between Mr. Colson and others,—Mr. Frank Colson and others, regarding the bidding at the sale?

30 A. When Mr. Bowker addressed Mr. Zellers to the effect that bidding by the owners took place against my brother-in-law, Mr. Propper, Mr. Colson admitted that he did bid on that property. This was a—may I explain, your Honor?

The Vice-Chancellor: Yes.

A. (Continuing) It was a communicating room,

there were two rooms, the door was—quite a wide door—open, and, of course, the principals in the affair flitted back and forth from one room to the other, Mr. Miller and Mr. Ackley were in the furthest room, of course, Mr. Iszard, Mr. Bowker, Mr. Colson, Mr. Zellers at that particular time were in the room nearest to the corridor, and it happened while in this room that this admission was made by Mr. Colson.

10

Cross-examination.

By Mr. Miller:

Q. You are a brother-in-law to the complainant?

A. Yes, sir.

20

S. STANGER ISZARD, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:

By Mr. Weaver:

Q. Mr. Iszard, when did you first hear of the sale of the real estate at Wildwood which took place on the 17th of August, 1914?

A. When Mr. George C. Bowker came to my office and asked me about getting title insurance upon certain lots.

Q. Did you then take him to the Title Company or what did you do?

A. I took him into the Title Company, the West Jersey Title & Guaranty Company, and we made

30

out an application for title insurance upon this lot and also the Grunner lots.

Q. When the search came in or about the time the search came in did you then have knowledge of the reservations in the deeds respecting this title?

10 A. I recall that I went into the Title Company and asked Mr. Casselman, or some one connected with the Title Company, about the title, and I think they referred to the restrictions when I asked them whether the title was clear, and my recollection is I got a copy of the restrictions, which I gave to Mr. Bowker, and subsequently got the settlement certificate from the Title Company and sent that to Mr. Bowker.

Q. Now, what was the next step in the proceedings so far as this property was concerned?

20 A. The next step was that Mr. Bowker communicated with me at my office and asked me to arrange to go down to Wildwood on the day fixed for settlement, which was, as I recall it, the 25th of September.

Q. Did you go down there?

A. I went down to the settlement.

Q. Now, briefly, what took place at that time and place of settlement?

30 A. We went to the office of Mr. Zeller, and when I say "we" I mean Mr. Bowker and the complainant, Mr. Propper, and I think Mr. Rigelhaupt was along, and also Mr. Kearney was along; we went there and met Mr. Miller, Mr. Zeller, Mr. Ackley and saw Mr. Colson there. We had considerable talk. Mr. Miller and I spent most of the time, I think, looking up some references to see whether we could reconcile the liability of parties in regard to restrictions; we went out into another office and got the use of a library there and we began looking over some references.

Q. What objections, if any, were made to taking title to this property?

A. Mr. Miller and I couldn't get together upon the effect of these restrictions, I claiming that they were an encumbrance upon the land, and after considerable discussion I said to Mr. Miller—I think it was Mr. Miller—there was no use talking about the matter, we had better have a formal tender made and I would make the formal objection and we could rest on our legal rights. The deed was formally tendered, I made the legal objections to the acceptance on the part of the complainant by stating the reasons. 10

Q. Now, what were those reasons?

A. First, the variance in description; second, upon the ground of puffing at the auction sale, and the third—did I name the variance?—that was the first, the variance in description, and the third was the conditions and restrictions, which I held was an encumbrance upon the lot, and at that time I asked Mr. Miller whether they absolutely relied upon that deed or would give us any other deed, and Mr. Miller stated that that was the only deed that they would tender, and I said, “We object to the tendering of it,” and we had the deed identified by having Mr. Zeller's initials and my initials endorsed on the deed so it could be identified for use if legal proceedings should subsequently be brought growing out of the transaction. 20

Q. Now, was there anything said in your presence respecting puffing at the sale? 30

A. Yes, there was. I think the conversation, though, was between Mr. Bowker and Mr. Colson, but I was present and I heard Mr. Colson state about as was stated here, that he did bid at the sale, I wasn't paying very much attention to it, because

I had been told before what took place, but Mr. Colson did say in my presence that there was bidding at the sale.

By Mr. Miller:

Q. What was that?

A. He did say in my presence that they were bidding at the sale. By "they" I presume he meant
10 Mr. Davis and himself and his son, who seemed to be together at the sale.

By Mr. Weaver:

Q. Did you hear any reason given why they were bidding at the sale?

A. I can't say that I did. I guess I formed my own conclusion as to reasons, but I don't recall that he gave any reasons in my presence.

20

Cross-examination.

By Mr. Miller:

Q. I don't know that it is strictly cross-examination, but you forget what further transpired in this business afterwards. Did I not write you a letter dated November —

A. Yes, we had considerable correspondence afterwards. I was waiting for you to bring suit and you were waiting for me to bring suit.

Q. Yes,—dated November 10th, 1914, I wrote you a letter, a copy of which I show you, did I not?

A. Yes, you wrote me such a letter as that.

Q. And in reply you wrote to me November 12th a letter, the original of which I show you?

30

A. Yes, that is my signature, I wrote that letter and mailed it to you.

Q. And on December 9th I wrote you a letter, a copy of which I show you, did I not?

Mr. Miller: The effect of those, if your Honor please, was to apprise him that the auctioneer was holding quite a sum of money, \$2,500, that he would wait until December 1st and then, unless something was done, turn it over to Colson and Davis; he acknowledged receipt of letter, and then the letter of December 9th notified him that the money had been turned over. It may not have any legal effect, I admit. 10

A. That is correct.

Mr. Miller: I offer those in evidence, to be marked 20 for identification, rather.

(Said papers marked Exhibits D2, D3, D4 and D5, for identification, respectively.)

Mr. Iszard: Complainant rests.

The Vice-Chancellor: Let me inquire before complainant rests whether it is conceded that the vendors here, Davis and Colson, owned the riparian grant from the State and included it in the tendered deed? I have not observed the deed. 30

Mr. Iszard: It is.

The Vice-Chancellor: So that while the descrip-

tion only runs to high-water mark the conveyance includes the rights which they have acquired from the State beyond high-water mark,—is that correct?

Mr. Miller: To the exterior line, yes.

Mr. Iszard: That is correct. It was so represented in the catalogue and the deed also.

10 The Vice-Chancellor: So that the meets and bounds description runs to high-water mark but the deed is so drawn that it includes the rights which the grantor acquired beyond high-water mark?

Mr. Iszard: That is correct. The description reads 80 feet on Wildwood Avenue, that is, west of the Boardwalk, and we are resting upon that as the property we were to get.

20

JOHN A. ACKLEY, a witness produced in behalf of the defendants, being duly sworn according to law, on his oath says:

By Mr. Miller:

Q. Senator, you are the auctioneer who made this sale, are you not?

30 A. I am.

Q. And you did issue the catalogue which has been offered in evidence and marked Exhibit C1 in this case?

A. I did.

Q. Now, do you recall the sale of this property, Senator?

A. Yes.

Q. Will you state to the Court what, if anything, was said to the people assembled there before you disposed of this particular property? But, first, I will ask, did you make a general announcement prior to the sale of any of the lots?

A. Oh, yes.

Q. And then you made a particular announcement when this lot was sold of some sort, did you?

A. Yes.

Q. Now, state what you said at the opening of the sale.

10

Mr. Miller: Of course, if the Court please, that may not be material, because Mr. Propper says he was not there then.

A. I will make this, your Honor, in as short form as possible. It is my custom at the opening —

Mr. Weaver: I object to his custom.

20

Q. No, state what you did on the opening of this sale.

A. On this date, the 17th day of August, 1914, at the opening of this sale, I made an announcement calling the people's attention to my catalogue, to the various descriptions and matter therein contained; then turned to page 1 and read that, "Important to Buyers," for the purpose of impressing upon them the necessity of paying particular attention to the description, terms and conditions of each individual property as it was offered, for the reason that the catalogue contained numerous typographical and other errors, and that I would not sell from catalogue description but from a legal descrip-

30

tion of each property which would be read previous to asking for bids on that property.

Q. Now, Senator, before this sale occurred had you prepared ready for signing memorandums or contracts of sale to be signed by the various buyers?

A. I had.

Q. They were all made up in advance?

A. All made in advance.

10 Q. And was the contract signed by Mr. Propper prepared in advance?

A. It was.

Q. Now, with reference to each particular lot, what did you do with these documents that you prepared, papers you prepared, if anything, prior to the sale?

A. Before offering this particular property—I was assisted in my sale by my son, Charles W. Ackley, and his duty was to read a description of the property to be offered, with the terms and conditions.

20 After he had read this —

Q. Well, was that done with all of the tracts, Senator?

A. With all the properties.

Q. Every one?

A. Every one.

Q. All right. Proceed.

A. I went further into this property than the other properties, for the reason of its value, and, for the purpose of benefitting the purchasers, I had made
30 by the Civil Engineer of the City of Wildwood, Harry Weir, a map and the outlines of this property thrown on scale. This map was about four feet wide and about six feet long, and it was tacked on the back of my platform, and on the outlines of that map, to which I directed their attention continuously from time to time, was marked the actual feet of width

and depth as taken from the official map, so that every one could have a perfect understanding and idea of it, and I called particular attention in this case to the map for the reason that there was a discrepancy in the catalogue where it read there were 80 feet on Wildwood Avenue; as a matter of fact there was 80 feet or more, and is now, on Wildwood Avenue, but I knew the inference would be how much lay back of the Boardwalk. With us the Boardwalk is not a fixed landmark, so because of that fact I several times called their attention to this map so that no one ever need err in regards to the depth or size of the lot, which has always been the custom. 10

By the Vice-Chancellor:

Q. Whether they could see the map or not they could hear what what said, could they?

A. Most assuredly, and those there endeavored to have every buyer have a full, definite knowledge and understanding. 20

By Mr. Miller:

Q. Now, Senator, if you did read this description from that particular piece of paper you didn't sell from that description, did you? That is, you didn't sell it in one parcel?

A. I had prepared for this particular lot three descriptions, four descriptions, I think, one which you have before you, embracing it as a whole, one describing lot number 30, one describing lot number 31 and one describing lot number 32. 30

Q. Was that in case there were three bidders?

A. It was advertised to be sold as a whole or in part, and I had—it was necessary in my sales to have

these various descriptions in readiness. Mr. Prop- per buying the first one offered, afterward buying the other two, it was only necessary to use the one description which covered all three, and for that reason we used this one and kept the others.

Q. When you sold lot number 30, on the corner, did you refer to this map, Senator?

A. Several times, emphasized it and read the description from the catalogue and called their particular attention to the error, as stated, and called their attention to this map, to this map which they were buying under and not at all from the catalogue.

By the Vice-Chancellor:

Q. What did you say about the error? You say you called the attention of the bidders to an error but what did you say to them? What did you say to them?—not what does the catalogue say.

20 A. It will be necessary for me to refer to the catalogue in order to answer that question, your Honor. There was an error on line 2 in this description of 80 feet. I called particular attention to that error. I then directed their attention to the large map made by Engineer Weir, on which was set forth the actual number of feet and inches.

Q. That is what you said before, but what did you say to them?

30 Mr. Miller: What was your language?

Q. Can't you tell what you said to them, not what you called their attention to but what did you say?

A. The individual language that I used I don't know that I could give.

Q. Then you can give the substance of it.

A. Then again there was another error——

Q. Can't you give the substance of what you said? It doesn't mean anything when you say you called attention to the subject unless you tell substantially what you said to them.

A. I read the description in the catalogue and told them that that was an error.

Q. Told them that the 80 feet was an error?

A. Told them the 80 feet was an error, and there were also other errors in the terms, in regards to the terms, called their particular attention to that, and other errors. 10

Q. What other errors did you call their attention to?

A. There are other errors in this catalogue applying to other lots.

Q. No, were there any other errors you called their attention to with reference to this property?

A. Yes, there is one error here——

Q. I haven't the remotest idea yet from all your testimony what you did. It may seem very clear to you but it is very dense to me. I don't know whether you specifically told them what the error was or whether you told them all the errors would be cured by the map or what you told them. Tell me what you told the people just the same as though I was a buyer. 20

A. Pardon me. I presume I stated that in my first statement.

Q. You haven't stated it yet as far as I have heard. 30

A. I said to the people, "We call your special attention to this map, upon which is given the outlines, meets and bounds, of the various beach front lots," because it had this lot and others on the map, "and I also want to call your attention to your

catalogue description in which there are errors, and for that reason we will sell from the description as read in the agreement, which you will be required to sign upon making your payment, based upon the terms as stated in the agreement.”

Q. Well, did you tell them that the distance of 80 feet in the catalogue was an error?

A. I did.

10 Q. Now, you didn't say so. Can you tell what you told them?

A. I told them the catalogue cited—there was a length or depth of 80 feet on Wildwood Avenue, this was an error.

Q. Now, did you tell them what was correct?

A. I referred them to the map, upon which there was in numerals the true length or depth and width of this particular lot.

20 Q. Well, did you tell them what the length of this particular lot showed on the map? If they couldn't see the map from where they were it would be necessary for you to tell them what was on the map. Now, did you tell them that?

A. The map could be seen by the greater part of the people.

Q. I don't care about that. Did you tell them what was on the map?

A. I did, your Honor.

Q. What did you tell them was on the map?

30 A. I believe the actual figures on the map was 59 feet and some inches westwardly of the Boardwalk.

Q. You told them what was on the map in feet, did you?

A. 59 feet and some inches.

Q. Showing the error made in the description?

A. Yes, there was that discrepancy, that amount of discrepancy.

Q. Now, if you had said that long ago you would have saved me all this trouble.

A. I am very sorry, your Honor.

By Mr. Miller:

Q. Now, Senator, after you made these announcements who bid on this first parcel, lot 30?

A. There were a great number of bidders, all of whom I cannot recall.

10

Q. Do you remember whether Mr. Davis, one of the defendants, bid?

A. Mr. Davis?

Q. Yes, this old gentleman.

A. He did not.

Q. Did Mr. Colson bid? I mean the elder, the defendant in this suit, Asa Colson.

A. Asa L. Colson?

Q. Yes.

A. He did not bid at any time.

20

Q. Did the younger man, Mr. Frank D. Colson?

A. Frank D. Colson, he did bid.

Q. Do you remember who bid next before Propper? That is, whose bid was next highest?

A. Mr. Frank D. Colson.

Q. After the sale this paper was signed by Propper that is in evidence, this contract?

A. That was signed, I presume, by Propper for Mr. Zeller, I didn't do the clerical work.

30

Mr. Miller: Have you a letter dated September 16th, 1914, addressed to Mr. Propper? You won't deny that having been written (handing paper to counsel), will you?

Mr. Iszard: That is simply a carbon copy. I

know nothing about it. The letter we have not been called upon to produce and we haven't it.

Q. On the 16th of September did you write to Mr. Propper a letter, a copy of which I show you on my letterhead?

Mr. Weaver: Now, we object to that.

10 The Vice-Chancellor: This is a letter to whom?

Mr. Miller: Addressed to Samuel Propper.

The Vice-Chancellor: This is a letter written to the complainant?

Mr. Miller: Yes, sir.

The Vice-Chancellor: I think that is proper.

20

Mr. Iszard: That is a carbon copy.

The Vice-Chancellor: Oh, well, you cannot introduce that until you have tried to get the original.

Mr. Miller: Well, I have asked them for it. Now, I didn't suppose they would deny it.

The Vice-Chancellor: Are you unable to produce
30 the original?

Mr. Iszard: It is the first we knew of it. We never heard tell of it before. I don't know whether there is such a letter in existence or not.

A. This letter was written in your office.

Q. I see, but did you send it?

A. I did.

The Vice-Chancellor: Wait, Mr. Miller, and see if they can produce the original. If they can, I do not see how you can introduce the copy; if they cannot perhaps you may.

Mr. Iszard: The complainant does not know anything about the letter. 10

Mr. Miller: He has testified he sent such a letter. I offer it.

The Vice-Chancellor: I do not think he can testify from the copy, Mr. Miller, unless you make a timely demand from the original. I have got to follow the rules.

Q. When did you first learn and how did you first 20
learn that these people objected to the title down there, Senator,—Propper and the lawyers?

A. I don't know the date, as I remember it, it was in September, sometime after my Labor Day sale, as nearly as I can remember.

Q. How were you apprised of their objections? How did you learn about it?

A. I received a letter and I also had a personal visit, I believe it was a visit by Mr. Propper and his attorney, Mr. Bowker. I think that was the first 30
intimation I had, or if not the first that followed quickly after the letter; I am not positive whether that visit was just after the receipt of a letter or just previous, it was sometime along the first of September, after the Labor Day sale, they called at my office in regards to it.

Q. Now, how shortly after the Labor Day sale was it?

A. I really cannot be positive on that, it might have been in the next week or ten days.

Q. Would you say that it was as late as September 18th, a week before the settlement?

A. No, I should think it would be earlier than that, I can't really recall, I made no memorandum of that visit I don't think.

10 Q. Can you refer to a letter, a copy of which you retained, addressed to Mr. Propper, and state when you learned of their objections?

Mr. Miller: Have you that letter, Mr. Iszard?

Mr. Iszard: No, sir; I have never seen it.

Mr. Miller: Have you it, Mr. Propper?

Mr. Propper: No.

20

A. This letter, as I remember it now, was written to them to answer their verbal objections made in my office upon that first visit, as I remember it.

Q. How long prior to the writing of that letter was it that they attended in your office and made the objections?

A. I can't recall, I can't recall the dates, I made no memorandum of it. I didn't answer these, because I considered their objections and consulted you.

30 Q. Now, you did write them a letter on September 16th, did you?

A. Yes, sir.

Q. And in reply you got a letter from Mr. George C. Bowker, which has been marked D1 for identification?

A. Yes.

Q. Did you not?

A. I did.

Q. This is the same as that?

A. Yes.

Mr. Miller: I offer this in evidence, if your Honor please.

By Mr. Weaver:

10

Q. Where is the original, Senator? Have you got it?

A. I have the original.

Mr. Miller: What is the difference? You admit writing it.

Mr. Iszard: Wouldn't the original be better evidence?

20

Mr. Miller: No, not if you admit writing it.

Mr. Weaver: We can't admit this copy here.

Mr. Miller: But you did admit it.

Mr. Iszard: We identified it, that is all.

Mr. Miller: If your Honor please, it is marked. 30
I asked Mr. Bowker on the stand if he didn't write such a letter and he said he did.

The Vice-Chancellor: I do not remember if he identified that as a true copy of a letter which he wrote, I do not know whether he did or not. If he

did it can be offered in the absence of the original, if he did not, you will have to have the original.

Mr. Miller: I really haven't got the original.

By Mr. Miller:

Q. Senator, do you know where it is?

A. It is in my safe.

10

The Vice-Chancellor: Who produced the copy?

Mr. Miller: I got it from Senator Ackley. I don't know where the original is.

A. (Continuing) I have the original in my safe. I didn't bring those letters this morning, I didn't consider them pertinent.

20 Mr. Miller: Mr. Bowker admitted writing that, if your Honor please. It is a copy made by Senator Ackley's office, and has been marked D1 for identification.

The Witness: It is a copy made in my office.

30 The Vice-Chancellor: If Mr. Bowker will identify that as a true copy of a letter he has written it will be competent, but I do not remember whether he has or has not already done so. This letter is written before the settlement certificate was issued.

Mr. Miller: Yes, sir; and he has testified—it may not be evidential, of course—that he wrote a letter on September 16th, Senator Ackley said he wrote to Propper, there is testimony that he wrote a letter,

which shows that the subject-matter was under discussion.

Q. Senator, did you keep a copy of the letter which you wrote to Mr. Propper?

A. I did.

Q. By referring to that, can you so refresh your mind that you can state the substance of it to the Court? If so please do that.

The Vice-Chancellor: Substance of what?

10

Mr. Miller: Substance of this letter.

The Vice-Chancellor: What letter is it?

Mr. Miller: That is the letter of the 16th of September, which recites that they then objected to these building restrictions, and the point of it is that they say they were not apprised of the restrictions until they got the settlement certificate. We claim they were, because they had a mortgage on this land, and we say that this testimony tends to show that they knew of it before they got the title papers.

20

Mr. Iszard: I think you do not conceive the testimony, because Mr. Bowker, as I recall it, upon the stand testified that he learned of something in Mr. Zeller's office prior to getting the certificate, he heard of the deed from the Improvement Company and had some knowledge of it but what the specific restrictions were he did not learn until he got the memorandum from the Title Company. That is my recollection of the testimony as it went in, and of course that knowledge from Mr. Zeller was prior to the other.

30

The Vice-Chancellor: Well, in any event, the question is not competent. You cannot prove the contents of a letter unless you can produce the original, or, if you cannot, if you have exhausted the legal requirements in procuring the original, then you can produce a copy.

10 Mr. Miller: Well, if your Honor please, I supposed they would acknowledge that; it is a very informal letter. I do not know what I can do. I don't want to lose the benefit of the testimony. I can recall Mr. Propper and ask him if he got such a letter.

The Vice-Chancellor: You may do as you choose. I cannot go beyond the rules.

Q. Now, Senator, you referred to a conversation prior to the writing of the letter of September 16th. What was this conversation?

20 A. Mr. Bowker and Mr. Propper came to my office and raised an objection to taking title to that Boardwalk property, and claiming as a reason that it was encumbered, and the encumbrances Mr. Bowker claimed consisted of certain restrictions as enumerated in the original deeds from the Wildwood Improvement Company to Colson. During our conversation, knowing of some facts that was not consistent with this opinion, I asked Mr. Bowker if he was Mr. Propper's attorney. He said that he
30 was. I asked him if he had passed and advised his client, Mr. Propper, to place a loan on a lot owned by Mr. Gould on the Boardwalk, the year previous. He said he had. I said, "Did you not know that that block of lots have the same restrictions that this block of lots has?" "Well," he says he didn't know. I says, "Did you pass on a loan for

your client without knowing?" "Well," he says, "it is a different matter," or something. I says, "You didn't consider those lots encumbered by these restrictions at that time?", and he tried to waive that out, said it didn't enter into the question, but that these lots he considered encumbered and therefore they wanted a return of their money which they had paid to me, and I told them that I was in no position to return their money unless they would set forth the facts to be true as they stated, and at that time—after this conversation, I think it was, I took the matter up with you from a legal standpoint and dictated this letter to them, and the letter of the 18th is an answer to this letter addressed to Mr. Propper on the 16th. 10

Q. Senator, you have been in the real estate business, engaged in buying and selling properties at Wildwood, for a number of years, have you not?

A. Over twenty years.

Q. What properties have you sold along the beach front, if any? 20

A. What say?

Q. What properties have you sold along the beach front in this vicinity, if any?

A. All of them in this vicinity, every one of them.

Q. And in a general way, just give the Court an idea of the extent of your business. What is the value in the aggregate of all the properties you have sold on the island there in this vicinity?

A. Do you mean in this vicinity alone? 30

Q. Well, along this beach front.

A. Well, it is such a great amount I couldn't tell you the exact amount, but millions. In this one plot I sold in one year over \$900,000 under these restrictions.

Q. Now, were those lots all sold subject to these

restrictions? That is, along in that section, that vicinity?

A. Every lot on the ocean front there contains the same restrictions.

Q. In what was known as the Borough of Wildwood?

A. In what was the old Borough of Wildwood before its incorporation.

10 Q. Is that the part shown on this map which is now on the Vice-Chancellor's desk? Is this the old Borough of Wildwood, Senator? That is, the ocean front property?

A. This is the whole of the ocean front of all of the original Borough of Wildwood, extending from Cedar Avenue on the south to the southerly side of 26th Avenue on the north.

20 Q. And were these restrictions which you have referred to applicable to all of the territory shown on that map, being all of that part of the old Borough of Wildwood lying east of Atlantic Avenue and which was sold by the Wildwood Improvement Company?

A. These restrictions as they are incorporated in the original deed of the Improvement Company to Colson are the same that applies to all of the beach front from Oak Avenue to Poplar Avenue and from Juniper Avenue to 26th Street. But those restrictions did not apply to that block P, for the reason that Baker Brothers did not own block P, consequently at this time—

30 Q. When was this development, Senator, generally speaking, east of Atlantic Avenue? When was that sold?

A. The first sale of this section was on Labor Day, 1911, was it not? 1911, yes.

Q. And then additional land sold in 1912?

A. This section was sold on Labor Day from Maple Avenue north,—on Labor Day, 1911, extending from Maple Avenue to a point here on Ocean Avenue, north of this point (indicating) that was sold, these blocks, on Labor Day, 1911. On December 5th, 1911, we sold this other section to the front, I think we run from—I can't tell, I haven't got my map here.

Q. Will this refresh your memory in any way? December 5th, 1911,—will that give you any idea? 10

A. Excuse me. There are three maps there that will give you the information, sectional maps. You have one more map there, Mr. Miller.

The Vice-Chancellor: What is the importance of this, Mr. Miller, when these different sections were sold?

Mr. Miller: I thought I would describe just very briefly the general development. 20

By the Vice-Chancellor:

Q. I wish you would tell me merely about the amount of beach front in distance, miles or less measurement, that are subject to these uniform restrictions?

A. The distance that is subject to these particular restrictions?

Q. Yes. Answer my question, if you can. 30

(Question repeated.)

A. The distance from Oak Avenue to Poplar Avenue, and from Juniper Avenue to 26th Street, approximately about sixteen hundred or seventeen hundred feet, I should say.

By Mr. Miller:

Q. How many blocks would that make, Senator?

A. Seven.

Q. Seven blocks fronting on the ocean?

A. Yes; and in my measurement of the feet I calculate the width of the streets, seven blocks of land.

10 Q. Now, do you know anything about the restrictions on the other side of the line, property owned next north of—

A. Property next north is owned by the North Wildwood Land Company.

Q. Do you know anything about their restrictions?

A. I do; I have sold their front and the riparian rights, but I haven't a copy of their restrictions, but they are practically the same as governing the old Wildwood front.

20 Q. And how far north do they go in extent?

A. From 26th to 19th—I think it is 19th Avenue, to 26th.

Q. That is seven squares of blocks?

A. Yes.

Q. Do you know anything about the restrictions in Holly Beach, what was called Holly Beach, the land next south of old Wildwood?

30 A. There are no restrictions because there is no land excepting that which is under water, and there is no land saleable, there is no land that you can acquire, there is a block and a half, more or less, under high-water, and there is none of that been sold—I have sold some of it.

By the Vice-Chancellor:

Q. There never was any Holly Beach restrictions?

A. No restrictions on the ocean front itself. I have never known of it.

By Mr. Miller:

Q. Have you bought and sold property on your own account along this section, Senator?

A. On the Wildwood front?

Q. In old Wildwood?

A. Oh, yes.

10

Q. Affected by these same restrictions?

A. I have bought and sold and I now own at the corner of Magnolia and the Boardwalk.

Q. You have a lot of your own right on the Boardwalk?

A. I have.

Q. From your knowledge of the property and your practical experience in making sales for others and transactions on your private account will you state to the Court whether or not these general restrictions enhance the value or depreciate the value of the lands affected by these restrictions, and give your reasons, if you will?

20

A. The general restrictions as contained in the original deeds most assuredly enhance the value of all that property.

Q. Why?

A. Because of the fact that it prevents any obnoxious plants being placed there, and also protects the ocean front and bathing ground, which is known to be the chief asset of a seaside resort, we consider it such.

30

Q. What is the present market value of this property, in your judgment?

A. Do you mean today?

Q. At this time, yes.

A. Or during the summer season?

Q. Now.

Mr. Weaver: I think we ought to object to that. It is irrelevant here what the value of the property is.

10 The Vice-Chancellor: I think the only relevant testimony touching value, if any, would be on the day of the sale, to see whether the lively bidding influenced it.

Mr. Miller: If we should win this suit it may be that your Honor might say that this sale shall stand, but treating this as a contract of sale, which it really is, in writing, it may be a question whether we could retain \$2,600 as liquidated damages. Now, I would like to show to your Honor—

20 The Vice-Chancellor: Well, you mean on your cross-bill for damages?

Mr. Miller: Yes.

The Vice-Chancellor: If such a bill can be maintained, which I do not for a moment admit, though you are entitled to try to maintain it, the testimony perhaps would be relevant.

30 Mr. Miller: It might be relevant in this wise: It might be really necessary for your Honor to ascertain liquidated damages.

The Vice-Chancellor: I do not refer to the facts, I refer to the law.

Mr. Miller: I thought, treating it as an ordinary

contract of sale and being paid a considerable sum, your Honor might say that it is not within conscience to keep so much as liquidated damages.

The Vice-Chancellor: I think all that goes to the law court, but I won't so rule at this time. I will let you introduce testimony in support of your cross-bill and make your case if you can.

Q. What is the present market value, Senator? 10

A. I don't know how any one can determine that without making an absolute offer and sale. I am prepared to say, in answering such questions privately in my business, what I would be willing to give for a property at all times by appraising it and that is my value.

Q. No, I want fair market value, according to your best judgment at this time?

A. I really don't know how one can get at that positively. 20

Q. Well, is it less or more than the bid at the sale?

A. If you should attempt to sell that property today it wouldn't bring as much money at it would in August, of course, it would be less at this season of the year, any property there.

Q. Well, has property increased or decreased in value down the beach since this sale?

A. Both; depends upon location.

Q. Can you state the fair market value of the property now? 30

A. Of that property?

Q. Yes.

Mr. Iszard: He has already said he couldn't.

A. I could tell you what it would be worth to me;

I don't know whether anybody else would give it or not.

Q. Senator, you were present when this deed was tendered to Mr. Propper?

A. Yes.

Q. At the same time the Gruner deed was tendered too, was it not?

A. They were both tendered.

Q. He bought the Gruner lots?

10 A. Yes, on Atlantic Avenue.

Q. Did he refuse the Gruner deed also?

A. I refer that question to Mr. Zeller.

Q. No, but you were there at the office?

A. I was there at the office, yes.

Q. And he didn't pay for the Gruner lots, did he?

A. I didn't see him. As a matter of fact he did not, as I understand.

Q. That was not because of any discrepancy in description, was it?

20 A. Not to my knowledge.

Q. And he didn't refuse the Gruner lots because of any puffing or by-bidding, did he?

Mr. Iszard: We certainly object to this line of examination. There were some other reasons on the Gruner lots. I do not think that should be worked in this case; I think it ought to rest on its own bottom.

30 Mr. Miller: We think it is relevant to show that he refused to take the Gruner property and that was not subject to any such claim touching by-bidding.

The Vice-Chancellor: I think it may be competent to determine whether or not the complainant in good faith puts forward the claims here.

Mr. Iszard: It will open up the case so that we will have to go in and show upon what ground we—

The Vice-Chancellor: You may rebut the proofs, if you want.

Q. What was the objection to the Gruner lot?

A. I don't recall.

The Vice-Chancellor: Was that settlement made 10 at the same time?

Q. The settlement was fixed for the same time and place, was it not, Senator?

A. In answer to your question—I haven't answered—I don't recall now their objections to the Gruner lot. I do recall the fact that they offered to take the Gruner lots if we would give up the ocean front lots, they would take title to the other if we would relieve them of this.

20

Q. Because you wouldn't do that they objected to the Gruner sale, refused to complete the Gruner sale?

A. I presume so.

Mr. Weaver: Now, I move that be stricken out.

The Vice-Chancellor: Yes.

Q. According to their own declarations?

A. That is, according to their own statements.

30

Mr. Iszard: We move that that be stricken out. That is so indefinite, "according to their own declarations."

The Vice-Chancellor: You may state what their

statements were but avoid your conclusions and what you understood to be their intention. State what transpired and confine your testimony to that, if asked.

Q. Well, with respect to the Gruner lots, what did they say? What reason was advanced by Mr. Prop- per for refusal to take those?

A. I don't recall now. No; I can't recall.

10 Q. Do you recall anything he said about the re- strictions being objectionable in that case?

Mr. Iszard: He has already said he doesn't re- call anything being said.

The Vice-Chancellor: I think it may be proper to refresh his memory to that extent. If you recall say so, if you do not say you do not.

20 A. I don't recall the words used in our verbal conversation but I believe their objections was—

The Vice-Chancellor: Never mind what you be- lieve.

Q. Now, what was the substance of their objec- tions stated to you by Prop- per and his attorneys in his presence?

30 The Vice-Chancellor: If you remember.

A. Restrictions is the only one that I know of con- versing with them about, restrictions that were in the original deeds.

Q. You attended at this settlement, Senator?

A. What say?

Q. You attended at Mr. Zeller's office for the purpose of completing this settlement on September 25th, 1914, did you not?

A. I did.

Q. And you were there for the purpose of transacting that business and watched what went on, did you not?

A. Yes.

Q. Did you hear any conversation in which Mr. Colson, Asa Colson, the defendant in this suit, this large gentleman sitting here, stated to any one that he had bid on these properties at the sale? 10

A. I did not hear him make that statement.

Q. Senator, after these deeds for the Gruner lots and the Colson-Davis lots were tendered to Propper and refused did you return to Gruner some of the money paid you on the Gruner sale?

A. I did.

Q. What has been done with the money paid by Propper? 20

A. I made my return to Mr. Colson, Mr. Asa L. Colson.

Q. You have paid to him all the money less what?

A. Less my proportionate share as commission.

Q. Five per cent. your commission was on the gross amount?

A. Practically.

Q. At your direction or by your authority I gave this notice to Mr. Iszard, did I not?—as shown in Exhibit D4 for identification. Just look at that letter. 30

A. What is your question?

Q. Whether I was authorized to send that letter for you?

A. You were, yes.

Q. You received no notice or restraint of any kind interfering with your paying this money over?

A. I did not.

Q. The defendants have never brought against you any lawsuit as a stakeholder to recover this money?

A. They have not.

Mr. Weaver: We object to that, if your Honor please; that is not relevant to the situation.

10 The Vice-Chancellor: I do not see that it is. However, you may ask it if you think it is relevant.

Mr. Miller: If your Honor please, I am not bound to assume the law is as my adversary states it.

The Vice-Chancellor: I have ruled in your favor. Would you like to have me reconsider it?

20 Mr. Miller: No, sir.

Recess until 1:45 o'clock P. M.

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

Mr. Miller: The stenographer has referred to his notes of the testimony of Mr. Bowker concerning the letter under discussion before recess.

Mr. Weaver: Mr. Bowker did say that that letter 10
was a copy of the letter he received, and under those
circumstances we are going to let it go in without
any further objection.

ASA L. COLSON, one of the defendants, being duly sworn according to law, on his oath says:

By Mr. Miller: 20

Q. Mr. Colson, you reside at Wildwood, do you not?

A. Yes.

Q. And you were one of the owners of the property in question?

A. Yes.

Q. At the time of the sale?

A. Yes.

Q. Did you attend the sale? 30

A. Yes.

Q. Were you interested in any other property or just these three lots?

A. I really don't remember whether I was interested in any other or not just now.

Q. Well, you were particularly interested in this land?

A. Yes, one-half.

Q. And you recall whatever the auctioneer said before your land was put up and sold, do you?

A. Yes.

Q. What did he say at the opening of the sale, and what did he say when he came to your particular parcel?

A. Oh, well, I don't know as I could tell you. He described the distance of the front, and such like, and had the map there showing the depth and the frontage of the lot.

Q. What did he say about the catalogue that he issued?

A. Why, I think he said that he didn't sell from catalogue description, that there was errors that he made in the catalogue, that he couldn't go by the catalogue.

Q. Well, when he came to this particular parcel what error, of any, did he indicate there,—call the attention of the audience to?

A. Well, he called the—about the number of feet there, and the error, and the map that would show there about that.

Q. And what did he say about the actual measurements, if anything?

A. I don't know what he did say really.

Q. Did he give actual measurements from the map?

A. Yes, from the map,—that he sold from the map, the way I understood it.

Q. Did he give the front on the boardwalk as well as the depth?

A. Yes.

Q. And did he explain about the riparian right and all that sort of thing?

A. Yes.

Q. What did you do with respect to the sale, if anything?

A. Why, I didn't really do anything but sit there and listen to the sale of these lots and others.

Q. Did you bid on this property?

A. I didn't never make a bid.

Q. Did Mr. Davis bid on the property?

A. I don't think he did. Not that I know of.

Q. Did your son bid on the property?

A. Yes, my son bid on the property. 10

Q. How old is your son?

A. I think thirty-three or four.

Q. What business is he in?

A. He is in with me in the lumber and mill business at Wildwood.

Q. Does he own properties of his own?

A. Oh, yes.

Q. What properties?

A. He has a half interest in the business there, and then he owns some property on Central Avenue. 20

Q. Was he so situated financially that he could have bought this property?

A. Yes.

Q. Did you know that he was going to bid?

A. I didn't know that he was going to bid that day. I knew he wanted the property and went to see a son-in-law of mine, that they wanted to buy Mr. Davis' interest in these properties, and they tried to buy it and couldn't, and I didn't know that he was going to bid on this property that day. 30

Q. When was it that he and the son-in-law wanted to buy it?

A. Why, I don't remember exactly; sometime during the spring.

Q. Long before the sale?

A. Yes, long before it was put in the sale.

Q. And did he talk to you about buying it at private sale?

A. I thought it would be all right for him to buy it, I thought it was a good investment. I owned half of it and Mr. Davis owned the other.

Q. Was he acting for you in any way, Mr. Colson?

A. How is that?

Q. When he bid, was he bidding for you?

A. Not at all. I didn't know that he was going
10 to bid that day, and I didn't bid myself.

Q. Did you attend at the date fixed for settlement at Mr. Zeller's office?

A. Yes, sir, I was down there.

Q. September 25th, 1914?

A. Yes; I think it was the 25th.

Q. And did you talk there with Mr. Bowker?

A. Very little. They didn't seem to want to talk. I said something to Mr. Propper but Mr. Propper didn't want to have any talk with me.

20 Q. Did you say to these men that have been on the stand, or any of them, Mr. Iszard, or Mr. Bowker, or Mr. Propper, all these witnesses, that you had bid on this property?

A. That I had bid on it?

Q. Yes.

A. Why, surely not. Why would I when I never did? I never said such a word.

Q. Did you use any such language at all?

A. No, I never said any such language. I never
30 bid on it. It would be so foolish to say I did bid on it when I didn't.

Q. Have you bought and sold real estate down there, Mr. Colson?

A. I have. Mr. Ackley has sold and bought some two hundred thousand dollars' worth through me, I think he has handled—

Q. For you how much?

A. \$200,000 worth, nearly that, in the last five years.

Q. Property that you have bought and sold?

A. Property that I buy and sell. Never had any trouble with any part of it before.

Q. Have you dealt in this character of property along this beach front?

A. Yes, sir, I deal in it.

Q. Do you know about these restrictions?

10

A. Oh, yes.

Q. Would you say they enhance the value of the property or depreciate it?

A. I wouldn't want to buy it if there was no restrictions there, wouldn't buy any without there was restrictions. Little shacks on the Boardwalk, on the ocean side, would certainly be a detriment to the property, I should think.

Cross-examination.

20

By Mr. Weaver:

Q. Mr. Colson, was there any upset price on this property?

A. Any set price?

Q. Any upset price?

A. Upset price?

Q. Yes.

A. No.

30

By the Vice-Chancellor:

Q. Perhaps you don't know what that means?

A. No; I don't know what he means.

By Mr. Weaver:

Q. I mean was there any limit as to price as to which this property was to be sold? Supposing ten thousand was offered for the property, was it to be sold at that price?

A. I don't think I ever limited any price. I told Mr. Ackley to go ahead and sell the property. I don't think there was any limit put on the property.

10 Q. Well, would you have stood by and see the property go at ten thousand if that had been the figure offered?

A. When I go in a deal I don't generally lay down.

By the Vice-Chancellor:

Q. Can't you answer his question? He asked you whether you would have let it go, not what your
20 habits were.

A. Well, I don't know about it, of course, but I don't remember telling Mr. Ackley about that; in fact, I didn't talk very much with Mr. Ackley about it.

By Mr. Weaver:

Q. Well, you certainly, Mr. Colson, did not intend to let your interest in this valuable piece of prop-
30 erty be sacrificed, did you, at that sale?

A. I didn't think it would be sacrificed at that price, I thought it was a good property.

Q. That isn't my question. Did you intend to let it be sacrificed at that sale?

A. Well, I don't know about that, I don't suppose—in fact, I never put any price to Mr. Ackley and he

went on and sold it, and I didn't say anything to Mr. Ackley about it.

Q. Now, isn't it a fact that you and Mr. Davis and your son were there to protect this property against a sacrifice sale?

A. I was not there to protect no property—this property. I didn't sit alongside of my son at the sale, he sat back of me, I think, if I remember. I didn't know he was going to bid on the property when he went down to the sale and I didn't bid myself. 10

Q. When did you first know that he was going to bid on the property?

A. When I seen him bid.

Q. Then he talked to you about it?

A. No, I don't think I said a word to him about it until afterwards.

Q. But you have already testified that you talked to him or he talked to you about the advisability of buying the property?

A. Before the sale I said he talked of buying 20 the property, and I told him I thought it was a good property, but the day of the sale I didn't say anything to him about it.

Q. Didn't you just state you didn't talk to him before the sale?

A. When he went down there I didn't say anything about it.

Q. When did you first talk to him about it?

A. Well, I talked to him along, I think, here early in the spring, he talked about buying it, went up to 30 see my son-in-law and they talked it over and went down to see Mr. Davis about selling it and then it fell through.

Q. Now, when did you first talk to him about buying this property at this public sale?

A. Talk to who?

Q. Your son.

A. I didn't talk to him about buying at public sale at all.

Q. When did you place this property in Mr. Ackley's hands for sale?

A. I don't remember. I think along about the first of August.

Q. And then you were surprised when you went to the sale there and saw your son bidding on the
10 property, were you?

A. Well, I knew he wanted it. I don't know as I was so very much surprised, because he had been talking about this property.

Q. Now, during the sale did you talk to him about the price of the property?

A. I don't think I said anything to him, no, during the sale.

Q. Did you see him bid on the property, or hear him bid on the property?

20 A. Yes, I seen him bid, I seen him bid once.

Q. Only once?

A. I think once was all, if I remember right, might have been twice.

Q. Now, didn't you make a calculation with your son, you and he together make a calculation as to what this property would bring when it was being sold by the running foot?

A. No, I don't think we ever figured it up there, we might have talked it over about what it would
30 bring or thought it would bring. You can't tell about the properties, they vary like everything.

Q. Well, now, can you tell us as a business man and as an intelligent man how you intended to protect yourself against the sale of this property at a great sacrifice?

A. Well, I was willing to take chances that it

would not be a great sacrifice, because other people had talked about it and asked about it.

Q. Well, you weren't sure there would be any bidders there for that property, were you?

A. Not sure, no, certainly, you are not sure of things. I had sold other property the same way and got good money.

Q. And you say that you expected there would be buyers there sufficient to guarantee —

A. Yes, I thought it was all right property, there would be buyers there, and I sell a good bit that way and often don't — 10

By the Vice-Chancellor:

Q. But supposing the bid had been \$13,000 instead of \$26,000: What would you have done?

A. Well, I don't know, probably I would have went on and let them sell; I don't know; I have sold property—I have told Ackley to sell property and sell it whatever it brings, and he has done it more than once. 20

Q. Well, maybe he is the one that protects the property. Does he have some way of bidding to get it up to reasonable figures? It seems to me on the face of it that it is a most desperate thing to do, to put a \$26,000 property up at public sale with a view of letting it go for whatever it brings, without any definite knowledge as to whether anybody will buy it at an adequate price or not. Now, that impresses me as a most desperate thing. I cannot conceive of doing such a thing myself. It may be that I am over-cautious, but on its face I should say it was a desperate thing to do. Now, do you mean to say that you made no precaution whatever against that property being sacrificed? 30

A. I did not.

Q. Supposing the bidders had made a little combination, two or three or four would have wanted the property and had determined that they wouldn't bid against each other and had bid \$13,000 and then quit, you would have lost half of the value of your property, wouldn't you?

A. Well, I was in partners with Mr. Davis and I was busy up to the yard there, I didn't talk to Mr. Ackley very much about the property, and I didn't bid and I didn't know he was going to bid when he went to the sale.

By Mr. Weaver:

Q. Mr. Colson, what did this property cost you?

A. What did it cost me?

Q. Yes, you and Mr. Davis together,—what did it cost you?

20 A. I don't know hardly how much it did cost. I think it was \$320 a foot, 67½ feet.

By the Vice-Chancellor:

Q. How much did you say a foot?

A. \$320 a foot.

By Mr. Weaver:

30 Q. That is upwards of \$21,000, isn't it?

A. I guess it is, yes, whatever it figures.

Q. Well, about, approximately?

A. Yes, \$320 a foot, if I remember right.

Q. Now, supposing there had been a combination of bidders there who should have gotten together and bid \$13,000 for this property: Would you have stood

by and allowed that property to go at that figure and lose in the neighborhood of \$8,000?

A. I don't know what I would have done in regards to that. As I say, I have had him to sell other properties that cost me a good bit of money, and say, "Go ahead and sell it," and never went to the sale; sometimes he sells property, I am not there, take chances and go ahead. It is a very foolish way to do but that is the way I do.

Q. Did you buy this property for a speculation or for an investment? I mean as a permanent investment or just a quick turn? 10

A. Oh, I buy really for to turn it.

Q. A quick turn?

A. We have got other property down there now, yes.

Q. Well, you bought and sold a good deal of property —

A. Yes.

Q. —in this way, and sold it through Mr. Ackley's sales? 20

A. Yes.

Q. And made some money out of it?

A. Yes.

Q. You never lost any money on any sale, have you?

A. Yes, I think I have.

Q. Well, how much?

A. Oh, I don't know. I have lost money on some of the sales but I can't just remember. 30

Q. Well, anything of any consequence?

A. Oh, I don't know. If I get a property and I don't like it I sell it, I move it, take the first loss.

Q. Let it go?

A. Yes.

Q. No matter what the price?

A. Yes, on cottages I have had up there. I am in the business, you know, furnishing lumber and millwork.

Q. Mr. Colson, you say Senator Ackley had a map on the wall and he called attention to this map. Did he distinctly state the number of feet that was being sold in this property?

A. I think he did. He had the map there, explained it.

10 Q. You are not sure about it, are you?

A. Yes, he had the map there explaining to them, and I think he took it up about the number of feet, in regards to it, yes.

By the Vice-Chancellor:

Q. Do you remember what your son offered you when he was talking of buying it? Do you know what price he was figuring on paying for it?

20 A. He was talking about buying Mr. Davis' share, he didn't talk about buying my share.

Q. Well, do you know what figures he was offering,—what amount he was offering Mr. Davis at that time?

A. I don't know that I do.

Q. Did he ever offer to buy your share?

A. No, no, we got it together, the three of us.

Q. Did you advise him as to what would be a fair offer to make Mr. Davis?

30 A. I told him I thought it was very good property, and ——

Q. No, but I am talking of price now.

A. No.

By Mr. Weaver:

Q. Mr. Colson, did he expect to buy Mr. Davis' share at this public sale?

A. Who? My son?

Q. Yes.

A. I think he did. When he was bidding there he was buying that corner lot; he sold that as a corner lot.

Q. He was only buying Mr. Davis' share?

A. He was buying—if he bought it, he would buy the corner lot.

Q. The corner lot?

A. Yes; the corner lot was sold first, and if he had bought that he would have bought — 10

Q. But you and Mr. Davis owned the corner lot together?

A. Yes, we owned it together, this would have been right out.

Q. Now, tell us, if you can, how at that public sale he could have bought Mr. Davis' share of that lot without buying yours?

A. Well, he couldn't, but he talked about it before, private sale. There is a difference between private and public. At this public sale he was buying the whole corner. 20

Q. But you have just told us that he was talking about buying Mr. Davis' share at this public sale.

A. At private sale, when he went up to see Mr. Davis.

Q. You have told the Vice-Chancellor he was figuring on buying Mr. Davis' share at this public sale.

A. Not when he went up to Woodstown; he went up to buy Mr. Davis' interest before the sale. 30

Q. Didn't he have some figures at the sale? Didn't he and Mr. Davis have some figures?

A. I don't know that, I don't know anything about that. He was buying for himself and had the money to pay for that.

Q. You didn't see them figuring anything at the sale, did you,—your son and Mr. Davis?

A. Well, Mr. Davis is very deaf and probably he was writing something on the envelope to him.

Q. Do you and your son live together?

A. No.

Q. You are in business together, aren't you?

A. We are.

Q. And he has a half interest in your business?

10 A. Yes, a half interest.

By Mr. Miller:

Q. Mr. Colson, you may have forgotten it but do you recall signing a written agreement with Senator Ackley before the sale? Do you remember you signed a paper?

A. Before the sale?

Q. Yes.

20 A. Yes.

Q. You know you signed a paper?

A. Yes, I think I signed it.

Q. That is your signature, is it (exhibiting paper to witness)?

A. Yes, yes, that is my signature.

Mr. Miller: I will have it marked for identification.

30 (Said paper marked Exhibit D6 for identification.)

JOHN A. ACKLEY, recalled.

By Mr. Miller:

Mr. Miller: With the Court's permission and permission of counsel I will ask him about this agreement. 10

Q. Senator, when you undertook the sale of this property you had an agreement in writing with Davis and Colson, which has been marked D6 for identification, did you not?

A. I did.

Q. And this is the agreement you had, is it (Exhibit D6 for identification to witness)? Is that the original?

A. Yes. 20

Mr. Miller: We offer it in evidence.

Mr. Iszard: Now, if your Honor please, we would like to see it.

(Said paper handed to counsel.)

Q. Now, Senator, you will have to explain to the Court, if you can, how it could be that you could 30 reasonably sell this property without reserve when in your own contract of sale there was what I should call a reserve price. Now, explain fully to the Court how you could protect these men in what you think was a legal manner, and what you would have done if the property had been offered for, say, \$13,000?

A. As a matter of fact, when one is acquainted with the situation, there was no possibility of there being a less bid, for I had more than one that would give more than \$350 per lineal foot, and previous to making the contract with Mr. Colson and Mr. Davis I guaranteed them a sale to realize \$350 per lineal front foot or more. I was justified in this, because I would have paid that myself, would have paid it then and am willing to pay it now; as a matter of
 10 fact, more than that amount today I would pay for it; so I was justified in guaranteeing the sale and it was given to me to be sold absolutely without reserve.

By the Vice-Chancellor:

Q. Providing it sold for \$350 a foot?

A. And I guaranteed that it should. I stood ready to purchase at that price myself, or more if neces-
 20 sary.

By Mr. Miller:

Q. Now, how could you have bought it? What was your plan or what would you do at the sale in case, as the Chancellor suggested, only \$13,000 was offered for the property?

A. I should have done as I always do. I buy a great deal of property in my own sales, and in each
 30 and every case where I buy a property I announce my bid publicly, "I will give so much, that is my bid," and in each and every case where I do so announce my bid I submit the offer to the owner, and in each and every case where it is acceptable to the owner I conclude the sale, if it is not acceptable I permit him to withdraw it. I have bought exten-

sively and paid the highest prices on the island for land openly, I always bid openly, and I would have done the same in this case.

Q. Senator, did Mr. Propper buy other lots at this same sale or did he not?

A. I don't recall.

Q. Did Propper ever demand from you the money back on this sale?

A. I have no knowledge of it. He did come with Mr. Bowker, I think, to my office and state that he would not take title. 10

Q. I understand that, but did he ever demand the money back?

A. He never made any demand upon me for the money. As a matter of fact, it wasn't my money.

Mr. Miller: I want to offer this contract in evidence.

Mr. Iszard: We have no objection to that contract. 20

(Said paper marked Exhibit D1.)

Mr. Miller: I offer this copy of letter.

(Said paper marked Exhibit D2.)

Mr. Miller: While I am offering these, I offer in evidence certified copy of mortgage from Phillip Gould, et ux, to Samuel Propper, and of the deed therein recited, Wildwood Improvement Company to Annie Gould. 30

Mr. Iszard: We object to that. It is not material, it is not evidence in this case.

The Vice-Chancellor: I think it may be competent evidence. I do not think it amounts to much but it may have some force.

(Said papers marked Exhibits D3 and D4, respectively.)

Cross-examination.

10 By Mr. Weaver:

Q. Senator, if you have in your agreements between the parties you represent and yourself a guarantee as to the price that you are to realize to them on a sale, on public sale, how do you protect the parties with whom you have agreed and whose property you are selling if the property will not be sold when it is put up at public auction at a less price? What is your method?

20 A. May I answer that in my own way?

The Vice-Chancellor: Certainly; he has asked you for an answer.

Q. What is your method, Senator?

30 A. In the first place I never make such a guarantee without having positive knowledge based upon facts in regards to the value and the possibility of disposing of it, and I am in constant touch with probable buyers, and in many cases without the knowledge of the owners, as I keep all of my business transactions sacred as a lawyer would. I have possible buyers who come to me and make offers for various pieces of land. With that knowledge I am absolutely safe. And no one who knows the condition of the real estate market in Wildwood could

question the improbable results of a sale at that time. There were hundreds of people would give—it seems so ridiculous when you name thirteen thousand, fifteen thousand or twenty thousand, it is absurd if you understand the conditions.

Q. This auction you then held at Wildwood and those you have held from time to time are bona fide public auctions, are they not?

A. Absolutely; yes, sir.

Q. They are bona fide?

10

A. Yes, sir; and in that connection I wish to say, in regard to the question asked Mr. Colson, I never have by-bidders.

Q. Well, now, right there I want to ask you, not having by-bidders, or stool-pigeons, whatever you may term it, how do you protect yourself, if these are bona fide public sales, against the property being struck off at a sum less than the amount you guarantee your seller?

A. By my knowledge of the property and the demands for it by the purchasing public. 20

Q. Well, but how do you know the purchasing public are going to be there and bid the price you think this property is worth?

A. By personal contact with individuals constituting the public.

Q. Supposing something happened and these persons you have personal contact with did not arrive at the sale in time to take care of your prices, what is your method under such circumstances?

30

A. I can't answer that, because it has never happened.

Q. Well, supposing such a thing had happened in this sale here of the Davis and Colson property, how would you have protected yourself? What would have been your method?

A. By buying the property myself.

Q. Then there was a limit as to the price at which this property should be sold at public auction, was there not?

A. No other than my guarantee.

Q. Well, but supposing there had been a combination of bidders and that property had been only bid up to thirteen thousand, what would you have done? Would you have withdrawn the property or would
10 you have let it go at \$13,000?

A. I would not have withdrawn the property but I should have discovered the combination of bidders and would have immediately offered my bid of \$350 per lineal front foot for all of it, openly, and that would have destroyed the combination. I have had combinations up against me; I know what they are.

Q. Secretly, then, there was an upset price for this property, wasn't there?

A. No.

20 Q. Well, what does this agreement mean, then?

A. Just what it says.

Q. Isn't that the upset price of that property?

A. That is the price at which I had assured these owners I would obtain or more.

Q. How did you expect to get it?

A. By giving it myself if the bidders in the open public didn't. As a matter of fact, I had so many

30 Q. You didn't announce publicly that there was an upset price on this property, did you?

A. Because I couldn't.

By the Vice-Chancellor:

Q. In that contract do you guarantee the price or do you say you won't sell it for less than the price? This is the very property in question, isn't it?

Mr. Miller: That is, as I understand it, the original agreement between Colson and Davis and Senator Ackley, who advertised it without reserve, but I don't know that it is especially pertinent, because, as a matter of fact, the property brought more than the reserve price. It doesn't affect any equities, but we want the truth of it, and that is the reason I produced it. What the situation would have been if Senator Ackley had bid on it I don't know, probably it would have meant another kind of lawsuit. 10

Q. You have been speaking of guaranteeing the price. There is no guarantee here. You do not in any way make yourself liable. They simply authorized you to sell for not less than \$320 a foot.

A. My guarantee was verbal, and I have done a great many thousand dollars' worth of business; my verbal guarantee is as good as the contract.

Q. There is no guarantee in the written contract, is there? 20

A. Any more than I consider this a guarantee when I set \$320 a lineal foot. As a matter of fact I had discussed it and guaranteed it would bring as much as that or more. I would give that much myself for it.

Q. What was the price it was sold for?

A. The first thirty feet was sold for —

Q. No, the average per foot that it was sold for.

A. What was the average? Have you got the average? About \$400 in round figures, the average price. 30

By Mr. Weaver:

Q. Now, you don't announce to the public that there is any limit to the price of this property, do

you?—that you must obtain a certain figure or the property won't be sold to other persons than yourself?

A. No.

Q. In other words, you give the public the impression that this is an open public sale at which the public will obtain the property for the highest bid?

A. On this particular property?

Q. Yes.

10 A. Yes.

Q. For the highest bid?

A. Yes, sir.

Q. And you keep back the knowledge that there is a figure below which it cannot be bought by the public,—isn't that right?

A. In this particular case, now, you are discussing?

Q. Yes.

20 A. As a matter of fact, I would have given the price specified in here which I guarantee to them, and more if necessary, but I myself couldn't state at the time how much more.

By the Vice-Chancellor:

Q. Well, in this case you did not notify the public that there was a limit below which they could not buy?

30 A. I did not, your Honor, because there was no limit in my mind.

Q. I thought you said you wouldn't let it go for less than the figure named?

A. Unless you construe my personal appraisement as a limit.

Q. That is what I am asking about. You say that in case there were no bids as much as \$350 a

front foot you would in that case bid that much, so you did not inform the public that they were not permitted to buy at less than \$350 a front foot?

A. Certainly not. I never considered it necessary; it never has been, wasn't in this case especially, because it was the most valuable property there.

By Mr. Weaver:

Q. If this was a bona fide public sale, as you 10
say it was, —

A. Of course it was.

Q. —why did you not say to the public that this property could not be bought for less than \$350 a front foot? Don't you think the public is entitled to have that notice if you are dealing with a bona fide public sale?

A. I certainly did not, because there was no restriction in my mind. I was positively instructed and I intended to sell it to the highest possible bid 20
obtained.

Q. Provided it reached \$350 a front foot. You wouldn't have let it go below \$350 a front foot?

A. That wasn't in the question at all.

Q. That is my question, whether you would have let it go below \$350?

A. It is not to be considered, I don't think, because it seems so improbable. There is two or three men in this room that would give more than that. I think Mr. Auerbach's bid was above that, if I re- 30
member rightly he offered more than that.

Q. Do you remember selling the Colonial Hotel at the same sale?

A. I do not.

Q. Did you sell it at another sale?

A. I did not.

Q. Did you have anything to do with the sale of the Colonial Hotel at any time?

A. I did not. I had the offering of the Colonial Hotel but I never sold it.

Q. You put it up at auction?

A. Yes, I offered it.

Q. Did you withdraw it from the market because the bid was not —

10 Mr. Miller: I object, this is beyond the pleadings.

A. I could not possibly answer that question without referring to my memorandum of my sale.

Q. Well, the property was put up for sale and withdrawn, wasn't it?

A. No, it was not withdrawn; it was sold to Mr. Auerbach with an "if." Mr. Auerbach is present. He had the privilege with the "if,"—if I remember
20 it, he could inspect the property, investigate it, if it was satisfactory take it at his bid, if not he need not take it. I think that was about it.

Q. Isn't it a fact, Senator, that the Colonial Hotel was put up at auction by you and the bid was not sufficient to satisfy you or your principals and it was withdrawn from the sale?

A. No, sir. The bid I struck it off for would have been acceptable to the owners had it been by the purchaser, and it was Mr. Auerbach who was the
30 purchaser.

Q. Well, we won't waste any more time on that. Let us call your attention to the map we have talked about here this morning. You say you had a map on the wall which had the dimensions of these lots sold to Mr. Propper on it?

A. I had; yes, sir.

Q. Now, where is that map?

A. That map is in my office in Wildwood.

Q. Is it there today?

A. It is.

Q. Now?

A. To the best of my knowledge.

Q. Why didn't you bring it up with you, Senator?

A. I wasn't instructed to bring it up.

Q. But you knew you were going to testify as to the size and dimensions of these lots, didn't you? 10

A. Your Honor, this is not my case, and I asked Mr. Miller —

The Vice-Chancellor: Answer the question he asked you, why you didn't bring it up. You can answer him as well as you can me.

A. (Continuing) I was not asked to bring the map.

Q. And you did not think it would be important to have it here today? 20

A. I didn't give it a thought. I realize it now. I wish I had it.

Q. Was this matter discussed with you as to the difference in the dimensions of the property sold to Mr. Propper?

A. Was what?

Q. Was the question of the difference in the dimensions on the property, that is, between the agreement and between the offer of sale and the public notice of sale, discussed with you before the trial of this case? 30

A. I don't just get your question. Was the difference between the dimensions of the lot discussed with me before whom?

Q. The dimensions of the lot as described in the public offer of sale?

A. Yes.

Q. And the dimensions of the lot in the agreement of sale?

A. Yes.

Q. And the dimensions of the lot in the deed offered or tendered?

A. Yes.

Q. Those dimensions all differ, do they not, Senator?

A. I can't say because I haven't seen the deed.

10 Q. Well, leave the deed out. Take your public announcement of the sale and your agreement of sale: Don't they differ,—the dimensions of the lot differ between those two papers?

A. In the public announcement?

Q. You have already testified they do. Now, do they or do they not?

A. I will have to ask another question in order to answer that. What does he consider my public announcement?—when I have various means. One is

20 my catalogue, —

Q. I mean your catalogue and the agreement of sale; your catalogue here?

A. There was a most definite public announcement made by a sign about eight feet wide and about twenty-six feet long on this particular lot, property, of which there was a map made and outlines given. Now, that is one description —

30 Q. We are getting away off the subject. You knew before you came here today that it was a question as to the difference in the description?

A. Yes, sir.

Q. A difference between the description contained in your public announcement of the sale —

A. Yes, sir.

Q. —and the description contained in the agreement which was signed by Propper?

A. Most assuredly I knew it.

Q. Now, you knew that that map would be an important element to describe the difference between the public announcement, the description in the public announcement, and the description in the agreement of sale: Why did you not bring that map here today?

A. I didn't deem it necessary, that is, I considered the agreement which was signed by Mr. Propper, the purchaser, sufficient to cover that. 10

Mr. Miller: Mr. Weaver, we will produce it and send it to the Chancellor.

A. (Continuing) I will be very glad to produce that map.

The Vice-Chancellor: You will have to produce it today, if you are going to produce it at all. 20

Q. Senator, you have testified here that Mr. Bowker and Mr. Propper called on you before the day fixed for the settlement of the Propper sale, that is, the sale of the land made to Mr. Propper. Where was it that they called on you?

A. As I remember it, at my office, corner of Magnolia Avenue and the Boardwalk, in Wildwood.

Q. When was that, Mr. Ackley?

A. I can't tell you the time.

Q. Well, how long before the day fixed for the settlement? 30

A. I can't fix that date because I made no memorandum, I have no memorandum of it and I am a very busy man.

Q. But you are entirely sure that Mr. Bowker called at your office before the date fixed for the settlement of the Propper sale?

A. Mr. Bowker, with Mr. Propper.

Q. There is no doubt about that at all, is there, in your mind?

A. Oh, not a particle.

Q. What?

A. I can't fix the date.

Q. Not the date, but is there any doubt at all in your mind that they called on you at some time between the date of the sale and the time fixed for the settlement of the property bought at the sale by Mr. Propper? You can answer that yes or no.

10

A. There is no doubt, as Mr. Bowker will verify, about his calling with Mr. Propper and Mr.—this gentleman here (indicating).

By Mr. Miller:

Q. Mr. Iszard?

A. Iszard, with one or both of those gentlemen.

20

By Mr. Weaver:

Q. When?

A. I can't give you the date, but it was prior, I think, on the 16th of September, I think it was, because after that conversation I took the matter up with Mr. Miller; as nearly as I can remember that was about it.

Q. Now, Senator, isn't it a fact that you never saw Mr. Bowker until the date fixed for the settlement when they were all together, Mr. Iszard and all these gentlemen in the room together, down at the office in Wildwood, with Mr. Zeller, for the purpose of settlement? Isn't it a fact that you never saw Mr. Bowker before that day?

30

A. It isn't a fact to the best of my knowledge.

Q. Now, on the day of the sale at which Mr. Proper bid on this property belonging to Mr. Davis and Mr. Colson, were you selling any other property that was free of restrictions?

A. Yes, sir. Oh!

Q. Free of restrictions?

A. I beg your pardon. I can't recall that. As I understand it, almost all lots on Five Mile Beach, with some few exceptions in Holly Beach, are restricted.

10

Q. Were you selling any lots in Holly Beach on that day?

A. Yes, what was known as Holly Beach section.

Q. It is all Wildwood now, isn't it?

A. Yes.

Q. But you were selling lots in what is known as the Holly Beach tract?

A. Yes.

Q. And on those lots there are no building restrictions?

20

A. I can't answer that question unless you specify the lots.

Q. Well, never mind, I won't specify any particular lots, but you were selling some lots on that day in Holly Beach on which there were no restrictions, weren't you? Can't you say whether that is a fact or not?

A. I don't recall, and I don't believe I sold any lots on that day in Holly Beach, Wildwood Crest, North Wildwood, or any section, without restrictions, I don't recall it; if there were any without restrictions it must have been the ocean front in the old Holly Beach section, but I can't just recall.

30

Q. Well, did you sell any property on the old ocean front in Holly Beach on that day?

A. I can't recall that without reference to my books.

Q. Well, did you announce at all at the time of this sale whether you were selling it subject to restrictions or not,—the property you were selling?

A. Did I announce whether they were subject to restrictions or not?

Q. Yes.

10 A. In all cases of sales made in the old Wildwood tract, in the North Wildwood tract, in the Wildwood Crest tract, in the Wildwood Crest Extension, in the Ottens, and in all those various sections where there are restrictions, that is announced by a general announcement at the opening of the sale, and it has been published so often by maps and charts and otherwise, and extolled upon,—in fact, I enlarge upon these restrictions as being the benefit of the property I am selling, call particular attention to them, —

20 The Vice-Chancellor: Just listen to the question and answer it. You have unnecessarily detailed your answer when you could have answered directly.

(Question repeated.)

A. I don't know.

Q. Now, if you were selling property at this sale some of which was subject to restrictions and some of it was not, would you call the public's attention to that fact?

30 A. I do.

Q. Why do you do that?

A. Because of the benefits derived from the fact of the restrictions being placed there.

Q. And then you want us to understand that you especially give notice in the sale of land of restrictions because of the value of the restrictions that are placed on the land?

A. I have done it for years, covering all these tracts, I have stated —

Q. When there are no restrictions on the land do you announce that fact?

A. I do.

Q. Well, now, why didn't you notify Mr. Propper in this case that there were restrictions on the land which you were selling him?

A. Individually? Personally?

Q. No. Well, at the time you were putting up this particular property for sale? 10

A. He didn't ask me. I know Mr. Propper for years and I know he has a knowledge of all that, in fact, they all have a knowledge of it.

By Mr. Miller:

Q. Why do you say you knew he had knowledge of it? Why do you say that, Senator?

A. Because of his interest in other beach front property there; he holds mortgages on beach front property there and he knows all about the restrictions, he is a yearly visitor. 20

WILLIAM E. ZELLER, a witness produced in behalf of the defendants, being duly sworn according to law, on his oath says:

By Mr. Miller: 30

Q. Are you conveyancer for the Wildwood Beach Improvement Company, Mr. Zeller?

A. Yes, sir.

Q. How long have you been such?

A. About twenty years.

Q. You prepared conveyances for all of the lots lying east of Atlantic Avenue sold by that company?

A. Yes, sir.

Q. When was this tract developed east of Atlantic Avenue in old Wildwood?

A. Began in 1911.

10 Q. During the year 1911, when the property was sold, was it all subject to the same restrictions mentioned in this case —

A. The restrictions —

Q. —and set up in the deed tendered to Mr. Prop- per?

A. The restrictions were the same in all lots in front of Atlantic Avenue, between Atlantic Avenue and the beach.

Q. Are there similar restrictions on the adjoining property in North Wildwood?

20 A. I can't say just what their restrictions are, I know they have general restrictions there of a similar character.

Q. Is that true in Wildwood Crest?

A. Yes, sir. I will say that, of course, the restrictions on the land between Atlantic Avenue and the beach are a little different from the restrictions in the other part of Wildwood and Wildwood Crest, on account of the necessity of doing certain things on the beach front to put the ground in shape for
30 building and permanent development.

Q. What different restrictions do you refer to?

A. Well, in regard to filling in the land, the question of using sand of the beach front, filling in the land and putting it in proper form of development ready to build and in shape for final finish, putting in the final improvements, such as sidewalks and other

public improvements, curbing, street improvements, sewers, &c.; they would have to be brought up to grade, and to do that it is necessary to fill it up with sand which was pumped in from the beach front, which, of course, was supplied by the ocean filling up the place where it was packed in.

Q. In your judgment are these restrictions of benefit to the proper development there, Mr. Zeller?

A. It has been regarded that the property could not be developed without the restrictions. 10

Q. Did you attend the sale, Mr. Zeller?

A. I have attended all Mr. Ackley's auction sales.

Q. What announcement did he make about restrictions, if any, at the opening of the sale?

A. He generally announces the question, the point of restrictions on the property which are of a universal and general character and calculated for the benefit of the entire property.

Q. Was that done in this case, or can't you recall? 20

A. Well, so far as I recall it was referred to in the opening of the sale.

Q. Just as he does at all of his sales?

A. Yes, sir.

Q. And did he invite those present to ask him questions about the properties?

A. He always gave them an opportunity to ask all questions freely.

Q. Did he have this map there that has been referred to, Mr. Zeller? 30

A. He had the map tacked up on the board immediately back of where he stood on the platform.

Q. Do you recall the sale of this particular lot?

A. I do.

Q. And can you recall who bid on that lot?

A. I don't pay much attention to who the bidders

are, I am usually occupied in closing the transactions.

Q. Before each parcel was sold was a description read from a typewritten paper that has been prepared?

A. Each part is specifically described from the contract, which is presented and held up and referred to as "this paper pertaining to the sale of this particular piece of property, and these are the terms and specifications thereof."

10 Q. And was that done in this case?

A. Giving the lots and blocks, or lot and block, and usually the measurements and the terms and all essential details.

Q. Was the description read from this paper in each instance?

A. It was.

Q. And it was so in reference to this particular sale, then?

20 A. And also referred to on the map back of Mr. Ackley, the size.

Q. Did he call attention to the number of feet in depth of that lot as described?

A. The statement was made that the information in the catalogue was not accurate nor correct, and that the information given on the map as to the measurements and on the contract were the correct guide for the sale of that property.

30 Q. After the sale, Mr. Propper signed this contract which has been offered?

A. Yes.

Q. And you prepared the deed, Mr. Zeller?

A. I prepared all the deeds, I prepared all the deeds from the Wildwood Beach Company, and I

Q. And it was your business to make up conveyances for this sale, was it not?

A. I had the matter in hand.

Q. Did Mr. Bowker come down to your office in the Drexel Building and talk about this?

A. Yes.

Q. Can you remember when that was?

A. It was, I think, about a week or two prior to the time fixed for settlement, possibly two weeks.

Q. What did he say?

A. He asked for the original deed that he might see the provisions contained therein, and I showed him the deed and he wanted a copy—I think he wanted a copy of the provisions there, and I made a copy and sent it to him. I think that is the situation. I took off a copy of the restrictions. 10

Q. Have you been concerned with a great many sales down there as to the subject of these restrictions? I don't mean those deeds from the company but subsequent conveyances,—have you drawn many of them?

A. Well, a very large number. 20

Q. And is the title subject to those restrictions down there insurable?

A. The Fidelity Trust Company has insured that entire front, has insured the entire front to the original owners and also to subsequent purchasers, and has also the West Jersey Title & Guaranty Company.

Mr. Iszard: I do not see what this has got to do with the case. 30

The Vice-Chancellor: I don't know what difference it makes.

A. (Continuing) I hardly recall any objection ever made to the restrictions in the deed.

The Vice-Chancellor: If you mean that they insured them where the question was involved whether a covenant was violated which provided that they should be free from encumbrance, then perhaps the question would be competent.

Q. Are these titles marketable down there, according to the practicable experience you have had as a practical conveyancer?

10 A. So far as they are considered free of encumbrance, yes.

Q. You attended at the day fixed for the settlement, didn't you, Mr. Zeller?

A. I did.

Q. Did you hear Mr. Colson make a statement to the effect that he was a bidder at this sale?

A. I didn't hear him make any such remark.

Q. Can you say whether or not he did bid, or didn't you notice whether he bid or not?

20 A. I heard nothing about his being a bidder, never heard that he was a bidder, neither from him or anybody else.

No cross-examination.

FRANK D. COLSON, a witness produced in behalf of the defendants, being duly sworn according to law, on his oath says:

By Mr. Miller:

- Q. Mr. Colson, are you the son of Asa Colson? 10
A. Yes, sir.
Q. And you are a nephew of Mr. Davis?
A. Yes.
Q. One of the defendants?
A. Yes.
Q. Did you bid on this property?
A. I did.
Q. And did you do that at the instance of either of these defendants, Mr. Colson?
A. No; I did not. 20
Q. You did that on your own account, did you?
A. I did; yes, sir.
Q. How old are you?
A. Thirty-three.
Q. Are you in business with your father down there?
A. Yes.
Q. And own what property?
A. I own where I live and own half of the business. 30
Q. If this property had been struck off to you could you have arranged to pay for it?
A. I think I could, yes.
Q. Had you been interested in buying it before this sale, in the spring?
A. I had bought lots in that sale before.

Q. I know, but with respect to this particular property, had you been interested in it before the sale?

A. Oh, yes.

Q. What did you do about the property with respect to attempting to buy?

A. My brother-in-law and I went to see Mr. Davis in the winter about buying it.

Q. Who is your brother-in-law?

A. William E. Lawrence, at Salem.

10 Q. What is his business?

A. He is a farmer.

Q. Is he a man of some means down there?

A. Yes; he had some left to him, heired some.

Q. Could you and he have arranged to buy this together? That is, did you have the means to do it?

A. Yes.

20 Q. Now, when this sale approached did you have any conversation with your father about your bidding, or with Mr. Davis?

A. No, I didn't.

Q. Did they see you and make any request of you about bidding for them?

A. No.

Q. Did you give them any intimation that you were going to bid?

A. No.

Q. Did you talk to Mr. Davis about it?

30 A. Why, I said something to him about it the day of the sale. Mr. Davis asked if I was still in the notion of the lots, I told him yes.

Q. Well, what did you say to Mr. Davis?

A. I told him I was.

Q. That is all, that you were in the notion of the lots?

A. Yes.

Q. And you claim that you really bid on these lots for yourself, in good faith, and not representing either of these parties?

A. I do, yes.

Cross-examination.

By Mr. Weaver:

Q. Mr. Colson, what was the hour fixed for this sale? 10

A. What was the hour?

Q. Yes; what was the hour fixed for the sale on August 14th?

A. Had the sale in the morning and then continued after dinner.

Q. What time did you go there?

A. I was there a while in the morning and went around for dinner.

Q. When was the property put up that you bid on, —that is, this property that Mr. Propper bid on also? 20

A. After dinner, I think.

Q. Now, who did you go there with in the morning?

A. Went there by myself.

Q. Did you know that this property was to be put up in the morning? Did you think this property was to be put up in the morning?

A. Yes. 30

Q. When did you first learn that it wasn't to be put up until afternoon?

A. Well, when they didn't come to it.

Q. Didn't you know the property wasn't to be put up until afternoon?

A. Not until I got there, no.

Q. Is Mr. Davis any relation to you?

A. Uncle.

Q. Now, when you got there in the afternoon was your father there?

A. I think he was.

Q. He got there ahead of you?

A. I don't remember about that. I think they were there, both of them.

10 Q. How about your uncle,—was he there?

A. I think he was, father and uncle were together, I think.

Q. And did you go up and greet them at all?

A. Yes.

Q. And where did you meet them? What part of the auction room?

A. Why, right—I don't know exactly, right where you go in, I guess.

Q. They were together, were they?

A. Yes, I think they were.

20 Q. You went up and joined them? You walked right up and joined them?

A. I think they were, yes,—I don't just remember about that.

Q. Now, what did you talk about when you went up to them?

A. I don't remember about that,—about the lots, about the sale.

Q. Now, what did you talk about the lots and the sale?

30 A. Why, I talked to Mr. Davis.

Q. What did you talk to him about?

A. About selling the lots. That is when he asked me if I was still in the notion of taking the lots.

Q. And did you talk to him about the prices that you would pay for the lots?

A. He said this: He wanted to know what I

thought it ought to be worth, I told him I didn't know.

Q. Well, you had some idea——

A. Yes.

Q. How far to go when you went there?

A. Yes.

Q. Did you tell him how far you would go?

A. Not exactly.

Q. Not exactly?

A. No.

10

Q. Did you talk to your father about it?

A. No, didn't say anything about it.

Q. And Mr. Davis was right there and your father was right there and heard you talking to Mr. Davis about these lots, did he?

A. No; I don't think he was there at that time.

Q. He went away, did he?

A. I think so, yes.

Q. Well, what did your father say to you about the prices of these lots?

20

A. He didn't say anything to me about it much.

Q. You say "much." Now, tell us what he did say?

A. He didn't say anything.

Q. Nothing at all?

A. No.

Q. Did you tell him you were there to buy these lots?

A. No.

Q. Didn't tell him that at all?

30

A. No, sir.

Q. Did you talk to him in the morning about it?

A. No.

Q. Now, you are in business together?

A. Yes.

Q. And you knew the sale was coming off?

A. Yes.

Q. And you knew your father was interested in these lots?

A. Yes.

Q. You didn't say a word to him about it?

A. Not at that time, no.

Q. When did you say something about it?

A. Well, along through the winter we talked about it.

10 Q. I mean the day of the sale, what did you say to him about it?

A. I don't remember saying anything to him the day of the sale at all.

Q. Now, when you joined your father and your uncle you talked to Mr. Davis, that is, your uncle, about this sale and your father went away. What was the reason for that? Didn't you want him to hear what you were going to say to Mr. Davis about the sale?

20 A. I don't know why he went away.

Q. And you never said a word to your father——

A. No.

Q. That day about the sale?

A. No.

Q. You are sure of that?

A. No, I didn't say anything about the sale.

Q. I say, are you sure about it?

A. Yes.

Q. Now, did you go in and all sit down together?

30 A. No, I don't think so.

Q. Now, you know you know what you did. Tell us what you did.

A. I don't think we all sat together.

Q. Well, now, you say "think"?

A. I couldn't say for sure. I sat alongside of Mr. Davis but I think father went in ahead of me.

Q. Well, where did he sit down?
side of me.

Q. Well, he was very close to you, wasn't he? He

A. I couldn't say whether it was back of me or
was so situated that you could talk to him, wasn't
he?

A. Well, I didn't talk to him during the sale. I
don't know exactly where he was.

Q. I didn't ask you that; I am asking you if he
wasn't so situated at this sale that you could talk to
him? 10

A. I don't know.

Q. Now, isn't it a fact that you and Mr. Davis and
your father all sat alongside of each other?

A. I don't think we did.

Q. Now, you say you don't think; you know?

A. No, I don't know. I sat alongside of Mr. Da-
vis, my father—I couldn't say.

Q. Why were you so particular to keep away from
your father during this sale? 20

A. Well, I don't know.

Q. Well, you are sure that you weren't alongside
of your father, are you?

A. Well, I don't think—yes, he didn't sit along-
side of me, he moved around.

Q. You must know. You say you "think." Why
do you say "I think"?

A. No, I don't know.

Q. Now, when the sale went on did you and Mr.
Davis discuss this matter of the purchase of this
property? 30

A. I told him what the bids were sometimes.

Q. What was that for?

A. He couldn't hear, he wanted to know what the
bids were, he couldn't hear people bid.

Q. Why was he interested in the bid if you were
going to buy the property?

A. Because he was selling, I suppose.

Q. Did you tell him how far you would bid on the property? I mean right there, when you were sitting and telling him what the bids were, did you then communicate to him the amount you were going to bid on the property?

A. No.

Q. He was right alongside of you?

10

A. No.

Q. Did you jump up and bid?

A. No, just sat still and nodded my head.

Q. Now, did you follow the bidding pretty close?

A. Yes.

Q. And what was your highest bid?

A. Well, on the corner I think was four hundred and fifty or four hundred and fifty-five, I don't know which, I think it was four hundred and fifty-five.

Q. And what of the other lot?

20

A. I think three hundred and forty-five, that is, the two inside lots.

Q. Now, did you communicate those facts to your uncle, that those were your bids? Were you telling your uncle which were your bids and which were Mr. Propper's bids?

A. No, I didn't know Mr. Propper was bidding.

Q. You knew there were other bidders?

A. From time to time he would say, "What is the price now?", and I would tell him.

30

Q. And would you tell him what your bid was?

A. No, not particular.

Q. You didn't tell him what your bid was? I mean your uncle.

A. No, not particular, no.

Q. You would keep that quiet?

A. He would say "What is the bid?", and I would tell him, I didn't tell him it was mine or whose it was.

Q. Well, how did your uncle know, then, whether the property was being protected or not?

A. I don't know.

Q. You don't know how he knew that, eh? Didn't he get that information from you?

A. No; he got what the bids were, is all.

Q. Well, he didn't know which was your bid and which was the bid of someone else, eh?

A. No.

Q. Didn't he ask you?

10

A. Not particular, No. Every once in a while he would say, "What is the bid?" and I would tell him, I wouldn't exactly tell him every time I bid or what everybody else bid.

By the Vice-Chancellor:

Q. Did he know that you were bidding?

A. I think he did, yes.

20

By Mr. Weaver:

Q. Now, if you had succeeded in purchasing this property, Mr. Colson, how did you expect to pay for it?

A. I didn't have to pay.

Q. What?

A. Ten per cent. is all you had to pay down and I could have gotten the other money.

Q. You would have to pay the balance of it. How 30
did you expect to pay that?

A. I could have got that in thirty days.

Q. Where?

A. I could have got that from my brother-in-law.

Q. Didn't your father tell you he would help you out on it if you bought it?

A. He never said anything like that.

Q. What did he tell you about it?

A. He didn't tell me anything about it.

Q. What did Mr. Davis tell you about it in case you bought it?

A. He said he would help me out.

By the Vice-Chancellor:

10 Q. He said he would help you out in case you bought it at this sale?

A. If I hadn't enough money to pay for it.

Q. When did he tell you that?

A. Before the sale.

By Mr. Weaver:

Q. How much money did you have with you that day?

20 A. I didn't have much money with me.

Q. What?

A. I couldn't tell you.

Q. How much? \$10.00?

A. I don't know.

Q. Well, you have some idea?

A. I could give a check for it; you wouldn't carry the money.

Q. Well, on your account? On your own bank account?

30 A. Why, we both use the same account, Father and I.

Q. You were going to give a check on your father's account, on the firm account?

A. Some of it, I could give some of my own.

Q. That was your intention, wasn't it?

A. Yes.

Q. Yes, give a check on your firm account?

A. Yes.

Q. Now, did you have that much money in bank that day?

A. Yes; we could get it from the bank if we didn't have it, I think we had it.

Q. Well, if you had given a check on the bank that day for ten per cent. of the purchase price—

A. Yes.

Q. —did you have that much money in the 10 bank?

A. Yes.

The Vice-Chancellor: That is, did the firm have, you mean?

Q. Yes. Did the firm have it? Now, be careful about this answer. I want to know whether, if you had given a check on the firm account, you had ten per cent. of the purchase price of this property in 20 cash in bank in the firm's name?

A. Well, I don't know.

Q. Well, then, how did you expect to pay for this property?

A. Why, I could go to the bank and get it if I didn't have it.

Q. Well, but this was a cash sale; you had to pay ten per cent. down. You weren't going to give a check on your bank account if you didn't have sufficient money there to meet it, were you? 30

A. No.

Q. How did you expect to work that out? Now, just tell us. You knew the terms of sale were ten per cent. cash, and that that had to be paid on the day of the sale, and you had to go get money; now, how did you expect to get that?

- A. You don't have to pay it that day exactly.
- Q. Well, that was the terms of sale, wasn't it?
- A. Yes.
- Q. Were you in a more favored class than the rest of the purchasers?
- A. No.
- Q. Eh?
- A. I don't know.
- 10 Q. Isn't it a fact that you were going to depend on your father to help you out on the money for this sale?
- A. My uncle would have helped me out.
- Q. Well, wouldn't your father help you out?
- A. No.
- Q. But you say you would have drawn a check on the firm account?
- A. Yes.
- Q. That would have been part of your father's money, wouldn't it?
- 20 A. Well, it might have been, yes.
- Q. When you were bidding on this property, now, you must have had some idea in your mind where you were getting the money from to purchase this property?
- A. My uncle.
- Q. Your uncle?
- A. Yes.
- Q. Did he tell you right there during the sale that he would help you out?
- 30 A. He said before the sale he would help me out.
- Q. Then you had talked to him about the purchase of this property?
- A. Yes.
- Q. What did you say to him?
- A. That is about all I said.
- Q. Is that all you said to him?

A. What I said before.

By the Vice-Chancellor:

Q. Tell me just what the conversation was with your uncle that morning, all of it, don't leave out any part of it, now, the substance of the whole of it.

A. I went down there and saw him,——

Q. Down where? At the sale?

A. At the sale, and he asked me if I was still in 10 the notion of the lots, and I said yes, if I had enough money, he says, "I will help you out with the money." He wanted to know what I thought they was worth, and I didn't know exactly what they would bring, might bring \$450, I didn't know. That is about all he said.

By Mr. Weaver:

Q. Did Mr. Davis, your uncle, tell you what price 20 he was willing to let this property go at?

A. No.

Q. Now, did Mr. Propper's bid immediately follow yours?

A. I don't know.

Q. Well, what was your last bid?

A. Four hundred and fifty-five, I think.

Q. On which piece of property?

A. On the corner lot.

Q. Now, what was your bid on the other lot, 30—your last bid?

A. The two inside lots I think was \$345.

By the Vice-Chancellor:

Q. Why didn't you go to \$550?

A. I didn't think they was worth that much.

Q. Or to \$350?

A. I don't know; I didn't think—I thought that was enough.

By Mr. Weaver:

Q. Was the property struck off at the next bid after yours?

10 A. I think it was.

Q. In both instances that is true, isn't it?

A. Yes, I think so.

Q. When you stopped bidding the next bidder was the man in each case who got the property?

A. Yes, I think so.

Q. Well, you know so, don't you?

A. Yes.

20

FRANK DAVIS, one of the defendants, alleging himself conscientiously scrupulous of taking an oath, having affirmation duly administered to him according to law, on his solemn affirmation saith:

By Mr. Miller:

Q. You are one of the owners of this land they are talking about in this suit, aren't you?

30 A. I was, I was part owner.

Q. And did you attend the sale on August 17th, 1914?

A. I did.

Q. Did you bid on this property yourself?

A. I did not.

Q. Did you employ any one else to bid for you?

A. I did not; I positively did not.

Q. Did you arrange with your nephew to bid for you?

A. Eh?

Q. Did you make arrangements with your nephew that he should go there and bid for you?

A. I did not.

Q. Now, before he went to the sale or at the sale did he ask you to help him about money, or anything like that?

10

A. Before the sale.

Q. Just tell what that was.

A. Before the sale we was talking about it up to Mr. Colson's house, and Frank had often talked about wanting to buy the lot, that corner lot, and I told him if he hadn't the money I would loan him the money, we owned the lots between us, I told him if he wanted the money I would let him have the money to buy that lot with. Frank Colson is named after me; I have got no children of my own; I have always thought a good bit of him and I am his uncle, that is, Asa Colson is my wife's brother.

20

Q. Had he talked to you in the spring, some months before that, about buying that lot?

A. He had talked about it before, he was up to our house last summer and was talking about it and he said his father expected to make a little money out of the lot and he thought he could do it too, he wanted to buy the lot, and that is all there is to it. I told him if he wanted to I was willing to take a chance on him and let him have the money if he hadn't the money.

30

Cross-examination.

By Mr. Weaver:

Q. Who did you have present at the sale to protect your interest in that lot?

A. How is that?

Q. Who did you have present at the sale to protect your interest in the lot?

10 A. Protect my interest?

Q. Yes.

A. I didn't have any one.

Q. Well, how did you expect to protect your interest?

A. Eh?

Q. How did you expect to protect your interest?

A. How to protect it?

Q. Yes.

20 A. Well, it was protected with Mr. Ackley, that agreement he had here,—if the lot didn't bring so much he didn't sell it, it wasn't sold. You seen that agreement.

Q. So that you didn't think it was necessary to have anybody there to bid for you?

A. I did not.

Q. Well, but supposing the property had only brought \$13,000, or \$10,000, what would you have done then?

30 A. Well, I don't know. Then Mr. Ackley wasn't allowed to sell—you saw that agreement here—in that condition.

Q. So that you didn't have anybody there to protect your interest?

A. No, sir.

Q. And you talked to Mr. Colson about this matter, didn't you?

A. Talked to him about the—he was talking to me about wanting to buy the lot.

Q. And how about the father,—did you talk to him about it?

A. No, sir; there was nothing said to the father about it.

Q. If the property hadn't brought the amount you arranged with Mr. Ackley it would not have been sold, would it?

A. Well, I don't know. No, I don't suppose it would. No. No, I don't suppose Mr. Ackley would have let it went, because he had no right to let it go if it didn't bring that amount.

Q. Didn't you meet Mr. Colson and his son there that day at the sale?

A. Meet him?

Q. Yes.

A. No, sir, I didn't.

Q. Well, you were there——

A. We went down there together probably from 20 his house, because me and my wife was staying at his house.

Q. All three of you came down there together on that day?

A. Well, I don't just remember about that, I don't just remember about that, whether we did or not.

Q. Well, you met when you got down there in the salesroom, didn't you?

A. Well, we was there together, my wife and all hands of us. My wife was Mr. Colson's sister.

Q. I mean when you got to the auction room?

A. Eh?

(Question repeated.)

A. What?

Q. Mr. Colson and his son both met you there, didn't they?

A. They both was there, yes, and I was there.

Q. And you all sat down together?

A. We was all together, yes, sir.

Q. How did you know the price your lots brought?

A. Well, this man testified that I sat alongside of Frank Colson, was talking to him,——

10 Q. Never mind what he testified to. What do you say?

A. What about?

Q. How did you know the price this property was bringing?

A. Why, by Frank Colson. I was sitting alongside of Frank Colson. I was naturally interested in the property and wanted to know what it was bringing.

Q. You got your information from Frank?

A. I did, sir.

20 Q. Did he tell you whether the bids he reported to you were his bids or someone else's?

A. He did not, just told me what the bids were.

Q. Well, were you going to help him out if he purchased the property?

A. I would, if he wanted some money, I told him if he was short of money I would let him have some money.

Q. Would you give him the ten per cent. that day?

30 A. Certainly, I would have to give him the ten per cent. if he bought the property.

Q. You were prepared to do it that day?

A. I was prepared to do it.

Q. Did he ask you for it?

A. He didn't buy the property.

Q. Well, had he made arrangements with you to get the money from you?

A. I told him—he didn't have to ask me, I told him I would help him, I had the money all right.

Q. So you had arranged with him that day to let him have the money if he wanted it?

A. I would, sir.

Q. Well, did you arrange to let him have it? Did you tell him?

A. I told him I would let him have what money he wanted to buy that lot with, if he wanted to buy it.

Q. Now, isn't it a fact that while the sale was going on you, Mr. Colson and Mr. Frank Colson all sat together? 10

A. No, sir; Mr. Colson sat over on one side, Frank and me sat together and my wife sat between us.

Q. So that you and Frank and your wife were together?

A. Well, my wife was sitting between us; I think Frank's wife was there, and Asa's wife was there too. He sat over on the end of the bench; my wife and Frank's wife sat between them and me. 20

Q. Wasn't it a fact that during part of the sale you and Mr. Colson and Frank Colson were all together?

A. No, sir, it was not.

Q. You weren't together at all?

A. We were positively not together.

Mr. Miller: I offer these letters in evidence. 30

(Said letters marked Exhibits D5, D6, D7 and D8.)

Mr. Miller: And this map that Senator Ackley has referred to, which we can forward to your Honor.

The Vice-Chancellor: I cannot receive it unless it is produced today.

CLARA S. MINDIL, a witness produced in behalf of the defendants, being duly sworn according to law, on her oath says:

10 By Mr. Miller:

Q. Do you live in Philadelphia, Mrs. Mindill?

A. I do.

Q. Do you own property at the seashore?

A. Yes.

Q. Wildwood?

A. Yes.

Q. And did you attend this sale held on August 17th, 1914?

20 A. Yes.

Q. Do you make a custom of entering notations on the back of auctioneers' advertisements?

A. I do.

Q. And did you do so on this occasion?

A. Yes, and other occasions.

Q. Have you brought with you the catalogue that you had at this sale?

A. Yes, and of other sales also.

30 Q. Why do you do that? Are you interested in the sales?

A. That is one reason, but the principal reason is because my husband is a physician and in going to the shore—he goes each week-end when he can get off, and then other times, during the summer, taking a week all together, I mean at each time. Dr. Neuber and my husband exchange practices and he takes

his vacation all at one time, so that it is seldom, if ever, that Dr. Mindil can go to Mr. Ackley's sales, because Dr. Neuber happens to be away just about that time, he goes in August and stays until the day after Labor Day. And owning property on the island, and being interested for other reasons as well, I have always made it a point to keep a record of these sales, in fact, I might add that in traveling anywhere I generally keep a record for my husband, because we have always lived as one, you might say, 10 what one knows the other knows, and I never felt really that I could take any trip without keeping a record of it to let him enjoy it if he could not be there himself.

Q. Now, referring to whatever memoranda you made at the commencement of the sale just state what, if anything, the auctioneer announced there.

A. Well, on that day, and I might add that to the best of my recollection at every sale that I have ever attended since 1907, including 1907, Mr. Ackley 20 has always made as general statements, "I do not sell from the catalogues." I remember on this occasion, this sale, he said, "I have never yet been able to get catalogues printed without errors, why I don't know, except all of us are human, but," he says, "the catalogues are simply gotten up for the purpose of giving people the privilege—sent out for the purpose of giving people the privilege of locating their properties and getting all the information they may desire before the date of the sale, therefore, the 30 errors are really—they don't amount to very much, because in each instance the description of the property will be read out,"—there was always a typewritten description—"and I want everybody to listen, and use your own brain and your own mind and your own opinion, do not depend upon other

people, after it is knocked down to you I want you when you come up to make the deposit to read your agreement and if it does not correspond with the statement, the description that has been read, or you haven't understood it, do not sign and I will put it up again." Another statement that he made was that—he said—shall I go on?

Q. Go ahead.

10 A. He always spoke of the restrictions that benefited property, he said they were generally—I don't remember the particular restrictions except in some instances, but he always said that Wildwood was wisely restricted and that he had faith in it, and the restrictions were of such a nature that he did not see how it was possible for property to depreciate in value except in case of a panic, or something of that kind. And then before—when he was about to cry this Boardwalk property, I remember distinctly that he said, "These lots are irregular," and he
20 pointed to the map, there was a large map hanging up, "they are all so many feet, more or less, no two lots, I think, are exactly the same depth, but that is immaterial, because on the Boardwalk the business is done on the front and not the back, as you gentlemen know, and for that reason I am not selling by the depth or length but by the front or lineal foot, and anything that you may bid will be by the foot, multiplied by the number of front feet, and do not do as one man did in a sale of mine some years ago,
30 say that he thought he had purchased the whole Boardwalk, not so many feet, for the price of one foot."

Q. Do you recall that he called attention to a particular error in the description of this property as contained in the catalogue?

A. Do you mean as to the depth?

Q. Yes.

A. No, I don't remember that. Mr. Ackley said, I remember, in I don't know how many but in several properties—he called attention to errors, but I cannot in any instance recall the particular piece of property. I do not know the depth of this property, nor the width of it, in fact, that is why I keep a record, because I cannot when there are perhaps forty or fifty more sales in a book, I can't possibly remember the number of feet or any width or any depth, except in North Wildwood and the Crest, and the reason I can remember the sizes of lots in both places is because they are thirty feet wide, as a rule, and they are sold in pairs, therefore if I know a pair of lots is sold it is sixty feet, but I cannot remember attention being called to any feet or sixty-seven feet or anything of that kind, but I do know that he said that the depth was immaterial because he was not selling by the depth. 10

Q. Did he give the depth and width of each lot from this map in figures? 20

A. I can't recall whether or not he called off the number of feet, but I do know that constantly he pointed to the map, and, having properties in the sale, I felt that Mr. Ackley was giving really—I was really a little nettled at the time because I thought he was giving so much attention to unnecessary explanation, because I thought that what he had said was so plain that he who runs may read, I thought he was losing unnecessary time, but I cannot say whether he called attention to the exact number of feet, I am not reasonably enough clear about it, but I know in several instances he called out properties saying "This is wrong," and "This is wrong," but I don't remember 80 feet or anything of that kind. 30

Cross-examination.

By Mr. Weaver:

Q. Were you interested in the purchase of this particular property?

A. No.

Q. Why do you remember so distinctly what he said about this property?

10 A. I remember what he said about all the property, except the number of feet, the measurements. I have never bought Boardwalk property because it is rather too much for us to handle.

Q. You can recollect all he said about——

A. Oh, no, I told you——

Q. —numerals?

20 A. I don't remember the numerals. I don't know about everything. Did I say that I remembered everything? If you ask me about some of the other properties I would remember just as well. Take any at random. You can test my recollection if you wish to.

Mr. Miller: We rest.

GEORGE C. BOWKER, recalled.

By Mr. Weaver:

Q. Mr. Bowker, it has been testified to here that between the day of the sale, on the 14th day of August, 1914, and the day of the settlement fixed for the property bought by Mr. Propper, you called, in company with Mr. Propper, on Senator Ackley at his office in Wildwood. Is that a fact or not? 10

A. It is not true. I have never been in Wildwood at any time except on September 25th, when I went down to make the settlement, nor had I ever seen Mr. Ackley previous to that time.

Cross-examination.

By Mr. Miller:

20

Q. Well, was it Mr. Iszard who was there?

A. I don't think he was, but I don't know.

Q. As I recall, the Senator said either you or Mr. Iszard.

Mr. Iszard: He said both.

A. I have never been in Wildwood excepting on September 25th, and not since. 30

SAMUEL PROPPER, recalled.

By Mr. Miller:

Q. Did you go to Mr. Ackley's office in Wildwood?

10 A. Never. I haven't been in Wildwood for five years until the 25th of September when I went down there to the settlement; hadn't seen Mr. Ackley for years before that time; on September 25th I saw Mr. Ackley at Mr. Zeller's office, that is the only time I ever saw him.

STEPHEN J. KEARNEY, recalled.

20

By Mr. Weaver:

Q. Mr. Kearney, you have testified that you were present at the sale of this property to Mr. Propper?

A. Yes.

Q. Senator Ackley has testified that at that sale, and at the sale of this particular property, he called attention to a map on the wall and stated distinctly the length on Wildwood Avenue of the property
30 which he was selling to Mr. Propper. Is that so or not?

A. Well, as far as I can remember he did call attention to the map.

Q. I mean about distance. What did he say about distance?

A. I can't recall. The only thing that I do re-

member very distinctly was this catalogue, and he sold according to this catalogue, the dimensions in this catalogue is what he sold by, and he never mentioned anything about being errors in the printing or not, that was never said at all.

Q. Nor did he say anything about the distance on the avenue as far as you can recollect?

A. Oh, no, only according to this catalogue—is what he sold.

Q. How about the agreement? He has testified 10 he read the agreement.

A. Well, I never saw or never heard an agreement read by Mr. Ackley. It was sold according to this, that is the only thing that I could see or hear at that sale.

Q. Were you in a position where you could hear him read the agreement if he had read it?

A. Yes, I was right in back of the men that bid for the property, right in back of those three gentlemen there. 20

Q. And there was nothing said about the agreement?

A. No.

Cross-examination.

By Mr. Miller:

Q. Was there a clerk there? Was his son attending as clerk? 30

A. Well, I think his clerk was there, a boy was there.

Q. Before each sale did he read from a paper?

A. Well, I can't recall that. This particular case I remember, because being Mr. Propper I was interested more than any other person, don't you know, knowing Mr. Propper.

Q. Well, this was considered—this was a valuable property, wasn't it?

A. Yes, supposed to be.

Q. Don't you remember that he did read from a printed paper—the clerk there, the particular description?

A. No, sir.

Q. You recall before the sale he did refer to errors in the catalogue?

10 A. No.

Q. Did he say he had never had one yet that was printed correctly?

A. He never had what? A catalogue?

Q. Yes.

A. I didn't hear it.

By the Vice-Chancellor:

Q. Were you there when the sale began?

20 A. Yes, Judge.

Q. In the morning, I mean?

A. Yes, your Honor.

BOTH SIDES REST.

COMPLAINANT'S EXHIBITS.

EXHIBIT C1.

For Exhibit C1, see Case, pp. 51, the Exhibit C1 read into the testimony.

10

EXHIBIT C2.

For Exhibit C2, see Exhibit "A" annexed to bill of complaint, Case, p.10

EXHIBIT C3.

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For Exhibit C3, see Exhibit "B" annexed to bill of complaint, Case, p.12

EXHIBIT C4.

This Indenture, made the Twenty-sixth (26th) day of August in the year of our Lord one thousand nine hundred and thirteen (1913) Between *The Wildwood Beach Improvement Company*, a corporation created and existing under the laws of the State of New Jersey of the first part, and *Asa L. Colson* of Wildwood, in the County of Cape May and State of New Jersey, and *Frank Davis*, of Woodstown, in the

30

County of Salem and State of New Jersey, of the second part: *Witnesseth*, that the said party of the first part, for and in consideration of the sum of one dollar and other valuable consideration lawful money of the United States of America, well and truly paid by the said party of the second part, to the said party of the first part, at and before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged hath granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, their heirs and assigns. All those certain lots or parcel of land situate, lying and being in Wildwood, in the County of Cape May and State of New Jersey, known and designated as Lots numbers Thirty (30), Thirty-one (31) and Thirty-two (32) of Block "C" as shown on Map of land and riparian rights, City of Wildwood, sold at Public Sale September 2nd, 1912 and are bounded and described as follows, to wit: *Beginning* at a point on the Northeasterly side of Wildwood Avenue distant six hundred and thirty three (633) feet Southeastwardly from the Southeasterly line of Atlantic Avenue, said beginning point being in the Southeasterly line of a "Ten foot drive for adjoiners only" and extending thence Northeastwardly along the Southeasterly line of said drive Sixty-seven and five-tenths ($67 \frac{5}{10}$) feet in front or breadth; thence Southeastwardly between parallel lines of that width or frontage at right angles to said Atlantic Avenue and binding on said side of said Wildwood Avenue a distance of fifty-eight and ninety-two one-hundredths ($58 \frac{92}{100}$) feet more or less to the high water line of the Atlantic Ocean, and thence still extending between parallel lines

of that width, be the distance more or less to the exterior line established by the Riparian Commissioners. Together with the right to use the "Ten foot drive for adjoiners only" hereinabove referred to, which is provided by the party of the first part hereto for the use of adjoiners only. Under and subject to the covenants and conditions that all buildings shall be artistic in design and attractive in finish and no smithy, factory, livery stable, public garage, slaughter house or fish market shall ever be erected or conducted on the premises conveyed by this deed and to the right of the grantor herein to fill the lots lying between Atlantic Avenue and the Boardwalk, as well as the streets, as near to the Boardwalk as shall appear discreet to the grantor and to gravel the streets and lay the pavements and curbs and sewer; and also subject to the reservations that there shall be no building or buildings erected on the ocean side of the Boardwalk except Ocean Piers, but no Ocean Pier shall be built before August 22nd. 1919 on the ocean front of Blocks "B" or "C" nor shall free bathing ever be prevented on the beach or in the surf in front of any land sold by the grantor September 2nd. 1912 at public sale. The right of way for the present boardwalk and to maintain and operate the same, and the right of way for any future boardwalk on the ocean side of the present boardwalk and to construct, maintain and operate the same upon surrender and vacation of the present right of way to the adjoining owners; and the right to take sand from the ocean side of the boardwalk to complete the fill to grade are each and all hereby expressly reserved to the grantor and its successors and assigns. Together with all and singular the improvements, woods, ways, rights, liberties, privileges hereditaments and appurtenances to the same belonging or in anywise appertaining,

and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, and every part thereof, with the appurtenances. *To Have and to Hold* the said premises above described, with all and singular the hereditaments and appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part their heirs and assigns forever. And the said party of the first part, for itself, its successors doth by these presents covenant, grant and agree, to and with the said party of the second part, their heirs and assigns that it, the said party of the first part, and itself, its successors all and singular the hereditaments and premises above described and granted, or mentioned and intended so to be, with the appurtenances unto the said party of the second part, their heirs and assigns, against it the said party of the first part, and its successors and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, from, through or under it, them or either or any of them, shall and will under and subject as aforesaid warrant and forever defend. *In Witness Whereof*, the said party of the first part to these presents hath hereunto set its corporate seal and caused this Indenture to be signed by its President and attested by its Secretary; dated the day and year first above written.

Wildwood Beach Improvement
Company (Corp. Seal)
By Philip P. Baker, President.

Signed, Sealed and Delivered
in the presence of
William E. Zeller, Secretary

State of New Jersey, Cape May County, ss. Be it Remembered, that on this Twenty-sixth day of August in the year of our Lord one thousand nine hundred and thirteen, before me, the subscriber a Master in Chancery of New Jersey, personally appeared William E. Zeller who being by me duly sworn, on his oath saith, that he is the Secretary of the Wild-wood Beach Improvement Company the grantor within named, and that Philip P. Baker is the President, that deponent knows the common or corporate seal of said grantor and that the seal annexed to the within Deed or conveyance is such common or corporate seal; that the said Deed or Conveyance was signed by the said President and the seal of said grantor affixed thereto in the presence of deponent; that said Deed or Conveyance was signed, sealed and delivered as and for the voluntary act and deed of said grantor for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said grantor; and at the execution thereof this deponent subscribed his name thereto as witness.

William E. Zeller

Sworn and Subscribed the
day and year aforesaid
O. I. Blackwell
Master in Chancery of New Jersey

Received and recorded this Deed, September 26,
A. D. 1913 at 11 A. M.

A. C. Hildreth, Clerk.

Complainant's Exhibits

State of New Jersey
 (Shield)
 County of Cape May

I, A. C. Hildreth, County Clerk, and Clerk of the Court of Common Pleas in and for said County, *Do Hereby Certify* that the foregoing is a true and correct copy of

Deed

From

10 Wildwood Beach Improvement Company
 To

Asa L. Colson and Frank Davis

as recorded, on the....Twenty-sixth....day of....
 September.....A. D.....1913....., in the Clerk's
 Office of the County of Cape May, in Book293
of....Deeds....at page216 &c.....

In Witness Whereof, I have hereunto
 set my hand and affixed the seal of said

20 (Seal) Court, at Cape May Court House, this
Twenty-fourth....day of....Decem-
 ber....A. D. 1915.

A. C. Hildreth
 Clerk.

[Documentary Stamp]

S. W. C.

12/24/15

[ENDORSED ON BACK]

30

C4 12/29/15

Certified Copy

of

Deed

From

Wildwood Beach Improvement Company

To

Asa L. Colson and Frank Davis

Cape May County Clerk's Office
Cape May Court House, N. J.

EXHIBIT C5.

This Company will not assume any responsibility for unpaid gas, electric light, sewer or other corporation claims, NOT LIENS; nor for the proper execution of papers until approved by it; nor will it perform the work required for the removal of any proper exception. Counsel should be employed where legal services are required. All papers should be submitted for approval BEFORE settlement day. 10

Where insurance is under a mortgage, the production and approval of the bond and mortgage will be required before issuing policy. 20

WEST JERSEY TITLE AND GUARANTY
COMPANY

S. E. Cor. Third and Market Streets, Camden.
N. E. Cor. N. C. & Atlantic Aves., Atlantic City.

Camden, N. J. September 19th, 1914

No liability assumed after this date; if settlement is postponed search should be continued.

Pursuant to application No. 22427 the "West Jersey Title and Guaranty Company" will, upon the surrender of this certificate, the payment of the premium and expenses, and the production and record of filing of the papers, hereinafter called for, insure Samuel Propper as Owner of premises—as per Schedule hereinafter written— to the amount 30

of Two Thousand (\$2000.) Dollars, against all liens or defects in title, except the following, which may now exist, and will be made exceptions in the policy unless removed, viz:

Note—It will not be guaranteed that there are any buildings or improvements on the land intended to be insured.

1. Tenancy of present occupants.
(Removed J. H. T.)
- 10 2. Rights of way, public or private.
3. Variation of lines and deficiency in quantity of ground.
4. Loss or damage by reason of mechanics' lien claims not filed or of record at this date.
(Removed J. H. T.)
5. Taxes, water rents and municipal claims for the year 1914.
6. Liability of premises for municipal improvements, such as grading, curbing, guttering, paving, sidewalks, sewers, water pipe &c., constructed or being constructed.
- 20 7. Tax Collector not heard from.
8. Conditions and restrictions as contained in Deed from Wildwood Beach Improvement Company to Asa L. Colson and Frank Davis, dated August 26th, 1913, and recorded in Book 293, page 216, and such restrictions as may be imposed by other deeds of the Wildwood Beach Improvement Company covering the entire tract.
- 30 9. Proof required, satisfactory to this Company, of such facts and circumstances attending the transmission of the title to insured premises by Deed from The Wildwood Beach Improvement Company to Asa L. Colson and Frank Davis, dated August 26th, 1913, and recorded

in Book 293, page 216, as will enable us to determine from the statement made of such facts and circumstances whether said conveyance was upon any secret trusts or confidences, as collateral security or otherwise. Said deed being a voluntary conveyance for a nominal consideration, the purchaser is put upon inquiry as to the bona fides of the transmission of the title.

10. Rights, public and private, over that part of 10
premises in question included within the lines
of a forty feet wide boardwalk extending
through and across the same.

Dated August 17th, 1914.

11. Agreement Between 10
of Sale Samuel Propper
—and—
John A. Ackley,
per W. E. Zeller
12. Evidence to be furnished that premises in ques- 20
tion are wholly or partly above high water
mark.
13. Recognizance in U. S. District Court for the
District of New Jersey, by Frank T. Davis,
filed March 16th, 1914. Further information
as to this will be furnished later.
14. Production and record of a Deed from Asa L.
Colson and wife and Frank Davis and wife, to
Insured.

West Jersey Title and Guaranty 30
Company.

W. T. Casselman Secy
by J. H. T.

SCHEDULE.

10 Estate in fee simple in that part of insured premises lying Northwestward or landward on the natural ordinary high water mark of the Atlantic Ocean, and such estate as is granted by the State of New Jersey, through its Riparian Commissioners, in that part of insured premises lying Southeastward or Oceanward of such natural high water mark, such Grant being made to The Wildwood Beach Improvement Company, dated January 9th, 1912, and recorded in the Clerk's Office of Cape May County in Book No. 273 of Deeds, page 157, SUBJECT, however, to the provisos and conditions in said Grant contained.

20 Land and premises situate in the City of Wildwood, County of Cape May and State of New Jersey, BEING Lots 30, 31 and 32, Block "C" on Plan of land from Cedar Avenue to Twenty-Sixth Avenue and from Atlantic Avenue to the Boardwalk in the City of Wildwood, N. J., October 1912, Harry E. Weir, C. E., filed November 4th, 1912:—

30 BEGINNING at a point on the Northeast side of Wildwood Avenue, 633 feet Southeast from the Southeast line of Atlantic Avenue, said beginning point being in the Southeast line of a "ten foot drive for adjoiners only," and extending thence Northeast along the Southeast line of said drive 67.5 feet in front or breadth; thence Southeast between parallel lines of that width or frontage, at right angles to said Atlantic Avenue and binding on said side of said Wildwood Avenue, 58.92 feet, more or less, to the high water line of the Atlantic Ocean, and thence still extending between parallel lines of that width, be the distance more or less, to the

DEFENDANTS' EXHIBITS.**EXHIBIT D1.**

We, Asa L. Colson & Frank Davis do hereby authorize and empower John A. Ackley to sell and dispose of the Real Estate known as the corner Boardwalk Lots & owned by the above named of Wildwood & Woodstown, N. J. and owned by _____ of _____ Situate on the northwesterly corner of Wildwood Ave., & Boardwalk, being Lots Nos. 30, 31 & 32. Block No. C. In the City of Wildwood, New Jersey, at public or private sale on or before the 1st., day of October 1914 for the sum of an average price of \$350.00 per lineal foot, on the following terms:

10
20 10% of the purchase price to be paid in cash on day of sale, twenty five per cent of the purchase price to be paid in cash when deed is given, and a mortgage accepted for the balance of the purchase price with interest at 6% per annum payable semi-annually.

Conditions:—Free and clear of all encumbrances, taxes for 1914 to be paid by the present owners.

We hereby agree to pay the said John A. Ackley five per cent of the gross amount of sale provided the amount received equals \$24,360.00 or more, but if 30 the sum realized should be less than \$24,360.00 we agree to pay the said John A. Ackley any sum above \$23,200.00 as a commission for the sale of same.

Asa L. Colson
Frank Davis.

Dated July 15th, 1914.

EXHIBIT D2.

Telephone

(Filbert 21-17
(18 Manayunk.

Law Offices of
George C. Bowker.

10

801 Franklin Bank Building Broad & Chestnut Sts.,
Philadelphia, Pa. September 18th, 1914.
Samuel Propper—1453.

Mr. John A. Ackley,
Vineland, N. J.

Dear Sir:—

Your letter of September 16th, addressed to Samuel Propper relating to lots at Wildwood, N. J. has been received and referred to me for answer. In reply I beg to advise you that we will be at the place designated in the contract for settlement on September 25th, 1914 at 12 o'clock. We will take the 8:50 train on that morning for Wildwood. We shall require, of course, deeds for lots 6, 7 and 8, and 30, 31 and 32 in accordance with the terms of sale; and we reserve to ourselves the right to make any objection which we are entitled to make by the bidding against Mr. Propper not being made by competitive bidders in good faith and solely for the purpose of forcing a higher price on Mr. Propper. 20 30

Very truly yours,
George C. Bowker.

EXHIBIT D3.

This Indenture made the twenty second day of October in the year of our Lord one thousand nine hundred and twelve (1912) Between Philip Gould and Annie Gould, his wife, of the City and County of Philadelphia and State of Pennsylvania (hereinafter called the Mortgagors) of the first part, and
10 Samuel Propper, of the City and State aforesaid, (hereinafter called the Mortgagee) of the second part. Whereas, the said Mortgagors, in and by a certain obligation or writing obligatory under their hands and seals, duly executed and bearing even date herewith, stand bound unto the said party of the second part, in the sum of Thirteen thousand dollars (\$13,000.) lawful money of the United States of America, conditioned for the payment in lawful money as aforesaid, of the just sum of Six thousand
20 five hundred dollars (\$6,500) lawful money as aforesaid payable at the expiration of three years, from the date thereof, together with interest thereon, payable semi-annually, at the rate of six per. cent, per annum and together with all taxes or charges, in nature thereof that may be laid or levied, on said obligation or this Indenture of Mortgage or the principal and interest moneys thereby secured immediately upon their assessment, without any fraud or further delay; and for the production to said obligee,
30 his heirs, executors, administrators or assigns, on or before the thirty-first day of December, of each and every year of receipts for all taxes for the current year assessed upon the premises hereinafter described Provided however, and it was thereby expressly agreed, that no credit should be claimed or allowed on the interest above provided, because of

any taxes paid upon said premises and that if at any time default should be made, in payment of interest as aforesaid, for the space of thirty, days, after any semi-annual payment thereof should fall due, or in the payment of any tax or charge as aforesaid for the space of ninety days after the same shall first become payable or in such production of tax receipts as aforesaid, on or before the day aforesaid, then and in either such case, the whole principal debt as aforesaid, should at the option of the obligee 10 therein named, his executors, administrators or assigns, become due and payable immediately and payment of said principal debt and all interest thereon, should be enforced and recovered at once, anything therein contained to the contrary notwithstanding, as in and by the said recited obligation, and the condition thereof, relation to the same being had may more fully and at large appear. Now this Indenture Witnesseth that the said party of the first part, as well for and in consideration of the aforesaid debt 20 or sum of six thousand five hundred dollars (\$6500) and for the better securing the payment thereof, unto the said party of the second part, his heirs, executors, administrators and assigns, in discharge of the said obligation above recited, as for and in consideration of the further sum of one dollar, in specie, well and truly paid to the said party of the first part, by the said party of the second part at and before the ensealing and delivery hereof, the receipt of which one dollar is hereby acknowledged, have, 30 granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm, unto the said party of the second part, his heirs and assigns. All that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in Wildwood, in

the County of Cape May and State of New Jersey, known and designated as Lot number Twenty seven-one (27-1) of Block "B" as shown on Map of land and Riparian Rights, City of Wildwood, sold at Public Sale, September 2nd, 1912 and is bounded and described as follows: to wit: *Beginning* at a point on the northeasterly side of Oak Avenue, distant five hundred and fifty four (554) feet Southeastwardly from the Southeasterly line of Atlantic Avenue said beginning point being in the Southeast-
10 erly line of a "Ten foot drive for adjoiners only" and extending thence Northeastwardly along the Southeasterly line of said Drive twenty nine and forty five one hundredths ($29 \frac{45}{100}$) feet in front or breadth thence Southeastwardly between parallel lines of that width of frontage at right angles to said Atlantic Avenue and binding on said side of said Oak Avenue sixty eight (68) feet more or less
20 to the high water line of the Atlantic Ocean, and thence still extending between parallel lines of that width, be the distance more or less, to the exterior line established by the Riparian Commissioners. Together with the right to use the "Ten foot drive for adjoiners only" hereinabove referred to, which is provided by the party of the first part hereto for the use of adjoiners only. Being the same premises which The Wildwood Beach Improvement Company by Indenture bearing even date herewith and intended to be forthwith recorded, granted and conveyed, unto the said Annie Gould, wife of Philip
30 Gould, in fee. Under and subject to certain conditions and restrictions as therein more particularly set forth. Together with all and singular the buildings, improvements woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in any wise appertaining and

the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To Have and to hold the said hereditaments and premises above grantea, or intended so to be, with the appurtenances, unto the said party of the second part his heirs and assigns forever. Provided, always, nevertheless that if the said Mortgagors, their heirs, executors, administrators or assigns, do and shall well and truly pay or cause to be paid unto the said party of the second part, or to his certain attorney or attorneys, heirs, executors, administrators or assigns, the aforesaid debt or sum of six thousand five hundred dollars (\$6500) on the day and time hereinbefore mentioned and appointed for the payment thereof, together with interest for the same, in like money, and for all taxes and charges and production of tax receipts in way and manner hereinbefore specified therefor, without any fraud or further delay, and without any deduction, defalcation or abatement to be made, for or in respect of any taxes, charges or assessments whatsoever; that then and from thenceforth, as well this present Indenture, and the estate hereby granted, as the said obligation above recited, shall cease, determine and become absolutely null and void to all intents and purposes, anything hereinbefore contained to the contrary thereof in any wise notwithstanding, and the said party of the first part, for themselves, their heirs, executors and administrators do covenant and grant to and with the said party of the second part, his heirs and assigns, that the said party of the first part their heirs and assigns, shall not nor will apply for or claim any deduction by reason of this mortgage, from the taxable value of the said lands and premises; and that the said party of the second part, his heirs, and assigns, shall and may from time to time and at all

times after default shall be made, in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances without the let, suit, trouble, hindrance or denial of the said party of the first part, their heirs or assigns, or of any other person or persons whatsoever. And it is also further agreed by and between the

10 parties to these presents, that the said party of the first part, shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies to an amount not less than six thousand five hundred dollars (\$6500) *dollars* and assign the policy and certificate thereof to the said party of the second part, as collateral security for the payment of the principal and interest aforesaid; and in default

20 thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums, paid for effecting, the same shall be a lien on the said mortgaged premises, added to the amount of the said bond and obligation and secured by these presents, and payable on demand with legal interest. In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Philip Gould (LS)

30 Annie Gould (LS)

Signed, sealed and delivered
in the presence of
Clement R. Lippincott

State of New Jersey, Camden County, ss. Be it remembered, that on this fourth day of December, in

the year of our Lord one thousand nine hundred and twelve (1912) before me the subscriber a Commissioner of Deeds for New Jersey, personally appeared Philip Gould and Annie Gould, his wife, who, I am satisfied are the grantors mentioned in the above Deed of Conveyance, and I having first made known to them the contents thereof, have acknowledged that they signed, sealed and delivered the same as their voluntary act and deed; and the said Annie Gould being of full age, on a private examination apart from her said husband before me acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband. All of which is hereby certified. 10

Clement R. Lippincott
Com. of Deeds.

Sworn and subscribed the
day and year aforesaid

Received and recorded this Mortgage, Dec. 5th, A. 20
D. 1912 at 9 A. M.

A. C. Hildreth, Clerk.

State of New Jersey
(Shield)
County of Cape May

I, A. C. Hildreth, County Clerk, and Clerk of the Court of Common Pleas in and for said County, *Do Hereby Certify* that the foregoing is a true and correct copy of 30
Mortgage

From
Philip Gould, et ux.
To
Samuel Propper

as recorded, on the....Fifth....day of....December....A. D.1912....., in the Clerk's Office of the County of Cape May, in Book....114....of....Mortgages....at page....42 &c.....

In Witness Whereof, I have hereunto set my hand and affixed the seal of said
(Seal) Court, at Cape May Court House, this...
Twenty-third....day of....December...
A. D. 1915.

10

A. C. Hildreth
Clerk.

[Documentary Stamp]
A. C. H.
12/23/15

[ENDORSED ON BACK]

20

Certified Copy
of
Mortgage
From
Philip Gould, et ux.
To
Samuel Propper
Cape May County Clerk's Office
Cape May Court House, N. J.

30

EXHIBIT D4.

This Indenture, made the Twenty-second (22nd) day of October in the year of our Lord one thousand nine hundred and twelve (1912). Between *The Wildwood Beach Improvement Company*, a corporation created and existing under the laws of the State of New Jersey, of the first part, and *Annie Gould* of the City and County of Philadelphia and State of Pennsylvania, of the second part. *Witnesseth*, that the said party of the first part for and in consideration of the sum of One Dollar and other valuable consideration lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged hath granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, her heirs and assigns, *All* that certain lot or parcel of land together with the improvements thereon erected situate, lying and being in Wildwood, in the County of Cape May and State of New Jersey known and designated as, Lot Number Twenty-seven-one (27-1) of Block "B" as shown on Map of land and Riparian Rights City of Wildwood, sold at Public Sale September 2nd, 1912, and is bounded and described as follows, to wit: *Beginning* at a point on the Northeasterly side of Oak Avenue distant Five Hundred and fifty-four (554) feet Southeastwardly from the Southeasterly line of Atlantic Avenue, said beginning point being in the Southeasterly line of a "Ten foot drive for Adjoiners

only" and extending thence Northeastwardly along the Southeasterly line of said drive Twenty-nine and Forty-five One Hundredths (29 & 45/100) feet in front or breadth; thence Southeastwardly between parallel lines of that width or frontage at right angles to said Atlantic Avenue and binding on said side of said Oak Avenue sixty-eight (68) feet more or less to the high water line of the Atlantic Ocean, and thence still extending between parallel lines
10 of that width, be the distance more or less to the exterior line established by the Riparian Commissioners. Together with the right to us the "Ten Foot drive for Adjoiners only" hereinabove referred to, which is provided by the party of the first part hereto for the use of Adjoiners only. Under and subject to the covenants and conditions that all buildings shall be artistic in design and attractive in finish and no smithy, factory, livery stable, public garage, slaughter house or fish market shall ever be
20 erected or conducted on the premises conveyed by this Deed; and the right of the grantor herein to fill the lots lying between Atlantic Avenue and the Boardwalk, as well as the streets, as near to the boardwalk as shall appear discreet to the grantor and to gravel the streets and lay the pavements and curbs and sewers and also subject to the reservations that there shall be no building or buildings erected on the ocean side of the Boardwalk except Ocean Piers but no Ocean Pier shall be built before August
30 22nd. 1919, on the ocean Front of Blocks "B" and "C" nor shall free bathing ever be prevented on the beach or in the surf in front of any land sold by the grantor September 2nd, 1912, at public sale. The right of way for the present boardwalk and to maintain and operate the same, and the right of way for any future boardwalk on the ocean side of the

present boardwalk, and to construct, maintain and operate the same upon surrender and vacation of the present right of way to the adjoining owners, and the right to take sand from the ocean side of the boardwalk to complete the fill to grade, are each and all hereby expressly reserved to the grantor, its successors and assigns. *Together* with all and singular the improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof, and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity of the said party of the first part, of, in and to the said premises, and every part thereof, with the appurtenances. *To Have and to Hold* the said premises above described, with all and singular the hereditaments and appurtenances, unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns for ever. And the said party of the first part, for itself, its successors doth by these presents covenant, grant and agree to and with the said party of the second part, her heirs and assigns, that it, the said party of the first part and itself, its successors all and singular the hereditaments and premises above described and granted or mentioned and intended so to be, with the appurtenances, unto the said party, of the second part, her heirs and assigns, against it, the said party of the first part, and its successors and against all and every person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, from, through or under it, them, or either or any of them shall and will

under and subject warrant and forever defend. In Witness Whereof the said party of the first part to these presents hath hereunto set its corporate seal and caused this Indenture to be signed by its President, dated the day and year first above written.

Wildwood Beach Improvement
Company (Corp. Seal)

By Philip P. Baker, President.

Signed, Sealed and Delivered

10 in the presence of
William E. Zeller, Secretary

State of New Jersey, Cape May County, ss. Be it Remembered, that on this Twenty-second day of October in the year of our Lord one thousand nine hundred and twelve, before me the subscriber a Master in Chancery of New Jersey personally appeared William E. Zeller who, being by me duly sworn on his oath saith that he is the Secretary of the Wild-
20 wood Beach Improvement Company the grantor within named, and that Philip P. Baker is the President, that deponent knows the common or corporate seal of said grantor; and that the seal annexed to the within Deed or conveyance is such common or corporate seal; that the said Deed or conveyance was signed by the said President, and the seal of said grantor affixed thereto in the presence of deponent; that said Deed or Conveyance was signed, sealed and delivered as and for the voluntary act and deed of
30 said grantor for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said grantor and at the execution thereof this deponent subscribed his name thereto as witness.

William E. Zeller

Sworn and subscribed the
day and year aforesaid
Herber F. Harris

Master in Chancery of New Jersey

Received and recorded this Deed, December 5, A.
D. 1912 at 9 A. M.

A. C. Hildreth,
Clerk.

10

State of New Jersey
(Shield)
County of Cape May

I, A. C. Hildreth, County Clerk, and Clerk of the
Court of Common Pleas in and for said County, *Do*
Hereby Certify that the foregoing is a true and cor-
rect copy of Deed

20

From
The Wildwood Beach Improvement Company
To
Annie Gould

as recorded, on the....Fifth....day of....Decem-
ber....A. D.....1912....., in the Clerk's Office of
the County of Cape May, in Book....284....of....
Deeds....at page....128 &c.....

In Witness Whereof, I have hereunto
set my hand and affixed the seal of said
(Seal) Court, at Cape May Court House, this 30
....Twenty-third....day of....Decem-
ber....A. D. 1915.

A. C. Hildreth
Clerk.

[Documentary Stamp]
A. C. H.
12/23/15

[ENDORSED ON BACK]

Certified Copy
of
Deed
From
The Wildwood Beach Improvement
Company
To
Annie Gould
Cape May County Clerk's Office
Cape May Court House, N. J.

10

EXHIBIT D8.

Philadelphia Office:
504 Franklin Bank Building
20 N. E. Cor. Broad & Chestnut Streets

Phones

Bell

Camden, 1015.

Philadelphia, Filbert 4453.

Keystone:

Philadelphia, Race 5797 D.

S. Stanger Iszard
Counsellor at Law
314 Market Street

Camden, N. J., December 10, 1914.

30

Louis H. Miller, Esq.,
Millville, N. J.

Dear Sir:

I beg to acknowledge the receipt of your favor of the 9th instant. I do not see that Mr. Propper has any control over Mr. Ackley in regard to his disposi-

tion of the deposit moneys. Mr. Ackley was present at the time of the tender of the deeds objected to and acted with knowledge of the existing conditions.

I expect to have some word from Mr. Bowker within the next few days in regard to proceedings to be taken. Personally I would like to try out the effect of the restrictive covenants in question upon an agreement to sell clear of all encumbrances. It is an interesting proposition as to just what our Court of Chancery would do and if it meets with Mr. Bowker's approval, I would like to see it take this course and try this suit out under a bill for specific performance. 10

I am,

Very truly yours,
S. Stanger Iszard

EXHIBIT D7.

December 20
Ninth
1914

S Stanger Iszard, Esq.
Attorney
314 Market Street
Camden, New Jersey.

In re Sale of Davis & Colson Lands to Propper
In re Sale of Gruner Lands to Propper

Dear Sir:

In the above matter Mr. Ackley has handed checks to Davis & Colson and to Charles Gruner for the deposit moneys, less his commissions, and deems the matter closed so far as he is concerned. That action is taken in accordance with my letter to you of November tenth, in which you were apprised of the action he intended to take. 30

Yours very truly,

EXHIBIT D6.

Philadelphia Office:
504 Franklin Bank Building
N. E. Cor. Broad & Chestnut Streets

Phones

Bell

Camden, 1015.

10 Philadelphia, Filbert 4453.

Keystone:

Philadelphia, Race 5797 D.

S. Stanger Iszard

Counsellor at Law

314 Market Street

Camden, N. J., November 12, 1914.

Louis H. Miller, Esq.,

Millville, N. J.

Dear Sir:

20 In the Propper matter, I beg to acknowledge the receipt of your two letters of the 10th instant, in the nature of notices in regard to the money paid under the contracts.

I will at once forward the notices to my client and after an interview will let you know what procedure we propose to take in the matter.

I am,

Very truly yours,

S. Stanger Iszard

30

November
Tenth
1914.

John A. Ackley, Esq.
Vineland
New Jersey.

In re sale of Davis & Colson lands to Propper
In re sale of Gruner lots to Propper.

Dear Senator:

10

I am writing to Mr. S. Stanger Iszard letters in the above matters, copies of which I send you herewith.

Yours very truly,

20

30

EXHIBIT D5.

Special Master in Chancery
 Supreme Court Commissioner

Bell Telephone 38
 Inter-State 'Phone 207 A

Louis H. Miller
 Counsellor-at-Law
 Millville, N. J.

10

November
 Tenth
 1914.

S. Stanger Iszard, Esq.
 Attorney
 314 Market Street
 Camden, New Jersey.

In re Propper

20 Dear Sir:

With reference to the above matter, John A. Ackley, the auctioneer who made the sale, requests me to notify Mr. Propper, through you, that, as agent for both parties he deems it his duty to close the matter of the sale of the Davis and Colson lots 30-31-32, Block C in the City of Wildwood, New Jersey, according to the precise terms of the contract.

30 He will, however, await turning the money in his hands, less his commission, over to the vendors until December first, next in order to give ample time for Mr. Propper to secure any injunctive writ or restraining order.

Please notify your client accordingly.

Truly yours,

