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New Jersey State Library

Bill of Complaint.

(filed March 29, 1928.)

IN CHANCERY OF NEW JERSEY.

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

The Complainants, Township of Maplewood, of the County of Essex, State of New Jersey, a municipality duly created and existing under the laws of the State of New Jersey, and William Paul Dickson of 37 Burnet Street, of the same place, respectfully show:

1. Prior to the 5th day of April, 1926, Edward T. Johnson and Hattie L. Johnson, his wife, were the owners in fee of the tract of land situate, lying and being in the said Township of Maplewood, described as follows:

> Beginning at a point on the southerly line of Burnet Street, distant about 233 and 34/100ths feet southerly from the intersection thereof with the southwesterly line of Maple Avenue; running thence along the aforesaid southerly line of Burnet Street south 62 degrees 54 minutes 30 second west 100 feet; thence south 27 degrees 5 minutes 30 seconds east 150 feet; thence parallel with the aforesaid southerly line of Burnet Street north 62 degrees 54 minutes 30 seconds east 155 and 4/100ths feet to land now or formerly of Anna M. Bright; thence along same north 57 degrees 14 minutes west 159 and 78/100ths feet to the place of beginning.

2. On said April 5th, 1926, said Edward T. Johnson and Hattie L. Johnson, his wife, conveyed said tract to the Marlyn Realty Company, a corporation of the State of New Jersey, of which defendant, Max Margolis was then and now is President, by deed recorded in the office of the Register of Essex County

on April 29, 1926, in Book N 14 of Deeds, page 4, which deed among other things contained the following:

> "Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings."

3. At the time of the execution and delivery of said deed, for a long time prior thereto and ever since, said Township had duly enacted and continuously maintained an ordinance wherein and whereby said tract of land was restricted to the erection thereon of single family residences only; and said ordinance complied in all respects with the statutes thereto appertaining.

4. On information and belief, that by inserting the provision in the deed quoted as aforesaid, said Edward T. Johnson and his wife, Hattie L. Johnson as grantors and the Marlyn Realty Company as grantee, expressly intended to charge the land therein and herein above described, with said provision as binding the grantee, its successors and assigns with the obligation to erect thereon only such buildings or building as complied with the Township ordinance aforesaid.

5. On information and belief, that in pursuance of such express understanding and to assure that such provision would not be cut off by foreclosure, the parties to the deed aforesaid caused to be inserted in the purchase money mortgage given by said Marlyn Realty Company as part of the consideration therefor, precisely the same provision as that quoted above and inserted in the deed. Said mortgage was executed and delivered simultaneously with the execution and delivery of the

said deed and was duly recorded in the office of the Register of Essex County.

6. On or about April 29, 1926, said Marlyn Realty conveyed the same premises to defendant, Max Margolis, its President, by deed recorded in the office of the Register of Essex County April 29, 1926, in Book E 57 of Deeds, page 420, and said Max Margolis is now the owner of said premises.

7. In violation of the restriction aforesaid, defendant Max Margolis has started to erect on said tract of land a three-story apartment for the use of 27 families, to occupy practically the entire plot.

8. Complainant Dickson owns in fee the premises 37 Burnet Street, Maplewood, immediately opposite the tract of land aforesaid, and both he and the Township of Maplewood are beneficially interested in the enforcement of the restriction aforesaid and entitled to have its violation enjoined.

9. Complainants are without adequate remedy at law.

WHEREFORE, your complainants pray that this honorable Court issue its writ of injunction, enjoining and restraining said Max Margolis and all others whom the matters may concern from in any way violating the provisions of the restriction aforesaid and from erecting an apartment house on the tract of land aforesaid; that defendant, Max Margolis be required to answer the allegations of this Bill of Complaint, not, however, under oath, and to that end pray that your Honor require the said Max Margolis and others whom it may concern to so answer and show cause at a time and place to be set by your Honor, why such writ of injunction should

not issue and why complainants should not have such other or further relief or both as the Court may deem equitable and just.

A. P. BACHMAN,
Solicitor and of Counsel with Complainant.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

JOHN S. DE HART, JR., of full age, being duly sworn, on his oath deposes and says that he is Chairman of the Township Committee, governing body of the Township of Maplewood, one of the complainants herein, that he has read the foregoing Bill of Complaint and knows the contents thereof; and that same is true to the best of his knowledge, information and belief.

J. S. DE HART, JR.

Subscribed and sworn to before me
this 28th day of March, 1928.

SAMUEL D. WILLIAMS,
A Master in Chancery
of New Jersey.

(Proof of service on defendant omitted by stipulation.)

Order to Show Cause.

(filed March 29, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD and WILLIAM PAUL DICKSON,
Complainants,

and

MAX MARGOLIS,
Defendant.

On Bill for Injunction.

On reading and filing the Bill of Complaint in the above stated cause and on motion of A. P. Bachman, solicitor and of counsel with complainants, it is on this 29th day of March, 1926, ORDERED that defendant Max Margolis show cause before the Chancellor in his Chambers in the Industrial Building, City of Newark, N. J., on the 3'd day of April, 1928, at ten o'clock in the forenoon or as soon as counsel can be heard, why said Max Margolis and all others whom it may concern should not be enjoined from proceeding with the erection of an apartment house on the premises in Maplewood, New Jersey, described in the Bill of Complaint, until the further order of this Court, and why complainants should not have such other or further relief as may seem equitable and just.

It is further ORDERED that said Max Margolis answer the allegations of the Bill of Complaint on such return day.

Service of a true copy of this order to show cause on said Max Margolis together with a true copy of the Bill of Complaint filed herein, on or before the 2nd day of April, 1928, shall be deemed sufficient service; and meanwhile and until the further order

of this Court said Max Margolis and all others whom it may concern are hereby enjoined and restrained from proceeding with the erection of the apartment house on the premises described in the Bill of Complaint aforesaid.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH, *V. C.*,
A true copy.

A. P. BACHMAN,
Solicitor of Complainants.

(Proof of service on defendant omitted by stipulation.)

Supplemental Verification of Bill.

(filed April 4, 1928.)

IN CHANCERY OF NEW JERSEY.

Between: TOWNSHIP OF MAPLEWOOD and WILLIAM PAUL DICKSON, Complainants, and MAX MARGOLIS, Defendant.	On Bill for Injunction. Deposition of verification by William Paul Dickson, of Original Bill

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

WILLIAM PAUL DICKSON, of full age, being duly sworn on his oath deposes and says:

Supplemental Verification of Bill.

I am one of the complainants in the above entitled cause and have read the Bill of Complaint filed herein, true copy of which is hereto annexed, as verified by John S. DeHart, in behalf of the Township of Maplewood, and I know the contents thereof; and same is true to the best of my knowledge, information and belief.

In further verification of the matters alleged therein I state, that the dates of deed of Johnson and wife to Marlyn Realty Company, of the purchase money mortgage of the Marlyn Realty Company to Johnson and wife, and the deed of Marlyn Realty Company to defendant, Max Margolis, and those of the recording thereof, are matters of public record in the office of the Register of Essex County, from which they have been taken;

The coverage of the plot of ground thus conveyed and the ordinance of the Township of Maplewood and its restriction to single family residences, are also matters of public record in the office of the Clerk of Township of Maplewood, from which they have been taken;

The allegations on information and belief with respect to the agreement between Edward T. Johnson and his wife, Hattie L. Johnson when they conveyed the said property and took back the purchase money mortgage aforesaid, with respect to the meaning and intent, expressly stated and agreed to at the time, were based on categorical statements to me by both Edward T. Johnson and his said wife, Hattie L. Johnson that the clause taken from the deed and mortgage and quoted in the original Bill of Complaint, paragraph 2, was inserted therein for the purpose of charging the land with a covenant to comply with the ordinances of the Township of Maplewood and not erect apartment houses thereon.

Supplemental Verification of Bill.

I am the owner in fee of the premises known as 37 Burnet Street, Maplewood Township, on which is erected a single family residence, occupied by my family and myself. The entire block whereon my said house is erected as well as the entire block wherein defendant's tract of land is located, as described in the Bill, are occupied by private residences, said tract being flanked by such, and my own house is immediately opposite said tract, so that the erection of an apartment house on such tract would, besides violating the covenant mentioned, be offensive to the entire neighborhood.

Defendant is the record owner of the tract of land on which he seeks to erect an apartment house and has started excavation for that purpose. The description of said tract of land given in the original Bill is taken from the public record of same.

Complainants are without adequate remedy at law and therefore pray that defendant be enjoined as prayed for in the Bill of Complaint.

WILLIAM PAUL DICKSON.

Subscribed and sworn to before me
this 3d day of April, 1928.

RICHARD H. THIELE,
A Master in Chancery of New Jersey.

(Proof of service on Messrs. Howe & Davis, April 4, 1928, omitted by stipulation.)

Notice of Motion to Dismiss Bill.

(filed March 30, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD and
WILLIAM PAUL DICKSON,
Complainants,

and

MAX MARGOLIS,
Defendant.

Notice of Motion.

To A. P. BACHMAN,
Solicitor of Complainant.

TAKE NOTICE that on Tuesday, the third day of April, 1928, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard at Chancery Chambers in the Industrial Building, Broad Street, Newark, we shall apply to the Chancellor or such Vice Chancellor as shall be sitting to hear motions, for an order dismissing the bill of complaint filed in the above entitled cause on the following grounds:

1. That the said bill of complaint sets up no grounds for equitable relief.

2. That the said cause of action is res adjudicata.

HOWE & DAVIS,
Solicitors for Defendant.

(Proof of service omitted by stipulation.)

Affidavit of Absalom P. Bachman, Verified April 3, 1928.

(filed April 3, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

TOWNSHIP OF MAPLEWOOD and
WILLIAM PAUL DICKSON,
Complainants,
and
MAX MARGOLIS,
Defendant.

On Bill for Injunction. Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

ABSALOM P. BACHMAN, of full age, being duly sworn on his oath deposes and says:

I have read the notice of motion of defendant herein to dismiss the Bill of Complaint on the grounds (1) that same sets up no grounds for equitable relief and (2) that the said cause of action is res adjudicata.

The first ground being a matter of argument, I meet same by brief separately filed herein.

The second ground being necessarily connected with facts which must be presented to the Court, I will state:

Max Margolis commenced a mandamus proceeding in the New Jersey Supreme Court to compel the Township of Maplewood to issue a permit which had been denied him by the Building Inspector for the erection of an apartment house on the premises

described in the present Bill of Complaint, Mandamus sought by defendant and before it was decided counsel sought to have the agreed state of facts amended by adding the deed and mortgage descriptions, which necessarily included the matter now argued as being a restriction on the use of the land.

The Supreme Court, while stating that it did not believe it could consider restrictions, allowed me to appear as Amicus Curiae and file a brief; but in 135 Atl. 662, it denied consideration of restrictions on the authority of the Pumo case.

The Chancery action was commenced for the sole purpose of going through to the United States Supreme Court in equity so as to come in under Village of Euclid v. Ambler Realty Co. 47 Supreme Court Reporter, 114, and although the Bill referred to the inclusion of the statement in deed and purchase money mortgage of the expression now urged as a private restriction, quoted in the Bill of Complaint in the case at bar, it was not presented at any time as ground for relief to the Township of Maplewood, except that it was mentioned in the briefs as indicating that Max Margolis was thus made aware that there was a zoning ordinance.

In neither of the two cases referred to was there any issue except the matter of the zoning ordinance, Vice Chancellor Backes in his opinion (136 Atl. 107) does not mention it.

The Court of Error and Appeals in affirming the appeals taken in each case, made no mention whatever of restrictions.

The case at bar is solely based on the clause in deed and deed which passed between the parties, under an expressed intention that it bound the

land to the erection only of such building or buildings as the ordinances of the Township allowed, and there are two complainants, the Township and a taxpaying neighbor—the latter by no implication whatever being a party to other litigation.

As defendant, Max Margolis, was and is President of the Marlyn Realty Company, the grantee of the deed and the mortgagor of the mortgage, when same passed, there is not even constructive notice; it is actual and binding upon him.

The motion to dismiss should be denied with costs.

A. P. BACHMAN.

Subscribed and sworn to before me
this 3d day of April, 1928.

J. GLENN ANDERSON,
A Master in Chancery of New Jersey.

(Proof of service on Messrs. Howe & Davis April 3, 1928, omitted by stipulation.)

Affidavit of Edward T. Johnson, Verified April 5, 1928.

(filed April 5, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

TOWNSHIP OF MAPLEWOOD, et al.,
Complainants,

and

MAX MARGOLIS,
Defendant.

On Bill for Injunction. Affidavits.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

EDWARD T. JOHNSON, of full age, being duly sworn according to law on his oath deposes and says:

1. I am one of the grantors in the deed dated April 8th, 1926, made by myself and my wife, Hattie L. Johnson, to the Marlyn Realty Corporation, a corporation of the State of New Jersey, for premises on the south side of Burnet Street in the Township of Maplewood.

2. The said deed contains the following provision:

> "Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings."

3. In inserting the said provision, it was not the intention of myself and my wife to impose any restriction upon the said premises but was made as a protection to ourselves in case the court should

construe a zoning ordinance as an encumbrance against property. We did not want to be responsible on the warranty in the deed in case it was held that a zoning ordinance was an encumbrance.

EDWARD T. JOHNSON.

Subscribed and sworn to this
5th day of April, 1928, before me,

J. CHAS. O'BRIEN,
A Notary Public of New Jersey.

(Duly served on complainants' solicitor April 6, 1928.)

Affidavit of J. Charles O'Brien,
Verified April 4, 1928.

(filed April 5, 1928.)

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

J. CHARLES O'BRIEN, of full age, being duly sworn according to law on his oath, deposes and says:

I. I am a real estate agent of the State of New Jersey and have been engaged in the real estate business for years. I negotiated the sale between Edward T. Johnson and Hattie L. Johnson, his wife, to the Marlyn Realty Company, for premises on the south side of Burnet Street, in the Township of Maplewood, the title for which closed on April 8th, 1926, and I am a witness on the deed and took the acknowledgement to said deed. The said deed contains the following provision:-

Subject to existing restrictions if effective

Affidavit of J. Charles O'Brien.

and Statutory and municipal requirements relating to land and buildings."

2. I know from the conversation I had with Mr. and Mrs. Johnson at the time the said deed was executed that it was not their intention to impose restrictions on the said land but the said provision was inserted as a protection in case it should be held by the courts that a zoning ordinance was an encumbrance against real estate, which would make them liable on their warranty in the deed.

J. CHAS. O'BRIEN.

Subscribed and sworn to this 4th day
day of April, 1928, before me.

EDWARD V. O'BRIEN,
A Notary Public of New Jersey.

(Duly served on complainants' solicitor, April 6, 1928.

Affidavit of Edward L. Davis, Verified April 2, 1928.

(filed April 5, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD, et al.,
Complainants,

and

MAX MARGOLIS,
Defendant.

On Bill for Injunction. Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

EDWARD L. DAVIS, of full age, being duly sworn according to law on his oath deposes and says:

1. I am a member of the law firm of Howe & Davis and a counsellor at law of the State of New Jersey. I have represented Max Margolis for the past two years. On March 3rd, 1927, the Township of Maplewood filed a bill of complaint in the Court of Chancery of New Jersey, which bill of complaint set up, among other things, the following facts:-

"4. On or about April 5th, 1926, the Marlyn Realty Company, a corporation of the State of New Jersey, of which defendant, Max Margolis, was President, acquired said vacant tract by deed of Edward T. Johnson and Hattie L., his wife, recorded in the office of the Register of the County of Essex, April 29, 1926, in Book N 74 of Deeds, page 4, which deed contained among other things the following:

'Subject to existing restrictions if effective

and Statutory and municipal requirements relating to land and buildings.'

and as part consideration thereof executed and delivered to said Johnson and wife a mortgage covering said premises, containing the same precise words, in both instances following the description of the property in said instruments." The said bill of complaint asked for an injunction against the said Max Margolis.

2. On April 6th, 1927, a decree dismissing the said bill of complaint was filed.

3. An appeal was taken from the said decree of dismissal to the Court of Errors and Appeals of New Jersey, which resulted in an order of affirmation of the said decree of dismissal, an opinion of affirmance having been rendered on October 18, 1927.

4. Thereafter, application was made to the United States Supreme Court for a writ of certiorari removing the said proceedings to the Federal Court but said writ of certiorari was refused.

EDWARD L. DAVIS.

Subscribed and sworn to before me
this 2nd day of April, 1928.

WM HOWE DAVIS,
A Notary Public of New Jersey.

(Duly served on complainants' solicitor April 6, 1928.)

Answering Affidavit of Absalom P. Bachman, Verified April 9, 1928.

(filed April 9, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD, et al.,
Complainant,

and

MAX MARGOLIS,
Defendant.

On Bill for Injunction. Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

ABSALOM P. BACHMAN, of full age, being duly sworn on his oath deposes and says:

I have read copies of affidavits sent me herein by defendant's counsel, Howe & Davis, verified as follows: by Edward L. Davis on April 2nd, 1928, before a Notary Public, by J. Chas O'Brien on April 4th, 1928, before a Notary Public and by Edward T. Johnson, before the last named affiant, J. Charles O'Brien as Notary Public, and answering same will state:

Mr. Davis's claim that the cause of action herein is res adjudicata is met by Vice Chancellor Backes' opinion in the former Chancery case (page 12, State of Case herewith) saying:- "Counsel said on the argument, that the bill was intended to carry the zoning question to the Court of Appeals on the equity side, presumably, because favorable results have not been reached on the law side" etc. and the learned Vice Chancellor bases his decision on the cases

of State (Ignaciunas) v. Nutley, 99 N. J. L. 389 and Jersey Land Co. v. Scott, 100 N. J. L. 45, following the maxim that equity follows the law. Not a single word is said about restrictive covenants and our brief before the Court of Errors and Appeals specifically disavowed bringing up the question of restrictive covenants, our quotation in the Bill to which Mr. Davis refers being to charge defendant with notice of the *existence of an ordinance.*

Mr. O'Brien's affidavit has no probative force and when it is seen that Mr. Johnson's affidavit is verified the day after that of Mr. O'Brien and before the latter as a Notary Public, the use of legal phrases in the Johnson affidavit stamps it as having argued into Mr. Johnson by Mr. O'Brien.

But Mr. Johnson's position is very pitiful, as he stated to me on the morning of April 3rd, 1928, that of course the words

> "Subject to existing restrictions, if effective and Statutory and municipal requirements relating to land and buildings."

were put in the deed to Marlyn Realty Company and the latter's mortgage to Mr. Johnson and his wife, to make sure that no apartments would be put upon the plot; that this was done because he wished to protect the neighbors and especially Mr. Schofield, whose house abuts the Margolis tract on the south; but when I submitted an affidavit for him to sign, he said he didn't want to do anything to endanger his mortgage on the plot and he would not make the affidavit on that account. He added, however, that he would take advice of counsel and let me know. On the 4th of April, 1928, I received a letter from Mr. Johnson returning the proposed affidavit with these words:

"Considering the advisability of signing the enclosed document, I sought counsel on this matter as suggested, and was advised not to sign, on practically the same grounds as stated to you this morning. I therefore return the papers herewith."

I annex this letter and it will be noted that the Johnsons had formerly lived at 36 Burnet Street, Maplewood, directly across from the home of the complainant, Dickson, 37 Burnet Street, Maplewood.

But the saddest thing is that when I was retained to go to the Supreme Court in the mandamus proceedings (State of Case herewith) I represented the neighbors on Burnet Street and Mr. and Mrs. Johnson, Mr. Johnson having definitely ordered me to do that. If my own statement were the sole basis for this it might be embarrasing to counsel, but I file herewith copy of my brief as Amicus Curiae in the Supreme Court proceeding, copy of which Messrs. Howe & Davis have had since I filed the brief in Court, (October, 1926, term, State of Case page 26). I personally sent copies to their office in Orange.

My application to have my clients made parties to the mandamus proceeding (which included Mr. and Mrs. Johnson) is referred to in the Supreme Court opinion (page 28, State of Case).

Aside from the infirmity of being sworn to before one not an officer of this Court and of Mr. Johnson's affidavit being taken before J. Charles O'Brien, the affiant of another affidavit connected with it in the proceeding, it is seen that none of the affidavits deny the statements of William Paul Dickson in his supporting verification, a copy of which counsel for defendant acknowledge receiving in the last part of their brief, with respect to pre-

cise statements of fact alleged to have been made to Mr. Dickson by both Mr. and Mrs. Johnson.

Under the circumstances, when the entire neighborhood of defendant's plot for the entire length of Burnet Street, is covered by the Township ordinance restricting same to the erection of single family residences, complainants have made out a good cause of action by their Bill and shown that the quoted part in deed of Johnson and mortgage of Marlyn Realty Company, is a restrictive covenant running with the land and fully intended so to be.

A. P. BACHMAN.

Subscribed and sworn to before me
this 9th day of April, 1928.

FRANK B. COLTON,

A Master in Chancery of New Jersey.
(Duly served on Messr. Howe & Davis, April 10th, 1928.)

Exhibits Annexed to Bachman Affidavit

EDWARD T. JOHNSON,
47 Jefferson Avenue,
~~36 Burnet Street,~~
Maplewood, N. J.

April 3d, 1928.

Mr. A. P. Bachman;
50 Pierson Road, Maplewood, N. J.

Dear Sir:-

Considering the advisability of signing the enclosed document, I sought counsel on this matter as suggested, and was advised not to sign,

on practically the same grounds as stated to you this morning. I therefore return the papers herewith.

Yours truly,

EDWARD T. JOHNSON.

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD and
WILLIAM PAUL DICKSON,
Complainants,

and

MAX MARGOLIS,
Defendant.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

EDWARD T. JOHNSON, of full age being duly sworn on his oath deposes and says:

On April 5th, 1926 my wife, Hattie L. Johnson and I conveyed to the Marlyn Realty Company the vacant lot on Burnet Street, Maplewood, 100 feet front by about 150 feet deep, and the reason we put into the deed and the purchase money mortgage that we took back, the words: "subject to existing restrictions, if effective and Statutory and municipal requirements relating to land and buildings" was that it was agreed by Mr. Margolis, the President of the Marlyn Realty Company and us that nothing should be put up on the lot except such buildings as were permitted by the zoning ordi-

nance of the Township of Maplewood and we thought we had covered that in making the deed and mortgage read as it did.

Subscribed and sworn to before me
this day of April, 1928.

EXTRACTS FROM BRIEF OF A. P. BACHMAN

AS AMICUS CURIAE FILED IN MANDAMUS PROCEEDING OF MARGOLIS, RELATOR VS. MAPLEWOOD, OCTOBER, 1926, TERM, N. J. SUPREME COURT.

ANNEXED TO BACHMAN AFFIDAVIT.

"The writer came into this proceeding through the property holders resident on Burnet Street, Maple Avenue, Pierson Road and Salter Place, Maplewood, owners of single family residences, joining first in opposing relator's application to the Township Committee of Maplewood for a change in zoning at a number of public hearings before that Committee."

"Among those represented by the writer are the owners of premises immediately abutting the premises of relator and Edward T. Johnson and Hattie L. his wife, who are the grantors of relator's premises to the Marlyn Realty Company and the mortgagees of the latter's mortgage given for purchase money, both the deed and the mortgage contain the following:

> "Subject to existing restrictions, if effective and Statutory and municipal requirements relating to land and buildings."

"As the grantors of the Johnson deed to Marlyn Realty Co. and the mortgagees of the purchase money mortgage there given, are represented here through the writer, together with the abutting property owners, the situation is precisely presented * * *"

"Mortgage of Marlyn Realty Co. (by Max Margolis, President) to Edward T. Johnson and Hattie L. his wife * * *
(Max Margolis, President, is the same individual as the relator)"

Conclusions of Vice-Chancellor.

(filed April 16, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD, et. al.,
Complainants,
and
MAX MARGOLIS,
Defendant.

OPINION.

A. P. BACHMAN, for complainants,
HOWE & DAVIS, for defendant.

CHURCH, V. C.

This is a suit brought to secure an injunction against the defendant from proceeding with the erection of an apartment house in Maplewood. The theory is that the construction of such a building would violate a restriction which reads as follows: "Subject to existing restrictions, if effective and statutory and municipal requirements relating to land and buildings."

FIRST. The bill alleges on information and belief "that the grantors expressly intended to charge

the land herein and therein above described with said provision as binding the grantee, its successors and assigns with the obligation to erect thereon only such buildings or building as complied with the township ordinances aforesaid." Affidavits are presented from the previous owner and the real estate broker who sold the property specifically denying this. Therefore, no preliminary injunction can issue.

Ye Olde Staten Island Dyers, etc. v. Barrett Nephews, etc. 98 New Jersey Equity, 702.

SECOND. In Kocher & Trier's New Jersey Chancery practice, page 1141, section 1590, it is stated; "Allegations of fact on information and belief without giving the source of the information and the grounds of the belief and without the affidavit of any person having actual knowledge of the facts are ordinarily insufficient whether contained in the bill or in the affidavits."

THIRD. No privity of contract is shown between complainant and defendant. The only allegation showing the connection of Dickson with the situation is paragraph 8 which states, "Complainant Dickson owns in fee the premises 37 Burnet Street, Maplewood, immediately opposite the tract of land aforesaid, and both he and the Township of Maplewood are beneficially interested in the enforcement of the restriction aforesaid and entitled to have its violation enjoined." It is not shown how the defendant Dickson is beneficially interested. No facts are alleged which connect this complainant with the property in question. It is not shown that the premises were derived from a common predecessor in title. It is not shown that the imposition of this al-

leged restriction was made for the purpose of benefiting Dickson's property. It is not shown that he purchased this property with knowledge of or in consideration of said alleged restrictions. The mere fact that defendant Dickson would incidentally benefit if a restriction existed does not give him any standing in this court. He cannot seek to enforce the alleged restriction against Margolis unless Margolis can enforce a similar restriction against him.

FOURTH. The interest of the municipality is disposed of by the decision in the case of Pumo v. Fort Lee, 4 Misc. 663. It was there held: "Whether the erection of this building would be a violation of the neighborhood restrictions is a matter of no concern to the municipality. The only parties interested in their existence or enforcement except the relators, so far as the present case discloses, are the complainants in the chancery suit, who are seeking to enforce the alleged restrictions."

FIFTH. The matter has already been disposed of by the Court of Errors and Appeals. On March 3, 1927, a bill of complaint was filed in this court. Paragraph 4 of that bill of complaint contains the following statement: "On or about April 5th, 1926, the Marlyn Realty Company, a corporation of the State of New Jersey, of which defendant, Max Margolis was President, acquired said vacant tract by deed of Edward T. Johnson and Hattie L., his wife, recorded in the office of the Register of the County of Essex, April 29, 1926, in Book N74 of Deeds, page 4, which deed contained among other things the following: "Subject to existing restrictions, if effective and Statutory and municipal requirements relating to land and buildings," and as part consideration therefor executed and delivered to said

Decree of Dismissal Appealed From.

Johnson and wife a mortgage covering said premises, containing the same precise words, in both instances following the description of the property in said instruments." And the bill of complaint prayed that an injunction might issue restraining the said Max Margolis from in any way erecting the so-called apartment house. In the zoning case, the question of this alleged restriction was brought in and discussed in the briefs and disposed of by the Supreme Court decision. Although mentioned in detail in the bill of complaint, the same was dismissed by a decree of dismissal filed April 6th, 1927.

The Court of Errors and Appeals confirmed the dismissal.

For these reasons I will advise a decree dismissing the bill.

Decree of Dismissal Appealed From.

(filed April 17, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD, and
WILLIAM PAUL DICKSON,
Complainants,

and

MAX MARGOLIS,
Defendant.

On Bill for Injunction.
DECREE.

IT IS, on this 17th day of April, 1928, on motion of Howe & Davis, solicitors for defendant,

Order Allowing Counsel Fee Appealed From.

ORDERED that the bill of complaint filed in the above entitled cause be and the same hereby is dismissed with costs.

AND IT IS FURTHER ORDERED that the restraint heretofore issued in said cause be lifted.

AND IT IS FURTHER ORDERED that the defendant have leave to apply to this court for a counsel fee in said matter.

Respectfully advised,

ALONZO CHURCH, *V. C.*

E. R. WALKER,
C.

Order Allowing Counsel Fee, Appealed From.

(filed May 7, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD, and
WILLIAM PAUL DICKSON,
Complainants,

and

MAX MARGOLIS,
Defendant.

IT IS, on this 5th day of May, 1928, on motion of Howe & Davis, solicitors for the defendant, ORDERED that the complainants do pay to the defendant or his solicitors, the sum of Two Hundred Fifty Dollars ($250.) for counsel fee in the above entitled cause.

Notice of Appeal from Decree and Order.

Respectfully advised,

ALONZO CHURCH, *V. C.*

E. R. WALKER,

C.

Notice of Appeal from Decree and Order.

(filed May 11, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

TOWNSHIP OF MAPLEWOOD, and
WILLIAM PAUL DICKSON,
Complainants,
and
MAX MARGOLIS,
Defendant.

On Bill, etc.
NOTICE OF APPEAL.

The Township of Maplewood and William Paul Dickson, complainants in the above stated cause, hereby appeal to the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, from each and every part of the decree made by the Chancellor on the advice of Hon. Alonzo Church, Vice Chancellor, dated and filed April 17, 1928, and from each and every part of an order subsequently made by the Chancellor on the advice of Hon. Alonzo Church, Vice Chancellor, awarding to defendant an allowance of $250, as counsel fee herein

Dated, May 7th, 1928.

A. P. BACHMAN.
Solicitor and of counsel with complainants.

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

A. P. BACHMAN,
Of Counsel with Complainants.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between: TOWNSHIP OF MAPLEWOOD, and WILLIAM PAUL DICKSON, Complainants-Appellants, and MAX MARGOLIS, Defendant-Respondent.	On Appeal From Decree and Order in Chancery.

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

The petition of the Township of Maplewood and William Paul Dickson, complainants-appellants, herein, respectfully shows that your petitioners are aggrieved by a decree made in the Court of Chancery by his Honor Edwin Robert Walker, bearing the date of the 17th day of April, in the year 1928, on the advice of Hon. Alonzo Church, Vice-Chancellor, wherein complainants' bill of complaint was dismissed and other relief granted to defendant, and further by an order subsequently made in said Court wherein the Chancellor, on the same advice awarded to defendant a counsel fee of $250. herein, in the following stated respects:

1. That it was erroneous to discharge the injunction in the order to show cause granted herein, for the reason that the Bill of complaint was properly and sufficiently verified by the oath of John S. DeHart, Jr., for the Township of Maplewood and by further oath of William Paul Dickson subsequently filed in verification of the Bill of complaint, by permission of the Court, prior to the decision in the cause.

2. That it was erroneous to dismiss the said injunction and the Bill on the affidavit of Edward T. Johnson and others filed herein, for the reason that said Edward T. Johnson and his wife, Hattie L. Johnson, had joined with all the neighbors of defendant's tract on Burnet Street in the Township of Maplewood, in retaining A. P. Bachman as attorney to appear in the Supreme Court of this State in a certain proceeding entitled, Max Margolis, relator, versus Township of Maplewood and another, October, 1926, Term, and move for the admission of said parties as defendants in said proceedings and to thereupon oppose the granting of a mandamus therein, on the ground that to grant such mandamus would violate the restriction contained in the deed of said Edward T. Johnson and Hattie L., his wife to the Marlyn Realty Company (of which defendant herein was and is President) and in the purchase money mortgage given back to said Johnsons by said Marlyn Realty Company, reading:

> "Subject to existing restrictions if effective and statutory and municipal requirements relating to land and buildings."

and said A. P. Bachman did thereupon duly appear in said proceeding and was permitted by the Court

to file as Amicus Curiae a brief as representing said Edward T. Johnson and Hattie L., his wife and all the neighbors of defendant's tract aforesaid, among whom was complainant, William Paul Dickson, the said appearance being fully expressed in said brief; and that said Edward T. Johnson and Hattie L., his wife were thus estopped from afterward setting up, as done in the action herein, that such quoted matter was not inserted in the deed as a restriction in favor of the neighbors and the Township, to the injury of any of said neighbors and of said Township.

3. It was error to dismiss the Bill, as the quoted matter constituted a restriction running with the land limiting its use only as permitted by the ordinance of the Township for single family residences only.

4. That defendant-respondent after obtaining title to the tract herein, conformed to the said restriction by seeking from the Township Committee a change in the zoning ordinance permitting him to use the said tract for the erection of an apartment house, and he is therefore estopped from denying that the quoted matter was and is a restrictive covenant running with the land, and the Court erred in overlooking this.

5. It was erroneous to dismiss said Bill of complaint on the ground that the quoted matter could not be enforced reciprocally as between defendant and complainant Dickson, the error consisting in overlooking the fact that the said Johnsons and the said Marlyn Realty Company by the execution and delivery of both the deed and purchase money mortgage containing the quoted matter, entered into an

express contract to hold the tract conveyed in full compliance with the provisions of the Township ordinance restricting the same to the erection of single family residences, and for the benefit of said Township and all of the neighbors of defendant's tract (of whom complainant Dickson was and is one), any and all of whom were thus given right of action for the enforcement of such contract, in accordance with the statutes and decisions thereto appertaining.

5. It was error to dismiss the Bill as to Township of Maplewood on the authority of Pumo vs. Fort Lee, 4 Misc. 663, as said decision ruled only on the facts of that case as expressed in the Supreme Court opinion, and said Court could not and did not decied as to restrictions, that belonging to Chancery only.

6. It was error to dismiss the Bill on the ground that there was a prior action in Chancery by the Township of Maplewood vs. Max Margolis, wherein Vice Chancellor Backes on a preliminary motion to dismiss on the ground that the bill set up no cause for equitable jurisdiction, dismissed that Bill and this Court affirmed. Said dismissal was simply a nonsuit, not a dismissal on the merits, and it was in no sense res adjudicata or an estoppel of complainants in another action. Furthermore, said prior suit was not based on the enforcement of any restrictive covenant in the deed and mortgage, but solely to enforce the Township ordinance as such, the Vice Chancellor adhering to a law decision of the Supreme Court as to zoning, all of which has been changed by the zoning amendment since added to the State Constitution and a different attitude of the Supreme Court and this Court toward zoning ordinances, since.

7. It was error to dismiss the Bill of Complaint on any ground, for with the allegations assumed to be true on a motion to dismiss, complainants, being without an adequate remedy at law, were entitled to the relief prayed for in the Bill.

8. It was error for the Court to make an order after dismissal of the Bill and filing the decree herein, awarding a counsel fee to defendant, as the Court of Chancery after making said decree of dismissal was divested of all further jurisdiction therein and it was further in violation of the Rules of the Court of Chancery requiring all applications for counsel fees to be made before the final decree.

9. It was further error for the Court to make the order granting allowance of counsel fee to defendant, inasmuch as there was no trial, no answer was filed by defendant and there was no formal appearance of defendant, counsel appearing in Court on a motion to dismiss and oppose motion for injunction, for which appearance there is provision in the statute and according to the practice in Chancery, as an attendance fee.

WHEREFORE, your petitioners pray that said decree and the said order allowing counsel fees be wholly reversed and for nothing holden, and that petitioners-appellants have such other or further relief or both as this Court may deem just and proper together with the costs and disbursements of this appeal.

Dated May 11th, 1928.

A. P. BACHMAN.
Solicitor and of Counsel
with Petitioners-Appellants.

Answer to Petition of Appeal.

(filed May 14, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

TOWNSHIP OF MAPLEWOOD, et als.,
Complainants-Appellants,

and

MAX MARGOLIS,
Defendant-Respondent.

On Appeal from Chancery. Answer to Petition of Appeal.

The answer of Max Margolis, the above named defendant-respondent, to the petition of appeal of the Township of Maplewood and William Paul Dickson, the above named complainants-appellants.

The defendant-respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto, notwithstanding, admits that a decree was on the 17th day of April, in the year Nineteen Hundred and Twenty-eight, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes in said petition mentioned, and as therein set forth, but as to the substance and form of said decree, this defendant-respondent begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

HOWE & DAVIS.
Solicitors for and of Counsel
with Defendant-Respondent.

Stipulation.

It has been stipulated by and between counsel for the parties that, subject to the consent of the Court, either party may refer in brief and argument to the State of Case on Appeal in Margolis, relator, vs. Maplewood, Supreme Court, October, 1926, Term (Court of Errors and Appeals, 114, May, 1927, Term) and Township of Maplewood vs. Margolis, Court of Chancery (Court of Errors and Appeals, 109, May, 1927, Term).

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36 OCT.1.1928

Argued by
A. P. BACHMAN

New Jersey Court of Errors and Appeals

Between:
TOWNSHIP OF MAPLEWOOD AND
WILLIAM PAUL DICKSON,
Appellants,
and
MAX MARGOLIS,
Respondent.

On Appeal from Chancery.

Appellants' Brief.

This is an appeal by the Township of Maplewood and William Paul Dickson from a decree of the Chancellor, advised by Hon. Alonzo Church, Vice Chancellor, dismissing their Bill of Complaint against respondent, Max Margolis, and also from an order on the same advice, *made after filing the decree*, which directs appellants to pay respondent a counsel fee of $250.

The cause of action alleged is the violation by respondent of a restrictive covenant contained in deed of Edward T. Johnson and Hattie L., his wife to the Marlyn Realty Co. which reads:

> "Subject to existing restrictions if effective and statutory and municipal requirements relating to land and buildings."

These same words were repeated in the purchase money mortgage given back to the Johnsons (p. 2, lines 4, 33).

Process was by an order to show cause (p. 5) which among other things requires respondent to answer the Bill. *He made no answer.*

Petition of Appeal (p. 30) presents grounds of appeal both from the decree of dismissal (p. 27/20) and the order for counsel fee (p. 28/20). *The answer to the Petition of Appeal does not traverse the order.*

Statement.

The Township of Maplewood is a duly organized municipality (p. 1/5); it duly enacted an ordinance in accordance with the statute, under which it restricted the territory on both sides of Burnet Street to single family residences (p. 2/10). Respondent is the owner of a tract of land in such zoned district (p. 3/8) and has begun the erection thereon of an apartment house (p. 3/10); complainant Dickson owns a house immediately opposite respondent's tract (p. 3/14); and it appears that in April, 1926, Edward T. Johnson and his wife conveyed the plot in question to the Marlyn Realty Co., its successors and assigns, by deed containing the above quoted words (p. 1/30, 2/4) and said Marlyn Realty Co. (of which respondent then was and now is President) gave back a purchase money mortgage containing the same words (2/26); that the Marlyn Realty Co. in April, 1926, conveyed the plot to respondent (p. 3/3) and appellants, having a beneficial interest in so praying, ask an injunction against violation of the said restrictive covenant (p. 3/20).

By inserting the quoted words in deed *and mortgage* the parties intended to charge the premises with an obligation to erect thereon only such buildings as were permitted by the ordinances of

the Township of Maplewood (p. 2/16), that is, single family residences, and the parties placed the same words in the mortgage which was given back, so as to avoid the covenant of restriction being cut off by foreclosure (p. 2/33).

Respondent moved to dismiss the Bill of Complaint cn the grounds that the Bill does not show grounds for equitable relief and that the cause of action alleged is *res adjudicata* (p. 9).

On submitting the matter to the Vice Chancellor affidavits were filed, one by appellants' counsel (p. 10) showing that a prior Chancery action was carried on only to bring up on the equity side the zoning question so as to get the benefit of the U. S. Supreme Court decision in *Village of Euclid* v. *Ambler Realty Co.*, 47 Sup. Ct. Rep. 114; one by respondent's counsel (p. 16) which picks out unconnected parts of the Bill in the prior action in an effort to show sameness of allegations; one by J. Charles O'Brien (p. 14/) real estate broker, based on hearsay and his own conclusions as to what was in the mind of the Johnsons when they had inserted in the *deed* the words of restriction above quoted (nothing said about the mortgage); one by Edward T. Johnson (p. 13) *sworn to before the last affiant, J. Charles O'Brien*, denying that the quoted words were inserted in the deed (nothing said about the mortgage) as a restriction, but were only put in the deed to protect the Johnsons under their warranties in case the zoning ordinance should be held to be an incumbrance.

In answer to the three last named appellants' counsel made affidavit, further showing (p. 18) that the prior Chancery matter could not be *res adjudicata*, pointing out the infirmities of the Johnson and O'Brien affidavits and then setting forth that *the Johnsons joined with all the neigh-*

bors of the Burnet Street tract owned by respondent in retaining the writer to appear before the Supreme Court in a proceeding wherein respondent as relator was asking for a mandamus on the Township of Maplewood to issue a permit to erect an apartment house on the tract (135 Atl. Rep. 662) and pray to have the Johnsons and all the neighbors (of whom complainant Dickson was one) made defendants in that proceeding for the purpose of opposing the mandamus on the ground that it would violate the restrictive covenant in deed and mortgage above quoted; that counsel appeared accordingly and was permitted by the Supreme Court to file a brief as *Amicus Curiae* for his clients, in which brief appearance for the Johnsons and neighbors is fully set forth and a copy of which brief was personally served on Messrs. Howe & Davis, respondent's counsel when filing same in Court for the October, 1926, term (p. 20/20, p. 23/10).

The Bill of Complaint was dismissed on these grounds:

1. That the Bill is insufficiently verified (p. 25/10);

2. that the Johnsons and the real estate broker deny that it was intended to make the quoted matter a restrictive covenant (p. 25/5);

3. that the matter complained of is *res adjudicata* by reason of Vice Chancellor Backes dismissing the Bill in a prior action in Chancery of *Maplewood* v. *Margolis* (p. 26/20);

4. that the Township's interest was disposed of in the case of *Pumo* v. *Fort Lee*, 4 Misc. 633 (p. 26/10);

5. that there is no privity of contract shown between complainants and the restrictive covenant-contract of deed and mortgage, as ground for enforcing same (Conclusions, p. 24).

The learned Vice Chancellor signed a decree (submitted without notice) "lifting" the temporary injunction contained in the show-cause order and dismissing the bill with costs; adding to the decree a reservation to respondent to move for allowance of counsel fee (p. 28/6). This decree was filed April 17, 1928.

Subsequently, the learned Vice Chancellor made an order directing complainants to pay respondent a counsel fee of $250 (filed May 7, 1928, p. 28, line 20).

By stipulation (p. 36) it is permitted to allude to State of Case on Appeal in the mandamus proceeding, *Margolis* v. *Maplewwood*, (No. 114, Court of Errors and Appeals, May term, 1927) and the Chancery action of *Maplewood* v. *Margolis* (No. 109, Court of Errors and Appeals, May term, 1927).

Before giving the grounds relied upon in this appeal, we give a condensed history of facts bearing on the questions here argued:

a. In April, 1926, respondent's company took over the tract herein in a deed of conveyance containing the quoted matter.

b. The company gave back a purchase money mortgage containing the same precise words.

c. Later in April, 1926, the company conveyed to respondent, then and now its President.

d. July 26, 1926, Chief Justice Gummere granted a Rule in the application of respondent for a mandamus to the Supreme Court.

e. August 16, 1926, respondent petitioned the Township of Maplewood committee to amend its zoning ordinance as to permit him erect an apartment house on the Burnet Street tract.

f. October 5, 1926, papers submitted to the Supreme Court on the Rule for mandamus, and while same was pending, Edward T. Johnson and Hattie L., his wife, grantors of the deed conveying the Burnet Street tract and the mortgagees of the purchase money mortgage given back, both deed and mortgage containing the above quoted words, joined with the Burnet Street neighbors of respondent's tract (of whom complainant Dickson was one), in retaining the writer to appear before the Supreme Court in that mandamus proceeding and pray for leave to have said Johnsons and said neighbors made defendants therein and to oppose the granting of a mandamus on the ground that it would violate the restrictive covenant contained in the above quoted words, holding the use of the land of respondent to the erection of single family residences under the Township zoning ordinance.

g. Counsel duly appeared and moved before Justices Parker and Campbell (Justice Black being absent) accordingly. The writer was permitted to file a brief as Amicus Curiae in behalf of the Johnsons and the said neighbors.

h. The brief specifically states the writer's retainer for the Johnsons and the neighbors.

i. Decision in mandamus proceeding, *Margolis* v. *Maplewood,* 135 Atl. 662 (not officially reported.)

j. Meanwhile, desiring to come in under *Village of Euclid* v. *Ambler Realty Co.* 47 Sup. Ct Rep. 114, the Township began a Chancery action to enforce the zoning ordinance by enjoining respondent from violating it.

k. Vice Chancellor Backes dismissed the Bill for lack of equitable jurisdiction, *Maplewood* v. *Margolis* 136 Atl. 707, (not officially reported)

l. Appeal was taken in both matters; affirmed.

m. Up to this time no actual step had been taken to erect the apartment house.

n. On the first overt act toward such erection the within action was begun for injunction against violation of restrictive covenant against use of the land for any but single family residences.

o. Bill dismissed on grounds already given.

p. After decree, order made granting an allowance of $250 to respondent as counsel fee.

The grounds of appeal are as follows (p. 31):

1. That it was erroneous to discharge the injunction in the order to show cause.

2. That it was erroneous to dismiss the injunction and the Bill on the affidavits because the Johnsons had heretofore estopped themselves from denying that the quoted matter in deed and mortgage was inserted as a restrictive covenant running with the land.

3. That it was error to dismiss as the quoted matter in itself constituted a restriction running with the land limiting its use to single family residences.

4. Respondent has estopped himself by conforming to the restrictive covenant by petitioning the authorities for a change in zoning ordinance to permit erection of an apartment house.

5. That it was error to dismiss the Bill on the ground that there was no privity of contract in complainants with the cause of action, the contract or its consideration.

6. That it was error to dismiss as to the Township on the authority of Pumo v. Fort Lee, 4 Misc. 663.

7. That it was error to dismiss the Bill on the ground of *res adjudicata*.

8. That it was error to dismiss, overlooking the fact that as there was only a motion going to the complaint, its allegations must be taken as true and relief granted accordingly.

9. That it was error to make after final decree was filed, an order granting a counsel fee of $250. as the Court was without jurisdiction and it was against Chancery rules.

10. That it was error to grant allowance of counsel fee, as there was no issue and no trial.

First Ground of Appeal.

It was error to discharge the injunction contained in the Show Cause Order.

The reason given by the learned Vice Chancellor for so doing is that the Bill is insufficiently verified by John S. DeHart, chairman of the Township Committee (p.4/10) although there

was a further verification in more elaborate detail permitted by the Court on the part of complainant William Paul Dickson (p.6/20), showing that as to matters alleged on information and belief they were based on categorical statements of Edward T. Johnson and his wife, Hattie L. to Mr. Dickson.

The learned court refers to a textbook which guardedly suggests that an allegation on information and belief should be verified by one having the information and knowledge. We submit that this is quite ridiculous, as it would simply mean that after a public holding out by a party that facts were so-and-so, one entitled to rely on such statements of fact could receive no help if the party with the actual knowledge should now deny that they are the facts.

Besides, the learned court overlooked the very important fact that the affidavit of Edward T. Johnson and J. Charles O'Brien should not be given credence in the face of the Johnsons taking stand in the Supreme Court that the matter inserted and mortgage *was* for the purpose of creating a restrictive covenant binding the land to the requirements of the Township ordinance with relation to land and buildings.

In the face of such a public attitude, so notoriously taken and abundantly shown to the court, no credence whatever should have been given to the Johnson and O'Brien affidavits. Furthermore, no layman could be believed in uttering such legal words and context as disclosed in these affidavits, to say nothing of Mr. O'Brien being himself an affiant and also the notary public who took the Johnson affidavit. Occurrences of this sort have repeatedly resulted in throwing out affidavits so verified.

Second Ground of Appeal.

The Johnsons were estopped from denying that the quoted matter was inserted in the deed to respondent's corporation as a restrictive covenant running with the land, requiring it to be used in accordance with the municipal ordinance for single family residences.

It is noteworthy that neither Mr. Johnson nor Mr. O'Brien tries to explain why the quoted matter was inserted in the *purchase money mortgage* and such insertion in the mortgage stands before both of these affiants as questioning the truth of their statements about the deed.

But we have a more pressing point here. The Johnsons, grantors of the deed to the Marlyn Realty Co. inserted these words "Subject to existing restrictions if effective and statutory and municipal requirements relating to land and buildings." They also had inserted in the purchase money mortgage given back by the Marlyn Realty Co. precisely the same words. (p. 2 lines 4, 33)

Respondent made application to the Supreme Court for a mandamus to compel the Township of Maplewood to issue to him a permit to erect an apartment house on his tract.

The Johnsons joined with the neighbors of the tract, of whom complainant Dickson was one, in retaining the writer to appear before the Supreme Court in the mandamus proceeding to pray leave to be made defendants therein and thereupon to oppose the mandamus on the ground that it would violate the covenant in the deed and mortgage restricting the use of the land to single family residences only, as provided in the Township

ordinance. Counsel appeared accordingly and the extracts taken from his brief, filed by permission of the Court, as Amicus Curiae, show conclusively that he was retained by the Johnsons and the neighbors definitely for the purpose stated (p. 23/10). The opinion of the Supreme Court (135 Atl. 662) also mentions confirmatory statements.

It must be noted that in this mandamus proceeding we had all the parties now before this Court in the present matter.

Before the Supreme Court the Johnsons were opposed to this respondent and aligned with the Township of Maplewood. At the present time, the Johnsons have reversed their attitude and have been heard to deny that the quoted words were put in the deed as a restrictive covenant. That is, they now oppose the Township and their neighbors, who had a right to rely upon their position and statements in the Supreme Court, and began this action on that reliance, by making statements which contradict completely, according to the learned court, what they stood for before.

The brief filed by us as Amicus Curiae has been in the hands of Messrs Howe & Davis, respondent's counsel, since December, 1926.

Estoppel is based on grounds of public policy and fairness. In equity particularly the court is or ought to be quick to apply the rule. It works to prevent duplicity and bargaining for a change of front, to the injury of those entitled to rely upon previous acts.

The retainer and appearance are not denied. The counsel for respondent in the Supreme Court proceeding and in the case at bar, are the same. The State of Case on Appeal in the Supreme

Court matter did not contain a full statement of the facts and, under our urging, successful application was made to the Court to enlarge the record.

At the same time we appeared in person before the Supreme Court, the Township counsel and Mr. Edward L. Davis, for the relator (now of counsel for respondent) being present, and argued before Justices Parker and Campbell for leave to have our clients, consisting of the Johnsons as stated and all the neighbors of respondent's tract (complainant, Dickson, being one of the neighbors), brought in as defendants and, if so permitted, to oppose the mandamus on the ground that to allow it would nullify the quoted matter set forth in the deed of Johnsons to Marlyn and purchase money mortgage of Marlyn to the Johnsons, restricting the use of the plot to single family residences under the municipal ordinance relating to land and buildings.

The learned Justices did not think there was precedent for allowing the Johnsons and the neighbors to come in as defendants, but took the matter under advisement and permitted us to file a brief as Amicus Curiae. This we did and, as pertaining to the present point, we have given extracts from that brief which show the retainer (p. 23/20) and the object of appearance, the brief itself having been in the hands of present counsel, Messrs Howe & Davis, since December, 1926 (p. 20/21)

It certainly violates all propriety for the Johnsons after taking such a public stand before the Supreme Court, to be now allowed to desert their former associates and to join hands with the one the Johnsons and their associates so determinedly and affirmatively fought in that Court, viz; this respondent.

The history of the Johnson affidavit appears somewhat in the record. On April 3d, 1928, we asked the Johnsons to execute an affidavit (p. 19/29) which supported their former statements and their retainer. They stated to us that they had inserted the quoted matter in the deed and mortgage to protect the neighbors, especially Mr. Schofield, from the erection of an apartment house, but Mr. Johnson added that he feared he might endanger the mortgage he and his wife held on respondent's tract if he gave us the affidavit, whereupon we suggested that he see counsel about it. He did that and on the same day he mailed us a letter, saying:

> "Considering the advisability of signing the enclosed document, I sought counsel on this matter, and was advised not to sign, on practically the same grounds as stated to you this morning. I therefore return the papers herewith" (pp. 21/30, 22/10).

The only ground stated was that he feared he might endanger his mortgage (p. 19/29).

The next thing we knew Mr. Johnson had executed, two days later, an affidavit for defendant respondent, reading (p. 13/20):

> "I am one of the grantors in the deed dated April 8th, 1926, made by myself and my wife, Hattie L. Johnson to the Marlyn Realty Corporation, a corporation of the State of New Jersey, for premises on the south side of Burnet Street in the Township of Maplewood.
>
> 2. The said deed contains the following: 'Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings.'
>
> 3. In inserting this said provision, it was not the intention of myself and my wife to

impose any restriction upon the said premises but was made as a protection to ourselves in case the court should construe a zoning ordinance as an encumbrance against property. We did not want to be responsible on the warranty in the deed in case it was held that a zoning ordinance was an encumbrance."

Note well that no reference is made to the insertion of the quoted words in the *purchase money mortgage* (compare record pp. 13/27, 2/30); that it refers to what a *court* would do, which is undoubtedly a fancy suggested at the present time, for a layman does not give thought to that view in making a deed; that it definitely shows that the zoning ordinance of the township was in mind; and the affidavit was sworn to on April 5th, 1928, before J. Chas. O'Brien, as notary public, who, *the day previous,* had himself made affidavit (p. 14/20) which after preliminary words, says on page 15:

> "I know from the conversation I had with Mr. and Mrs. Johnson at the time the said deed was executed that it was not their intention to impose restrictions on the said land but the said provision was inserted as a protection in case it should be held by the courts that a zoning ordinance was an encumbrance against real estate, which would make them liable on their warranty in the deed."

Here, again, we note that there is no mention of insertion of the same words in the purchase money mortgage; there is reference to what the courts might do, so improbable to believe in any event, and-what is amazing—the idea that the affiant is given *knowledge* by conversations had, whereas the affidavit of complainant Dickson (p. 7/24) as to categorical statements made to him

by Mr. and Mrs. Johnson have been entirely disregarded by the Court below.

Both of these affidavits for respondent are artificial and show in their very content composition by the lawyers in this case.

Contrasting what the affidavits say, with the public appearance of the Johnsons in the Supreme Court at the October term, 1926, we find them then clamoring to have the quoted words which were inserted in the deed *and the mortgage,* declared to be an incumbrance on the property so as stop the issuance of a mandamus and *without any fear that as an incumbrance the warranty of the deed would injure them.*

With the matter so plainly presented, the learned Vice Chancellor gave credence to the Johnson and O'Brien denials (p. 25/5) and entirely brushed aside the appearance in the Supreme Court which so patently belies the affidavit statements. He also overlooked the fact of the affidavits quoted omitting all reference to the insertion of the same words in the purchase money mortgage, an occurrence which to a real estate agent like Mr. O'Brien must have been so unique that some explanation would be now made about it. Where were there any warranties to protect in the purchase money mortgage?

It would be unconscionable and contrary to public policy to permit the Johnsons in these circumstances to now be heard to deny what they had in open court alleged to be a fact two years ago.

The reason which governs estoppels is that after a man has by his own deed or act in pais admitted a fact to be true, he shall not be permitted to contradict it.

Flagg v. *Mann,* 14 Pick. (Mass) 467.

A man is concluded and forbidden by law

to speak against his own act or deed, even though it is to say the truth.

Demarest v. *Hopper*, 22 N. J. Law 599.
Hudson v. *Winslow Twp.* 35 N. J. Law 437.
Sparrow v. *Kingman*, 1 N. Y. 242.

> A recital in a judicial record imports absolute verity and all parties thereto are estopped from denying its truth.
> *16 Cyc.* 684.

Counsel's brief as to appearance for the Johnsons and the Burnet Street neighbors, finds precise connection in characterizing the Johnsons as the grantors of the deed to Marlyn and mortgagee of the mortgage Marlyn to Johnsons containing the precise words therein, quoted there and here.

The Supreme Court opinion in the mandamus proceeding says (135 Atl. 662):

> "Application was also made to bring in as parties to this proceeding owners of property adjacent and in the neighborhood of relator's property as being parties in interest."

Mention is then made of our filing a brief as Amicus Curiae.

> Where a person has with knowledge of the facts acted or conducted himself in a particular manner or asserted a particular claim, title or right, he cannot afterward assume a position inconsistent with such act, claim or right, to the prejudice of another.
> *16 Cyc.* 785.

Taken in any view of the case the Johnsons threw in their lot with the neighbors of the tract and the Township of Maplewood for the single purpose of stopping a mandamus by asserting the quoted matter as a restrictive covenant in

favor of those neighbors and when one such neighbor, relying on the assertion and public appearance in court, now seeks to have violation of the covenant enjoined, the learned court has ruled to the injury of such neighbor and the Township.

It is not within the power of the Johnsons to release the property from the covenant contract placed in the deed and mortgage. Respondent evidently holds that their affidavit herein (p. 13/20) even if nullified by application of estoppel by conduct and in pais, must act as a release of the property. This is, of course, altogether untenable. Effort has been made in the past to have a grantee released from his assumption of a mortgage by taking deed, through deeding back the property to the grantor or by the grantor releasing him from the assumption. It has been held that this cannot be done.

Gifford v. *Corrigan*, 117 N. Y. 257.
Starbird v. *Cranston*, 48 Pac. Rep. 652.
1 Jones Mortgages, sec. 764.
Clark v. *Howard*, 150 N. Y. 232.

If, then, the release or deeding back cannot release the grantee from his assumed obligation on the bond and mortgage, nothing the Johnsons can now do will alter the plain intent of the contract contained in deed and mortgage entered into to benefit the Township and the neighbors of respondent's tract.

Third Ground of Appeal.

It was error to dismiss as the quoted matter in itself constituted a restriction running with the land limiting its use to single family residences.

Every word in a deed, as in a will, is to be given meaning if it can be done fairly and reasonably; and it is not readily to be dismissed as being meaningless.

The matter in both deed *and mortgage* herein is:

> "Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings."

The word "ordinance" is not mentioned, but the stronger words are used: "requirements relating to land and buildings."

In the lower court respondent busied himself with much argument as to meaning of the words "Subject to" and cited about one hundred cases to show that unless the grantee *assumes* in express words, let us say, a mortgage, he is not liable on the same. The error here was in confusing what the grantee is liable for on a bond and mortgage with what the property itself is liable for. We have no quarrel with respondent about the grantee as an individual being liable on the bond and mortgage when he accepts a deed which says that conveyance is subject to a bond and mortgage which are assumed by the grantee.

As bearing on another point herein, respondent also knows that although the mortgagee is not privy to the assumption and no consideration as such passes from the mortgagee to the grantee, the mortgagee can hold the grantee as an obligor

on both bond and mortgage. And even though the grantee deeds the property to another and the mortgagee assigns his mortgage to still another, the mortgagee by assignment has the right to hold the first grantee as an obligor, even though such mortgagee was not possibly in mind when the deed was given and taken.

The words "subject to" in a deed or other instrument, are defined as meaning "charged with" or "subservient to."

7 *Words and Phrases*, 1st series, 6712.

This is universally regarded as the meaning of the words. The property is charged with whatever it is recited as so subjected to.

The plain idea is to inform the grantee that the property is so charged and that the property must respond accordingly, whether the owner thereafter wants it or not.

We have here a very unique situation in that the purchase money mortgage given back contained the same words as the deed:

> "Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings."

The mortgage was signed by grantee as mortgagor and bound itself, its successors and assigns. The only sensible view of the matter is that the land was to be forever charged and the restriction could not be cut off by foreclosure.

The wording of the quoted matter gives us an idea of just what was in the minds of the parties. "Existing" applied to restrictions, when followed in context by words indicating a further burden on the property, means to refer to those restrictions already on the premises as well as those which follow "If effective" suggests also that if those already on the premises are not ef-

fective, it shall not limit the restrictions which follow in the same context. "Requirements" means that the grantee is made aware that he comes into the community to obey what the municipality requires, subordinating his own wishes and the property to the rule of that municipality. "Relating to land and buildings" shows the precise reference to particular requirements, because with no mention of "requirements" there might be dispute that it referred only to avoiding nuisances, obeying health laws etc. whereas precise reference to "land and buildings" leaves no loophole for the grantee to escape. It is pointed out to him that in accepting the deed the grantee has bound the land to *"Statutory and municipal requirements relating to land and buildings"* and to further avoid any misunderstanding as to just what the grantee is binding the property with, *the same precise words are put into the purchase money mortgage* given back as part of the consideration in such a way that even if the mortgagee obtained possession of the property, he could not avoid the restriction.

It will not be disputed that at the time of giving and taking the deed and mortgage herein, April, 1926, there had been litigation where those desiring to erect apartment houses on plots, sought the Supreme Court for mandamus to enforce giving a permit for such erection. It will not be disputed, further, that the granting of writs of mandamus before April, 1926, was greatly agitating communities where apartment houses were and still are regarded as simple pests, destructive of community interest. Hence, in April, 1926, it was a fair assumption that if the Johnsons had gone to the Supreme Court they could

have obtained permit to erect an apartment house on the plot afterward conveyed to the Marlyn Realty Co.

With this potential right in the Johnsons, what could be the meaning of their inserting in the deed to the Marlyn Co. that the conveyance was subject to "statutory and municipal requirements relating to land and buildings", if not to make sure that so far as the Township and the neighbors of the tract were concerned, they should be protected from the erection of an apartment house by making the grantee take the property charged with compliance with the municipal ordinances, *court or no court?* This is what the Johnsons told counsel on the morning of April 3d, 1928, when they said that they had inserted the provision in deed and mortgage to protect the neighbors, especially Mr. Schofield, from the erection of an apartment house (p. 19/26). This is what the Johnsons told complainant Dickson (p. 7/30) when they said that it was intended by such provisions to charge the property with compliance with the zoning ordinances. That, furthermore, was the only thing they had in mind or could possibly have in mind when they retained counsel in association with the neighbors of respondent's tract, to appear before the Supreme Court in the mandamus proceeding to oppose granting a mandamus to compel the Township to grant a permit to erect an apartment.

Respondent in the court below admitted that there was no case in point which, to his mind, fitted this case, altho he picked up *Van Duyn* v. *H. S. Chase & Co.* 149 Iowa, 22, in an effort to show by analogy that his position was the right one. A simple statement of the facts and the court's conclusion there will show that it does not apply to a situation like the one here.

The supplemental verifying affidavit of William Paul Dickson (p. 7/23) states:

> "The allegations on information and belief with respect to the agreement between Edward T. Johnson and his wife, Hattie L., when they conveyed the said property and took back the purchase money mortgage aforesaid, with respect to the meaning and intent, expressly stated and agreed to at the time, *were based on categorical statements to me by both Edward T. Johnson and his said wife, Hattie L. Johnson that the clause taken from the deed and mortgage and quoted in the original Bill of Complaint, paragraph 2, was inserted therein for the purpose of charging the land with a covenant to comply with the ordinances of the Township of Maplewood and not erect apartment houses thereon.*"

This was not denied by the Johnsons although counsel had copy of the affidavit before verifying their own affidavit (p. 14/10), and respondent's counsel not only had the Dickson affidavit but also that of counsel (p. 18) with its pointed statements of fact (p. 19/17; p. 20/16), for both were alluded to in his brief to the Vice-Chancellor below.

Fourth Ground of Appeal.

Respondent is estopped by his own conduct.

As will be seen from the detailed narration under our opening statement, *supra*, Chief Justice Gummere granted a Rule on an application for mandamus to the Supreme Court, July 26th, 1926. Respondent on August 18, 1926, filed a petition with the Committee of the Township of Maplewood for a change in ordinance which would zone his plot so as to permit erection of an apartment.

There was no necessity in itself to make this application. As the Supreme Court was granting mandamus in like cases, what explanation could there be for it except that respondent recognized that the land was charged with obedience to the municipal requirements relating to land and buildings and he therefore sought to come in under that restriction, so plainly expressed, by having the governing body change the requirement?

Respondent cannot say that he was without knowledge of his rights, for he chose by counsel to go to the Supreme Court for a mandamus before he petitioned the Township Committee.

Referring to the State of Case in *Margolis* v. *Maplewood*, #114, this Court, May, 1927 term, it will be seen that motion for Rule was returned July 24th, 1926 (page 1, that record); petition for Rule verified July 20, 1926 (page 7, that record); Rule made July 26, 1926 (page 8, that record) and the agreed statement of facts (page 11, that record) states:

> "7. On August 18, 1926, relator applied to the municipal authorities of Maplewood for a change of zone under the ordinance and thereupon the Township Committee directed

the preparation of an ordinance changing the zone in accordance with the petition, so that such ordinance might be introduced and a hearing upon it held. That the ordinance has been prepared and will be introduced at a regular meeting of the committee to be held on October 5th, next."

Ordinarily this would be regarded as indicating an effort of respondent to experiment with the situation, but with counsel at hand respondent knew that he applied for change in ordinance because his property was charged with the restriction aforesaid. Having fully recognized and acted under the restriction he is estopped from now attacking it .

Fifth Ground of Appeal.

It was error to dismiss the Bill on the ground that there was no privity of contract in complainants with the cause of action, the contract or the consideration.

The learned Vice Chancellor uses the words "privity of contract" to predicate upon them his finding that there must be such in order to permit complainants to obtain relief herein.

The words quoted as constituting a restrictive covenant are contained in a deed of Johnsons to Marlyn and purchase money mortgage of Marlyn to Johnsons (p. 2), thus providing the signatories directly. Respondent was then and is now President of the Marlyn Realty Co. and the deed and mortgage bind the parties and their assigns.

This constitutes an express contract, with the exchange of deed and mortgage on statement of consideration, providing full consideration for such express contract.

We have already shown that the land covered thereby is burdened by an obligation to use same in accordance with the statutory and municipal requirements relating to land and buildings, the words of the instruments (p. 2/4).

We have also shown that the Johnsons took position before the Supreme Court that such obligation was thus placed on the land *for the benefit of the neighbors and the Township.* In the face of the many statements as to this, *respondent has remained completely silent.* He has not answered the Bill. He has made no affidavit. He contents himself with a motion to dismiss and affidavits of others.

Aside from the declaration of the Johnsons that the quoted matter was inserted for the benefit of the neighbors, who else outside of the Township itself could have interest in it? The entire district, both sides of Burnet Street, is restricted by the municipal ordinance to single family residences. This appears the more in the State of Case on Appeal covered by stipulation of counsel (p. 36), as well as by the affidavit of counsel (p. 21/3).

Complainant Dickson is bound as well as the rest of the people on Burnet Street, including respondent. The entire argument before this court in appeals on this Maplewood zoning dispute, (# 109, # 114, May Term, 1927), was that there is a definite establishment by the Township of a community plan and in keeping with that plan the most of the people of Maplewood went there and established homes. With the dispute so sharply conducted ever since the decision in *Ignaciunas* v. *Risley* (99 N. J. Law 389) communities have tried to retain the plan so established and it was a perfectly rational expecta-

tion on the part of the Johnsons, formerly living at 36 Burnet Street, Maplewood (note erasure of old address, p. 21/24) that this district plan of single family residences should be maintained by inserting in the deed *and the mortgage* the provision that the conveyance was conditioned upon use of the plot for single family residences, as provided by the Township ordinance.

Respondent, president of the Marlyn Realty Co. *who signed the mortgage,* does not deny a single word of the Bill or affidavits for complainants, although the statements are precise and to the point. Hence, it can be assumed that respondent is unable of knowledge or on information and belief to deny that the deed and the mortgage were worded as stated to make it a contract expressly binding the plot for the benefit of the neighbors and the Township.

It is notorious that the Ignaciunas case was decided long before April, 1926. Agitation in communities was pronounced, as the list of cases for mandamus in zoning matters in the Supreme Court fully shows. It was a natural thing for the parties to bind themselves and the property to obedience to the zoning ordinance and carry it to their successors and assigns. The words of restriction are free from ambiguity. Reading them with particular point to use of the words "subject to existing restrictions if effective", there is indicated by what follows an intention to bind the property with new restrictions.

The learned Vice Chancellor thought there must be a reciprocal right in respondent to entitle complainants to right of enforcement of this restriction (p. 26/8). He, however, lost sight of the fact that there has become established in our law the right in a third party to sue on account

of a contract made for his benefit, even though such third party may not be in privity and may in fact know nothing whatever about the contract.

Appellants claim that they are third parties for whose benefit the contract between grantor and grantee of respondent's plot was made and we have shown that such claim is supported in statute and court decisions.

The Practice Act provides that a third party may sue, in these words (Compiled Statutes, page 4059 section 28):

> "Third person may sue on contract for his benefit.—Any person for whose benefit a contract is made, whether such contract be under seal or not, may maintain an action thereon in any court and may use the same as matter of defense in any action brought against him nothwithstanding the consideration of such contract did not move from him."

It has been held that the same right in a third party exists in equity.

> *Syllabus.*
>
> "A contract of two persons on a sufficient consideration for the benefit of a third person is enforceable against the contractor."
>
> *Page 402 of opinion.*
>
> "It is undoubtedly the law that if two people upon sufficient consideration agree to do something for the benefit of a third, such contract may be enforced as against the two contractors."

Deseumer v. *Rondel*, 76 N. J. Equity 394.

It must be again stated that the Johnsons in their position before the Supreme Court, retaining counsel to appear to enforce the restrictive covenant in favor of the neighbors and the Town-

ship, took the stand that the quoted matter was inserted for their benefit. Respondent makes no denial of that.

The history of this third party right begins early. Chancellor Kent in the old case of *Duke of Cumberland et al.* v. *Codrington et al.* December 31, 1817, in Johnson's N. Y. Chancery Reports, volume 3, p. 229, discusses and digests many old cases on the subject. The leading case in New York is *Lawrence v. Fox*, 20 N. Y. 268, but the rule has been much enlarged until in *Seaver* v. *Ransom*, 224 N. Y. 233, it has broadened into many matters of law and equity, so as to leave no doubt about it.

With these two great States, New Jersey and New York in harmony on the subject, there can be no further question about the matter. Having shown that the only ones who could have been in contemplation of the parties were the neighbors and the Township, the finding of the learned Vice Chancellor is erroneous and such beneficiaries or any of them have the right to sue for enforcement of the right covered by the restrictive covenant.

The cases range over a great variety of subjects and it being noted that they go largely into a realm where the highest quality of law is involved.

We have heretofore alluded to the privity of contract discussion with reference to assumption by a grantee of a mortgage named in a deed.

Privity is based on knowledge of the contract and mutuality of covenant, predicated upon participation in the consideration. To insist upon the finding of the learned Vice Chancellor, only those can sue who thus knowingly have active part in the agreement of restriction and of the

consideration passing between the parties.

A conveyed property to B by deed stating that conveyance was subject to a mortgage of some amount "assumed by the grantee." The mortgagee is not known to B and does not know him. In fact grantee and mortgagee are strangers and the mortgagee at the time knew nothing whatever of terms of the grant. And yet, when the mortgagee later finds out about it, B must respond to the obligation of the bond and mortgage to said mortgagee.

B conveys the land to another without repeating in his deed assumption of the mortgage. The mortgagee assigns his mortgage to another. B does not escape his obligation by such conveyance nor would he so escape even if he put it in his deed that the mortgage was assumed by his grantee. On the other hand the assignee of the mortgage, whether he knows it or not, has the right to hold B, if he wants to, although he had no part whatever in the transaction outside of taking the mortgage.

Here we have third parties with the right to sue, without privity of contract.

Sixth Ground of Appeal.

It was error to dismiss the Bill as to the Township on the authority of *Pumo* v. *Fort Lee*, 4 Misc. 663.

We confess to being puzzled over the learned Vice Chancellor's finding on this point. It has become academic that each case stands upon its own facts and it is so plain that the Supreme Court in the *Pumo* case stated that that case depended on its own facts, that there is no founda-

tion for following as a rule of law a statement in the opinion separated from its context.

In the *Pumo* case there was a Chancery action pending on restrictive covenants and apparently it had been urged (as we urged in our Supreme Court case) that to grant a mandamus would nullify restrictive covenants in the deeds of record. The Supreme Court felt there and in our case, that restrictions were a matter for Chancery and if a party erected a building in violation of a restriction, despite a mandamus for a permit, he would have to tear it down. What the learned Vice Chancellor picked on, however, was the statement in the *Pumo* opinion that so far as the facts of that case showed the municipality had no interest in the restrictions, and to simply state it is to show how inapplicable it is to the case at bar.

By its very terms, "Subject to * * * statutory and municipal requirements relating to land and buildings," the municipality is given a beneficial interest. It is not just a private restriction; it is a contract expressly entered into in deed and mortgage for the benefit of the municipality and the neighbors. The Supreme Court said that it would do nothing about restrictions in a mandamus proceeding. Now the learned Vice Chancellor says that as the Supreme Court so stated, he will say the same thing, thus cutting us from all relief in law or equity. In short, our facts are widely different from the *Pumo* case, requiring different consideration and hence different treatment.

The words of the opinion in *Pumo* v. *Fort Lee, supra,* in the Supreme Court, so far as relevant here, are:

"The only parties interested in their existence or enforcement (referring to assertion of restrictions) except the relators, *so far as the present case discloses*, are the complainants in the chancery suit who are seeking to enforce the alleged restrictions." The italics are ours.

It would be as sensible to draw from that opinion that a municipality has no interest in a restriction as to claim before the Court of Chancery that the Supreme Court had discounted the restrictions as binding by calling them "the alleged restrictions" and throwing doubt on their merit.

All the Supreme Court claims to do and all that Justices Parker and Campbell thought they could do when we addressed them in behalf of the Johnsons and the neighbors in the mandamus proceeding (*Margolis* v. *Maplewood*, 135 Atl. 662) was to consider solely the right of a municipality to refuse a permit to erect an apartment because it had zoned the district for single family houses. The learned Justices cited the *Pumo* case on that hearing, but only as showing that the Supreme Court had nothing to do with restrictions.

Seventh Ground of Appeal.

It was error to dismiss on the ground of *res adjudicata*.

It is almost a proverb that the doctrine of *res adjudicata*, is handled recklessly and, we regret to say, without full knowledge of the law.

The Court below attached great importance to the dismissal of the Bill in a former Chancery suit of *Maplewood* v. *Margolis*, (136 Atl. 707) and held such dismissal as *res adjudicata*, giving

as basis that the Bill included among its allegations the matter above quoted from deed of Johnson to Marlyn and purchase money mortgage Marlyn to Johnsons, and the demand for relief.

As to the demand for relief there is no sense in that finding, as no reference is made to anything warranting it.

As to the inclusion of words which we now urge as a contract between the parties restricting the use of the land according to the municipal ordinance, the learned Vice Chancellor followed the urging of respondent in affidavit and brief.

Every case has a theory and if it is consistenly adhered to, it is binding on the parties on appeal. That is to say, we cannot hold to one theory in the trial court and then for the first time on appeal enlarge the theory so as to bring in things never considered below.

This theory is not disclosed by naked separation of words or clauses from the context of a Bill. It is found in the stand shown by parties and counsel below and in the upper courts. We plainly claimed in the Court of Chancery that we were seeking to come up on the equity side so as to get protection of the U. S. Supreme Court in *Village of Euclid* v. *Ambler Realty Co.*, 47 Sup. Ct. Rep. 114 (p. 11/14). Vice Chancellor Backes chided us in his opinion for not showing him wherein equity entered (136 Atl. 707). On appeal to this Court the briefs discussed zoning ordinances only and specifically disavowed arguing about restrictions. Respondent's brief never touched upon restrictions. As we thought a constitutional question was involved we sought to go to the U. S. Supreme Court by petition and brief on certiorari. It will be looked for in vain to find in such petition and brief any remote reference to the quoted matter herein as a restric-

tive covenant or an express contract for the benefit of the municipality and neighbors of the tract. In fact it would have been supremely silly for counsel to have sought to go to the U. S. Supreme Court on a claim based on such matter. Our grounds for asking certiorari were that the zoning law of New Jersey had never been reviewed by the highest court and that this Court's decision on the question was in conflict with the decisions of *Village of Euclid* v. *Ambler Realty Co.* and a later one of *Zahn* v. *Los Angeles.*

As this cannot be denied by respondent, it settles the question of theory of the prior action.

By an error in printing the record on appeal in that prior case (*Maplewood* v. *Margolis,* 109, Court of Errors and Appeals, May Term, 1927), the notice of motion by respondent was left out. It moved for dismissal of the Bill on the ground that it showed no cause for equitable relief; *which was entirely jurisdictional.* There was no answer filed by respondent, there was no trial of issues. The Vice Chancellor in that case dismissed on the authority of the Supreme Court on the law side and holding that we showed no reason for equitable jurisdiction. There was a nonsuit and dismissal, not, however, on the merits. This could not become *res adjudicata.* Had there been anything but a jurisdictional question involved, complainants would have been entitled to amend their bill as matter of right. Nothing of the sort was discussed or thought of.

There being a dismissal as non-suit only, there was no estoppel on a new action on exactly the same grounds. Here, however, we have a different condition before the court. Instead of the leading case of *Ignaciunas* v. *Risley,* 99 N. J. Law, 389, we have an amendment to the Constitution (passed September, 1927) and a changed

attitude of the courts on the subject of zoning. The Supreme Court has even held that the zoning ordinance of Maplewood is in conformity with the 1928 statute on the subject.

With conditions thus changed we have full right to sue in Chancery if we want to, without being foreclosed of such right by a prior dismissal by non-suit of an action between respondent and one of the appellants.

We have always thought that on a motion to dismiss the facts disclosed in the Bill are the only ones to consider. Here we have had affidavits on the subject of prior adjudication, which were given weight by the court; although such an issue is one of fact to be raised by answer and determined by trial.

All that the motion raises for discussion is the sufficiency of the Bill. That was all that was decided in the prior Chancery action. Respondent wants to give it the dignity of an adjudication on the merits, when there was a simple motion to dismiss. He seeks to come in again on a motion to dismiss on the same ground as before, adding, however, the ground of *res adjudicata*. This does not appear on the face of the Bill and he has no right to add *ex parte* statements outside of the Bill to substantiate his position.

But respondent does not make affidavit himself. *He denies nothing*, although one would think him interested in doing so. To bring in an outside affidavit to prove something that respondent does not formally make claim to, is queer. And yet respondent prevailed below.

It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiff's right of action.

Smith et al. v. *McNeal et al.*, 109 U. S. 429.

Determination of a motion is not *res adjudicata*.

Felz v. *Roseberger*, 10 N. J. Law 79.

"In the case of *Hughes* v. *U. S.*, 4 Wall 232, it appeared that one Sewell had a suit respecting his rights under a patent, which was carried on through various stages but that the suit was dismissed before final hearing upon the merits for want of jurisdiction and want of proper parties and also because of defective statements as to cause of action. The court said: "it requires no argument to show that judgments like this are no bar to the present suit. In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies and the point of controversy must be the same in both cases and must be determined on its merits. If the suit was dismissed for defect of proceeding or parties or a misconception of the form of proceeding or want of jurisdiction, or was disposed of on any ground which did not go into merits of the action, the judgment rendered will prove no bar to another suit (*Wells Res Adjudicata*, sec. 455 etc. *Bigelow* v. *Winsor*, 1 Gray, 301). This last case shows what is believed to be the general practice; that when a bill is dismissed and court intends to protect the plaintiff against an estoppel it usually adds to its decree that it shall be without prejudice. But I cannot conceive for a moment that the absence of those words is a bar as to future consideration of the equitable rights of the parties (*Brandlyn* v. *Ord*, 1 Atk. 571; *Behrens* v. *Pauli*, 1 Keen 456, 460; *Big. Estop.* 121; *Longstreet* v. *Phile*, 10 Vroom 63).

Hemminger et al. v. *Heald et al.* 51 N. J. Eq. 74.

"In case of the involuntary non-suit the judgment is a final judgment so far as to be a basis for a writ of error, but as long ago as 1927 Chief Justice Ewing held that a judgment of non-suit in a former action between

the same parties is no bar to subsequent action by the same plaintiff against the same defendant for the same cause of action * * *. Since that time it has always been held that a non-suit not reversed is not an obstacle to to a new suit between the same parties for the same cause of action."

Beckett v. *Stone*, 60 N. J. Law 23.

"It is of course elementary that for a judgment in one suit to be a bar to the prosecution of another suit between the same parties or their privies, the point of controversy must be determined on its merits and if the first suit be dismissed for want of jurisdiction or disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to the prosecution of another suit."

Nirdlinger v. *Stevens*, 262 Fed. at p. 598. citing:

Hughes v. *U. S.*, 4 Wall. 232.

Beckett v. *Stone*, 60 N. J. Law 23.

"At common law a judgment of non-suit was not a bar to a new suit by the plaintiff against the defendant on same cause of action (Blackstone's Commentaries v. 3, 376; Tidd Pr. 797; Arch. Pr. 433). There is no statute in New Jersey which changes this common law rule * * *. (*Longstreet* v. *Phile*, 39 N. J. Law, 63, 71; *Chapin* v. *Dalrymple*, 53 N. J. Law 267; *Beckett* v. *Stone*, 60 N. J. L. 23). * * * The rule in New Jersey in our opinion is sound, has the great weight of authority and prevails in the Federal courts (*L. V. R. Co.* v. *Quereau*, 289 Fed. 767; *Horner* v. *Brown*, 57 U. S. 354; *Manhattan* v. *Broughton*, 109 U. S. 121.)

W. U. Tel. Co. v. *Ammann*, 296 Fed. at p. 455.

Freeman in his work of "*Judgments*" at section 263, upon the authority of Smith's leading cases divides judgments which are not a bar to another action because not on the merits, into the following classes:

"1. When the plaintiff fails for want of jurisdiction in the court to hear his complaint or to grant him relief; 2. where he has misconceived his action; 3. where he has not brought the proper parties before the court; 4. where the decision was on demurrer and the complaint in the second suit sets forth a cause of action in proper form; 5. where the first suit was prematurely brought; 6. when the matter in the first suit is ruled out as inadmissible under the pleadings."

Eighth Ground of Appeal.

It was error to dismiss, overlooking the fact that as there was only a motion going to the Bill of Complaint, its allegations must be taken as true and relief granted accordingly.

The practice herein seems to have been quite irregular in overlooking this important point. Taken as they stand the allegations of the Bill show a contract between parties to a conveyance and purchase money mortgage binding the real property to existing restrictions if effective and statutory and municipal requirements relating to land and buildings—all of the words of contract being strong, pointed and free from ambiguity, and further show the beneficial interest of the appellants in the right to have violation enjoined.

It was idle to discuss ordinary private restrictions in a case like this, where there is usually demanded a mutuality as well as derivation from a common grantor. Nothing of the sort is needed or called for. The third party right to assert a demand for relief as beneficiary of the contract definitely made, appears plainly from the Bill. Why

then should there have been permitted affidavits to press upon the court something outside of the issue?

This is an unusual problem. It has never been decided on facts as here presented, as far as we can ascertain. And yet the learned court decided the motion for dismissal on what he conceived to be the facts shown by affidavits for respondent, disregarding the Bill itself under this point, and the affidavits for complainants.

Ninth Ground of Appeal.

It was error to make after final decree was filed, an order granting a counsel fee of $250. as the Court was without jurisdiction and it was against the Chancery rules.

The Chancellor's Rule 146 specifically requires applications for allowance to be made before final decree.

Aside from this, there is no simpler rule of practice than that entry of a final decree ends counsel's retainer in the litigation where the decree is entered and also ends the Court's authority to make any further order in the matter, unless it be to set aside the decree and direct a new or further hearing. Even that must be done promptly. The reservation in the present decree (p. 28/6) as to counsel fees is without power in the Court to so direct. In the present case counsel for respondent was quick to get his decree "lifting" the injunction and dismissing the bill, all without notice of settlement, and he has but himself to blame.

Reservations in matrimonial decrees as to alimony and custody are of course permissible, for the good reason that they are provided for in

terms. But the Court could not hold open after a decree is made, even in a matrimonial case, the question of a counsel fee. Counsel fees are a part of the judgment itself and not separable from it.

Jurisdiction is not a flexible term, but it is fixed and determined by precise rules. This needs no argument, as it is admitted generally and denied only when there is a profit to be made by a litigant asserting the contrary.

The issuance of the show-cause order on filing the Bill gave the Court primary jurisdiction of subject-matter and complainants. Service of the show-cause order and the appearance of counsel for respondent on its return, without reservation, admitted jurisdiction as to respondent; but he predicated on his appearance a motion addressed solely to the Bill as to jurisdiction of the subject-matter and ground for relief asked for.

The granting of respondent's motion by a decree of dismissal completely sent the case out of the learned Vice Chancellor's hand and stopped our retainer to such an extent that we could not be served with notice of motion for allowance of a counsel fee. All that we as counsel could do was to appeal or move to set aside the decree before trying to appeal. In neither case would jurisdiction be conferred anew on the Vice Chancellor to add to his decree already filed.

A parallel came up in Chancery a number of years ago when we were counsel for petitioner in a divorce action and the present Vice Chancellor was the Advisory Master, and a decree was filed denying the petition. Later we obtained evidence which had not been available to us before but we were not able to move the Advisory Master in any way for the purpose of bringing in that evidence. There had to be a new reference by the Chancellor, a new proceeding in effect, and we believe this established practice in that respect.

As soon as the Vice Chancellor advises a decree and it is signed by the Chancellor and filed, that Vice Chancellor is without any power, the reference to him having been ended by his complying with the original order. While there was no order of reference herein the idea is the same and the conclusion of the matter so far as Chancery is concerned is just as absolute.

As stated elsewhere, the answer to the Petition of Appeal (p. 35) makes no mention of the order allowing counsel fee of $250. and we believe we are entitled to a reversal of that order as matter of course.

In any event, the learned Vice Chancellor had no power to make the order and it should be reversed anyway.

Tenth Ground of Appeal.

It was error to grant allowance of counsel fee, as there was no issue and no trial.

There has grown up a reckless habit of asking allowances of counsel fees in every kind of a proceeding, motions as well as trials; and it is getting alarming, so much so that there is an opening for a declaration of correct practice in this matter which will bring litigants to their senses.

In the case at bar there was a motion, nothing else. Counsel for respondent filed no formal appearance, but relied upon a notice of motion to dismiss. The motion was granted. What is there but an appearance in court? There is provision in the law for an appearance fee and nothing else happened to warrant an outside allowance. There was no issue. There was no trial. There was not even a hearing, if counsel insists that there is a

difference between trial and hearing. Respondent made his choice to move to the complaint and it would be a sad thing if in such a matter there should grow up the practice of allowing counsel fees, with not a thing to show the importance of the trial or preparation for it, the number of witnesses necessary to sue or defend, or the value involved in the suit.

Both the decree and order appealed from should be wholly reversed, with costs to appellants.

Respectfully submitted,

A. P. BACHMAN,
Of Counsel with Appellants.

3/36 OCT.1.1928

New Jersey Court of Errors and Appeals

Between
TOWNSHIP OF MAPLEWOOD and
WILLIAM PAUL DICKSON,
Appellants,
and
MAX MARGOLIS,
Respondent.

On Appeal from Chancery.

RESPONDENT'S BRIEF.

Statement of Facts.

This is an appeal from a decree of the Chancellor advised by Honorable ALONZO CHURCH, Vice-Chancellor, dismissing the complainant's bill against the defendant and also for an order awarding a counsel fee of $250.

The suit was brought in the Court of Chancery to secure a temporary and a permanent injunction against the defendant from proceeding with the erection of an apartment house on the theory that a restriction existed against the premises. The alleged restriction consisted of the following statement in the deed:

> "Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings."

The complainants desire to consider this provision as imposing a restriction upon the premises. On

the question of the intention to impose a restriction, two affidavits were produced in evidence, one made by a previous owner, Edward T. Johnson, and another by the real estate agent, J. Charles O'Brien, who negotiated the deal. These affidavits show that it was not the intention of the previous owner to impose a restriction upon the property.

The bill of complaint as originally filed had attached to it no affidavit other than a simple verification. Subsequently, the appellants' solicitor was permitted to file supplemental affidavits. He stated (S. C., p. 19, line 17, etc.) that Mr. Johnson, the previous owner, had told him that the restriction was put in the deed for the purpose of excluding apartments. He also sets up what he alleges to constitute an estoppel on the part of Mr. Johnson. The estoppel is to be derived from the fact that in a previous suit brought by the present respondent against the Township of Maplewood, Mr. Bachman had represented Johnson and others in contesting the action.

The Vice-Chancellor very properly dismissed the bill of complaint on the ground:

1. That the bill was insufficiently verified.

2. That the allegations of fact set up in the bill had been met by a flat denial.

3. That the case was *res adjudicata* by reason of the dismissal of a prior bill of complaint in a similar action brought between the same parties.

4. That the Township had no interest in the matter by reason of private restrictions.

5. That no privity of contract existed between the complainants and the owner of the property assuming that it constituted a restriction.

LAW.

FIRST GROUND OF APPEAL.

"It was error to discharge the injunction contained in the show cause order."

The bill of complaint was accompanied by an ordinary verification instead of a detailed affidavit.

It is stated on page 1141 of Kocher and Trier's New Jersey Chancery Practice, Section 1590,

> "All the facts necessary to sustain a restraining order or preliminary injunction must be verified by positive proof. There should be a special affidavit of the truth of all the material facts alleged in the bill; an injunction issued upon a common affidavit in the form ordinarily annexed to a sworn answer will be dissolved very much as a matter of course. Allegations of fact upon information and belief, without giving the source of the information and the grounds of the belief, and without the affidavit of any person having actual knowledge of the facts, are ordinarily insufficient, whether contained in the bill or in the affidavits."

Youngblood v. *Schamp*, 15 N. J. Eq. 42;
Holdrege v. *Gwynne*, 18 N. J. Eq. 26;
Thompson v. *Ocean City R. R. Co.*, 37 Atl. 129, 130;
McMahon v. *Pneumatic Transit Co.*, 85 N. J. Eq. 544, 547;
Society for Useful Manufactures v. *Low*, 17 N. J. Eq. 19;
Schoenfeld v. *American Can Co.*, 55 Atl. 1044.

The statements in the bill of complaint were contradicted by affidavits produced and the preponderance of evidence certainly was in favor of the respondent. It is stated on page 1150 of

Volume II of Kocher and Trier's Chancery Practice, under Section 1605 that:

> "Upon an application for an injunction, the complainant must establish the facts necessary for the granting of such relief by a preponderance of the evidence, what constitutes a preponderance of the evidence being a question for the court, taking into consideration all the circumstances of the particular case. It is a general rule that when the facts creating the equity on which the complainant's right to an injunction rests are denied under oath in such manner as to show that they are not true, or as to leave their truth in serious doubt, the injunction must be denied, unless it clearly appears that to put upon the defendant the restraint which is asked will do him no serious harm, while a refusal to enjoin him will deprive the complainant of all relief, or subject him to some other peculiar hardship, should he finally succeed in his case.
>
> "A preliminary injunction will be refused where the complainant's right is uncertain as a matter of law. And all doubts must be resolved in favor of the defendant."

Kocher's Chancery Practice, 513;
Schlemm v. *Whittle*, 86 N. J. Eq. 415;
Smith &c. Co. v. *Jersey Rwys. &c. Co.*, 89 N. J. Eq. 12;
Brunetto v. *Montclair*, 87 N. J. Eq. 338, 341;
Caplan v. *Palace Realty Co.*, 110 Atl. 584;
Scherman v. *Stern*, 93 N. J. Eq. 626;
Cosmos Dyeing Co. v. *Calderini*, 91 N. J. Eq. 378;
Nolan v. *United Brotherhood, &c.*, 101 Atl. 194;
Auto Hearse Mfg. Co. v. *Bateman*, 109 Atl. 735.

The Court, therefore, very properly discharged the restraint contained in the order to show cause and refused to grant a preliminary injunction.

SECOND GROUND OF APPEAL.

"The Johnsons were estopped from denying that the quoted matter was inserted in the deed to respondent's corporation as a restrictive covenant running with the land, requiring it to be used in accordance with the municipal ordinance for single family residences."

It will be noted that the Johnsons are not parties to this suit. We conceive it to be a highly novel principle of law that witnesses can be prevented from testifying in a case in which they are not parties by reason of the fact that they have on some previous occasion taken a stand which might seem to be inconsistent with their present testimony. Edward T. Johnson's affidavit was produced for the purpose of supplying evidence in this case. His evidence stands, unless it can be overcome by contradictory evidence, which has not been done in this case. It is respectfully urged that the present respondent is not interested in whether or not the Johnsons would be estopped in any other legal proceeding in taking the stand they are now taking. It is insisted that their affidavit is properly in evidence. Counsel for appellants misconceives the elements of an estoppel.

But were an estoppel of a third person permitted to influence the case, it does not seem reasonable that the joinder of the witness Johnson with other parties in an attempt in a previous suit to prevent the respondent from putting up an apartment house, in no way conflicts with his present testimony. It is perfectly reasonable to suppose that no intention to impose a restriction existed in the minds of the parties to a deed and yet the grantor might have desired to prevent the grantee from erecting an apartment house on the premises conveyed. The previous suit was what is commonly

known as a zoning case and would in no way involve the construction of the provision contained in the deed as a restriction.

THIRD GROUND OF APPEAL.

"It was error to dismiss as the quoted matter in itself constituted a restriction running with the land limiting its use to single family residences."

The important allegations of the bill, to wit, those contained in paragraphs 4 and 5 of the complaint, are made only on opinion and belief and not as absolute facts. But no restrictions exist against the said premises and none are shown to exist. The provision in the deed and in the purchase money mortgage is as follows:

> "Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings."

This does not constitute the imposition of a restriction.

We are unable to find any local authorities bearing directly on this point. We do find, however, that an almost identical situation was disposed of in the case of *Van Duyn* v. *H. S. Chase & Co.*, 128 N. W. 300, 301, 149 Iowa, 222. In that case the deed to a lot contained the restrictions that the front of any residence built thereon should not be less than forty feet west of the east line of the lot, and that no other building except a residence should be built on the front half of the lot; but the deed contained no restrictions as to the back half of the lot. Subsequently defendant came into possession of part of the back half of the lot by a deed providing that the conveyance should be "subject to" the restrictions in the former deed.

Held, that such restrictions not originally referring to the back half of the original lot, were not made applicable thereto by defendant's deed; the phrase "subject to" meaning under the control, power, or dominion of, or subordinate to, and, not being words of contract, imposing upon defendant no contractual obligation.

The nearest analogy to the situation that we can find is that of a conveyance of property subject to a mortgage. The distinction appear to be that when a purchaser takes property subject to a mortgage, he enters upon no personal liability beyond that which is attached to the land but that where in addition to taking property subject to the mortgage he assumes or agrees to pay the mortgage, he makes himself personally liable. Decisions appear to hold uniformly that a purchaser who does not expressly agree to pay the mortgage debt is not personally liable therefor by reason of his deed being subject to the mortgage. *Metropolitan Nat. Bank* v. *St. Louis Dispatch Co.* (1892), 149 U. S. 436, 37 L. Ed. 799, 13 Sup. Ct. Rep. 944; *Shepherd* v. *May* (1885), 115 U. S. 505, 29 L. Ed. 456, 6 Sup. Ct. Rep. 119; *Elliott* v. *Sackett* (1882), 108 U. S. 132, 27 L. Ed. 678, 2 Sup. Ct. Rep. 375; *Allentown Nat. Bank's Appeal* (1884), 18 Rep. (Fed.) 641; *Mott* v. *American Trust Co.* (1916), 124 Ark. 70, 186 S. W. 631; *J. H. Magill Lumber Co.* v. *Lane-White Lumber Co.* (1909), 90 Ark. 436, 119 S. W. 822; *Patton* v. *Adkins* (1883), 42 Ark. 197; *McArthur* v. *Goodwin* (1916), Cal—160 Pac. 679; Hibernia Sav. & L. Soc., 5 Dickson (Cal.), *supra*; *Capitol Nat. Bank* v. *Holmes* (1908), 43 Colo. 154, 16 L. R. A. (N. S.) 470, 127 Am. St. Rep. 108, 95 Pac. 134; *Lippitt* v. *Thames Loan & T. Co.* (1914), 88 Conn. 185, 90 Atl. 369; *Burbridge* v. *Guinter* (1915), 69 Fla. 49, 67 So. 571; *Drawford* v. *Nimmons* (1899), 180 Ill. 143, 54 N. E. 209; *Robinson Bank* v. *Miller* (1894),

153 Ill. 244, 27 L. R. A. 449, 46 Am. St. Rep. 882, 38 N. E. 1078; *Rapp* v. *Stoner* (1882), 104 Ill. 618; *Fowler* v. *Fay* (1892), 62 Ill. 375; *Dunn* v. *Rodgers* (1867), 43 Ill. 260; *Comstock* v. *Hitt* (1865), 37 Ill. 542; *Nicholson* v. *Nicholson Coal Co.* (1914), 190 Ill. App. 607; *Macfarland* v. *Utz* (1912), 175 Ill. App. 525; *Lane* v. *Davis* (1910), 158 Ill. App. 563; *Townsend* v. *Wilson* (1910), 155 Ill. App. 303; *Elser* v. *Williams* (1902), 104 Ill. App. 238; *Rourke* v. *Coulton* (1879), 4 Ill. App. 257; *Hancock* v. *Fleming* (1885), 103 Ind. 533, 3 N. E. 254; *Hewitt* v. *Powers* (1882), 84 Ind. 295; *Gregory* v. *Arms* (1911), 48 Ind. App. 562, 96 N. E. 196; *Springer* v. *Foster* (1901), 27 Ind. App. 15, 60 N. E. 720; *Lamka* v. *Donnelly* (1913), 163 Iowa 255, 143 N. W. 869; *Moore* v. *Olive* (1901), 114 Iowa 650, 87 N. W. 720; *Lewis* v. *Day* (1880), 53 Iowa, 575, 5 N. W. 753; *Hull* v. *Alexander* (1869), 26 Iowa 569; *Aufricht* v. *Northrup* (1865), 20 Iowa 61; *Holcomb* v. *Thompson* (1893), 50 Kan. 598, 31 Pac. 1081, 32 Pac. 1091; *Schmucker* v. *Sibert* (1877), 18 Kan. 104, 26 Am. Rep. 765; *Crane* v. *Huches* (1897), 5 Kan. App. 100, 48 Pac. 865; *Peck* v. *Hewlett* (1898), 20 Ky. L. Rep. 45, 45 S. W. 104; *Webb* v. *Reed* (1894), 16 Ky. L. Rep. 447; *Clay Fire Ins. Co.* v. *Hickman* (1884), 6 Ky. L. Rep. 308; *Chilton* v. *Brooks* (1890), 72 Md. 554, 20 Atl. 125; *Fiske* v. *Tolman* (1878), 124 Mass. 254, 26 Am. Rep. 659; *Drury* v. *Tremont Improv. Co.* (1866), 13 Allen (Mass.) 168; *Strong* v. *Converse* (1864), 8 Allen (Mass.) 557, 85 L. R. A. 1917 C. Am. Dec. 732; *Strohauer* v. *Voltz* (1880), 42 Mich. 444, 4 N. W. 161; *Winans* v. *Wilkie* (1879), 41 Mich. 264, 1 N. W. 1049; *Clifford* v. *Minor* (1899), 76 Minn. 12, 78 N. W. 861; *Hall* v. *Morgan* (1883), 79 Mo. 47; *Fuller* v. *Devollo* (1910), 144 Mo. App. 93, 128 S. W. 1011; *Keifer* v. *Shacklett* (1900), 85 Mo. App. 449; *State Ins. Co.* v. *Irwin* (1896), 67 Mo. App. 90; *Walker* v. *Goodsill* (1893), 54 Mo.

App. 631; *Lang* v. *Cadwell* (1893), 13 Mont. 458, 34 Pac. 957; *Pendleton* v. *Cowling* (1891), 11 Mont. 38, 27 Pac. 386; *Green* v. *Hall* (1895), 45 Neb. 89, 63 N. W. 119; *Lawrence* v. *Towle* (1879), 59 N. H. 28; *Woodbury* v. *Swan* (1878), 58 N. H. 380; *Dingeldein* v. *Third Ave. R. Co.* (1868), 37 N. Y. 575; *Binsse* v. *Paige* (1863), 1 Keyes (N. Y.) 87, 1 Abb. App. Dec. 138; *Stebbins* v. *Hall* (1859), 29 Barb. (N. Y.) 524; *Smith* v. *Johnson* (1843), Hill & D. Supp. (N. Y.) 240; *Tillotson* v. *Boyd* (1851), 4 Sandf. (N. Y.) 516; *Whitney* v. *Meister* (1904), 26 Ohio C. C. 593; *Walker* v. *Goldsmith* (1879), 7 Or. 161; *Granger* v. *Roll* (1895), 6 S. D. 611, 62 N. W. 970; *Chaffee* v. *Hawkins* (1916), 89 Wash. 130, 154 Pac. 143, 157 Pac. 35; *Tanguay* v. *Felthousen* (1878), 45 Wis. 30; *Real Estate Loan Co.* v. *Molesworth* (1886), 3 Manitoba L. W. 116.

A declaration counting upon an express assumption of a mortgage by the grantee in a deed (the deed being made part of the declaration) will not be supported by a clause in the deed, "That the land is conveyed subject to the mortgage," the words of assumption being absent. Loudenslager v. *Woodbury Heights Land Co.* (1900), 64 N. J. L. 405, 45 Atl. 784.

Restrictions can only be imposed upon premises by a definite covenant made by the parties. If the agreement to pay a mortgage upon premises cannot be carried over to a grantee except upon his express agreement to pay the mortgage and a conveyance subject to the mortgage does not imply such an agreement, it would seem clear that when premises are conveyed subject to restrictions, there is no new imposition of them unless the grantee agrees to be bound by such restrictions.

The sole purpose of this provision in the deed seems to have been to protect the grantor in his warranty contained in the deed. The very lan-

guage of the entire provision seems clear that the grantor did not intend to impose the restrictions upon the grantee unless they already had some binding force and that seems to have been the case in regard to the municipal ordinances.

Complainants arbitrarily assume that the assertion of this provision was made for the purpose of benefiting the Township and Mr. Dickson. It was inserted for no such reason. It was inserted only as a protection to the grantor in case it should be urged that the existence of a zoning ordinance constituted an encumbrance for which the grantor might be liable under his warranty in the deed.

This whole proceeding is a strained attempt to prevent the defendant from proceeding with the construction of a building after having previously failed in two attempts before the Court of Errors and Appeals.

FOURTH GROUND OF APPEAL.

"Respondent is estopped by his own conduct."

None of the facts referred to under this heading by appellants' counsel appear in the State of the Case on appeal and were not set up by any of the affidavits.

It is respectfully submitted that the action of the Chancery Court can only be reviewed on matters brought to its attention.

FIFTH GROUND OF APPEAL.

"It was error to dismiss the bill on the ground that there was no privity of contract in complainants with the cause of action, the contract or the consideration."

No privity of contract was shown between the complainant William Paul Dickson and the de-

fendant. The only allegation showing the connection of Dickson with the situation is paragraph 8 which states, "Complainant Dickson owns in fee the premises 37 Burnet Street, Maplewood, immediately opposit the tract of land aforesaid, and both he and the Township of Maplewood are beneficially interested in the enforcement of the restriction aforesaid and entitled to have its violation enjoined." It is not shown how the defendant Dickson is beneficially interested. No facts are alleged which connect this complainant with the property in question. It is not shown that the premises were derived from a common predecessor in title. It is not shown that the imposition of this alleged restriction was made for the purpose of benefiting Dickson's property. It is not shown that he purchased this property with knowledge of or in consideration of said alleged restrictions. On the contrary, our information is that the said complainant Dickson acquired his property some time prior to 1920, whereas the so-called restriction was not imposed until 1926. The mere fact that defendant Dickson would incidentally benefit if a restriction existed does not give him any standing in this Court. He cannot seek to enforce the alleged restrictions against Margolis unless Margolis can enforce a similar restriction against him. Both of the complainants in this case are intruders in the situation and without any standing to invoke the aid of this Court.

Volume 4, Thompson on Real Property, Section 3401, page 512, states as follows:

> "The right of an owner of a lot to enforce a covenant to which he is not a party or an assign, restrictive of the use of other lands, is dependent on the covenant having been made for the benefit of this lot. Obviously, while a subsequent purchaser might, by the operation of this rule, acquire a right of action against

a prior purchaser, the prior purchaser would acquire no rights from a covenant entered into by a subsequent purchaser, unless there exists some condition which will entitle him to the benefit of such covenant. The right of grantees from the common grantor to enforce, *inter sese,* covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property, and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase."

To the same effect is the case of *Mulligan* v. *Jordan,* 50 N. J. Eq. 363.

This was followed in the case of *Beattie* v. *Howell,* 98 N. J. Eq., page 163, which held:

> "A subsequent grantee can enforce a restrictive covenant concerning land against a prior grantee of another lot, but a prior grantee cannot, excepting where the purpose of the covenant is to carry out a general plan or scheme for the development of all of the original grantor's property."

To the same effect is *Leaver* v. *Gorman,* 73 N. J. Eq., page 129, and *McGrath* v. *Norcross,* 73 N. J. Eq., page 274.

SIXTH GROUND OF APPEAL.

"It was error to dismiss the bill as to the township on the authority of Pumo v. Fort Lee, 4 Misc. 663."

The question of the interest of a municipality in a similar case was disposed of in *Pumo* v. *Fort Lee,* 4 Misc., page 663, which held that:

> "Whether the erection of this building would be a violation of neighborhood restrictions is a matter of no concern to the municipality. The only parties interested in their existence or enforcement except the relators, so far as the present case discloses, are the complainants in the Chancery suit, who are seeking to enforce the alleged restrictions."

It is plain that the Court quite properly disposed of the interest of the municipality on the same grounds as that decision.

SEVENTH GROUND OF APPEAL.

"It was error to dismiss on the ground of res adjudicata."

The matter was already adjudicated in the Court of Errors.

On March 3rd, 1927, a bill of complaint was filed in this Court. (The states of the case in both the previous proceedings between the parties were submitted.) Paragraph 4 of that bill of complaint contained the following statement:

> "On or about April 5th, 1926, the Marlyn Realty Company, a corporation of the State of New Jersey, of which defendant, Max Margolis, was President, acquired said vacant tract by deed of Edward T. Johnson and Hattie L., his wife, recorded in the office of the Register of the County of Essex, April 29, 1926, in Book N 74 of Deeds, page 4, which deed contained among other things the following:
>
> > 'Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings.'
>
> and as part consideration therefor executed and delivered to said Johnson and wife a mortgage covering said premises, containing the same precise words, in both instances fol-

lowing the description of the property in said instruments."

And the bill of complaint prayed that an injunction might issue restraining the said Max Margolis from in any way erecting the so-called apartment house. In the zoning case, the question of this alleged restriction was brought in and discussed in the briefs and disposed of by the Supreme Court decision. Although mentioned in detail in the bill of complaint, the same was dismissed by a decree of dismissal filed April 6th, 1927. The Court of Errors and Appeals affirmed the dismissal and an attempt was made to carry the case to the United States Supreme Court by writ of certiorari which was denied. No new facts are brought to the attention of the Court in the present bill of complaint that did not already exist at the time the previous bill of complaint was filed, except that the permit has finally been granted and work commenced on the building.

EIGHTH GROUND OF APPEAL.

"It was error to dismiss, overlooking the fact that as there was only a motion going to the bill of complaint, its allegations must be taken as true and relief granted accordingly."

It was not error to dismiss the bill of complaint unless the bill of complaint set up some equitable grounds for maintaining the action. This, for the reasons hereinbefore mentioned, it did not do. Failure to show privity of contract alone was sufficient ground for dismissing the bill.

NINTH GROUND OF APPEAL.

"It was error to make after final decree was filed, an order granting a counsel fee of $250 as the Court was without jurisdiction and it was against the Chancery rules."

The decree dismissing the bill expressly reserved the right to apply for a counsel fee. This reservation was made and subsequently taken advantage of. The counsel fee granted was a reasonable one considering the importance of the attack made on the respondent, the amount of legal investigation necessary to defend it and the trivial nature of the equitable grounds set up in the bill of complaint.

TENTH GROUND OF APPEAL.

"It was error to grant allowance of counsel fee, as there was no issue and no trial."

An examination of the State of the Case on appeal will show that counsel was obliged to spend considerable time in meeting the allegations of the bill by affidavit and in preparing to argue both orally and by brief the legal questions involved.

For all of the foregoing reasons, it is respectfully submitted that bill of complaint was properly dismissed.

Respectfully submitted,

HOWE & DAVIS,
Solicitors for Respondent.

EDWARD L. DAVIS,
Of Counsel.

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