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TESTIMONY FOR COMPLAINANT.

TESTIMONY FOR DEFENDANT.

DEFENDANT'S EXHIBIT.

Bill of Complaint.

(Filed November 17, 1924.)

In Chancery of New Jersey

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

The complainant Frank C. Kliem of Jersey City, New Jersey, respectfully shows that:

1. On November 14th, 1916, by deed bearing date on that day, complainant purchased from Charles H. Smith and wife for a good and valuable consideration, for the purpose of using the same as a home for himself and family, knowing that the adjoining premises was restricted as hereinafter set forth and relying thereon, the premises known as street No. 81 Kensington Avenue, and more particularly described as follows:

> ALL that certain lot, tract or parcel of land and premises, situate, lying and being in Jersey City, in the County of Hudson and State of New Jersey, which on a certain map on file in the Register's office of said County, entitled Map of the property of William Jewett and Wm. S. L. Jewett, situated in South Bergen, Hudson Co. N. J. Mar. 1864, Levi W. Post, City Surveyor, is known as the front one hundred (100) feet of lot Nineteen (19) more particularly described as follows:—BEGINNING at a point in the southwesterly side of Linden now Kensington Avenue, distant Fifty (50) feet northwesterly from the monument placed on the

southwesterly side of Kensington Avenue, One thousand (1000) feet northwesterly from the point formed by the intersection of the said side of Kensington Avenue, with the northwesterly side of the road designated on said map as the road to Bergen Point now Bergen Avenue and running thence (1) Southwesterly and along the northwesterly line of Lot Eighteen (18) on said Map One hundred (100) feet; thence (2) Northwesterly and parallel with said side of Kensington Avenue, Fifty (50) feet to the northwesterly side of said Lot Nineteen (19); thence (3) Northeasterly along said line of Lot Nineteen (19) One hundred (100) feet to the said side of Kensington Avenue; thence (4) Southeasterly along said side of Kensington Avenue, Fifty (50) feet to the point or place of beginning, and being now known as the premises street number 81 Kensington Avenue;

and complainant and his family since that time and up to the present time have continued to use the said premises for a home.

2. That the defendant hereinafter named, The Sisters of Charity of St. Elizabeth, a corporation of New Jersey, is the owner of the premises adjoining the aforesaid premises of complainant on the southwest side and also on the southeast side, said premises having been conveyed to the aforesaid defendant by John Nevin and wife by deed dated November 19th, 1912, and is more particularly described as follows:

ALL that certain lot, tract or parcel of land and premises, situate, lying and being

in Jersey City, in the County of Hudson and State of New Jersey, described as follows:— BEGINNING at a point where the southwesterly line of Kensington Avenue formerly Linden Avenue would intersect the northwesterly line of Hudson Boulevard, said point being the beginning point; and thence running (1) Northwesterly along the southwesterly side of Kensington Avenue, Seventy-five and forty-five hundredths (75.45) feet to a point, being on the easterly line of Lot 19 on a certain Map entitled "Map of Property of William Jewett and William S. L. Jewett, situated in South Bergen Hudson County, New Jersey, surveyed by Levi W. Post and filed in the Clerk's now Register's office of Hudson County, on May 17, 1864; thence (2) Southwesterly at right angles to Kensington Avenue and along said Easterly line of Lot 19, One Hundred (100) feet; thence (3) In a Northwesterly direction and parallel with Kensington Avenue, Fifty (50) feet; thence (4) Southwesterly at right angles to Kensington Avenue and along the Westerly line of Lot 19 on the aforesaid Map, Thirty-five and thirty-eight hundredths (35.38) feet to a point which is distant One Hundred thirty-two and eighty-nine hundredths (132.89) feet northwesterly from the northwesterly side of Hudson Boulevard; thence (5) In a Southwesterly direction and parallel or nearly so with Kensington Avenue, One hundred thirty-two and eighty-nine hundredths (132.89) feet to the Northwesterly side of Hudson Boulevard; thence (6) In a Northerly direction and along the

Northwesterly side of Hudson Boulevard, One hundred thirty-four and seventy-six hundredths (134.76) feet to the point or place of beginning.

3. That formerly, practically all of the premises on the south side of Kensington Avenue aforesaid including both the premises of the complainant and defendant, were owned by William S. L. Jewett or his heirs, the said William S. L. Jewett and his heirs at law for the protection of themselves, as well as their grantees and their heirs and assigns, provided a general scheme for restricting the use of all of said property so sold by them, which restrictions were in effect the same or similar to the restrictions next hereinafter mentioned; and on November 12th, 1868, the said William S. L. Jewett and Mary S. Jewett, his wife, conveyed to one Henry J. Carr, by deed dated November 12th, 1868, and recorded in Book 181 of Deeds, page 192, the premises known as Lot 19 on Map of Property of William Jewett and William S. L. Jewett, situated in South Bergen, Hudson County, N. J., being 50 feet wide by 135′ 7″ in depth, and in which deed it was covenanted that the grantee, his heirs, executors, administrators and assigns, would not erect or cause or procure to be built upon said premises more than one house for each fifty feet of frontage thereof, nor of a less value than $2,000 for each house so built, and that they would not erect any slaughterhouse, bone boiling establishment, tallow chandlery, dairyman's cow stable, livery stable, private stable, smith shop, furnace, gas wire works, glue, vitriol, varnish, ink, lard, oil, soap, candles, starch, turpentine, camphene, kerosene, chemical or poudrette nor any establish-

ment for the tanning, dressing or preserving of or keeping of hides, skins or leather, nor any eating or drinking house or bowling alley, sugar house, brewery or distillery or other nuisance; said Lot 19 included all of the lands owned by the complainant as aforesaid, as well as a portion of the lands owned by the defendants as aforesaid; subsequently by several mesne conveyances the title to the whole of said Lot 19 came into Mary M. MacLean and Elizabeth Jewett and subsequently by deed dated April 24th, 1893, duly recorded in the Register's office of Hudson County on May 12th, 1893, the said Mary M. MacLean and husband and Elizabeth Jewett conveyed that part of said Lot 19 fronting on the street—100 feet in depth and subsequently the same was conveyed by several mesne conveyances to the complainant by deed above set out; and the rear part of said Lot 19 being all of said lot remaining after conveying the front part thereof—100 feet in depth, was conveyed by the said Elizabeth Jewett and Mary M. MacLean and husband to John Nevin and wife by deed dated June 16th, 1903, and recorded in the Register's office of Hudson County on June 26th, 1903, and by said John Nevin and wife the said rear part of said Lot 19, together with other premises, was conveyed to the defendant herein by the deed to it aforesaid; that all of said mesne deeds as aforesaid are duly recorded in the Register's office of Hudson County, but in none of them subsequent to the deed to Carr as aforesaid are said restrictions therein again set forth as above mentioned.

4. That on the front 100 feet of said Lot 19 now owned by complainant as aforesaid there was erected more than 15 years or more ago, a dwelling house which is now occupied by complainant and

his family, and on the balance of said Lot 19, being approximately thirty-five feet thereof, which is now owned by the defendant herein, there was no building, but now the said defendant has threatened and has actually started the erection of a brick building occupying the entire area of said rear part of Lot 19, two stories or more in height, which building the complainant is informed and believes is to be used as a school, and which building will violate the restrictions as aforesaid.

5. That on June 16th, 1903, Elizabeth Jewett (who afterwards married Ashmund N. Brown) and Mary M. MacLean owned both the premises so conveyed to the complainant and to the defendant as first aforesaid, or a part thereof or some interest therein, and thereupon the said Elizabeth Jewett and Mary M. MacLean, by deed dated June 16th, 1903, and recorded in the Register's office of Hudson County on June 26th, 1903, conveyed the aforesaid premises of the defendant to John Nevin and Nellie Nevin, his wife, in which deed it was provided, among other things: "This conveyance is subject to the following restrictions: That the parties of the second part, their heirs and assigns, will not erect or cause to be erected on the lands herein, any building which including stoops or steps thereon, shall be nearer to the building line of Kensington Avenue, than a point distant 12 feet therefrom, and will not erect or cause to be erected any dwelling house upon said premises which will cost less than $2,000 and will not erect or cause to be erected any stable within a 100 feet of Kensington Avenue, and will not erect any slaughter-house, bone or tallow factory, cow or livery stable or any factory or foundry, eating or drinking house, bowling alley or other nuisance"; and that

said restrictions were placed thereon for the benefit of the said Elizabeth Jewett and her sister Edith J. Marvin (who then owned the adjoining premises afterwards conveyed to the complainant) and their heirs and assigns, in accordance with the general scheme of restrictions on all of the property of the aforesaid William S. L. Jewett and his heirs at law in conveying the property owned by them on Kensington Avenue; and subsequently the said John Nevin and wife conveyed the same premises to the defendant herein, The Sisters of Charity of St. Elizabeth, a corporation of New Jersey, by deed dated November 19th, 1912, and recorded in the Register's office of Hudson County, November 19th, 1912, in which deed the same restrictions were set out identically as in the deed to John Nevin and wife as aforesaid; that subsequently, and on February 16th, 1906, the said Elizabeth Jewett, then Elizabeth Jewett Brown, and her husband and the said Edith J. Marvin and her husband conveyed to Charles H. Smith the premises adjoining said premises conveyed as aforesaid to John Nevin and wife by two deeds dated February 16th, 1906, and recorded in the Register's office of Hudson County on March 16th, 1906, and subsequently the said Charles H. Smith and wife conveyed the said premises to complainant herein by the deed dated November 14th, 1916, and hereinbefore set out, and recorded in said Register's office November 29th, 1916.

6. That the said defendant has threatened to erect and has actually started to erect upon the premises aforesaid so owned by it a brick building to be occupied as a school, two stories or more in height and extending out to and along the building line of Kensington Avenue and nearer

to said building line then a point distant twelve feet therefrom, in direct violation of the restrictions and covenants in both the deed to the said John Nevin and wife as well as in the deed to the said defendant as aforesaid.

7. That when complainant purchased these premises as aforesaid, there was built upon the adjoining premises of the defendant (other than Lot 19 aforesaid), a frame one-family dwelling house which was built more than twelve feet from the building line of said premises on Kensington Avenue, but that recently the defendant tore down said building and commenced the erection of a brick building upon its said premises, which building covers practically the entire area of said land belonging to the defendant and which is being built up to the building line of Kensington Avenue and out to and along the division line between the premises of the complainant and defendant.

8. That the dwelling house upon the premises of complainant is built at least twelve feet back from the building line of Kensington Avenue, as are practically all of the dwelling houses built on the southerly side of Kensington Avenue, in the neighborhood of the premises of complainant and defendant; the premises in the neighborhood of the premises of complainant and defendant being occupied and used for residential purposes.

9. That if defendant as alleged does erect said building upon its said premises as contemplated by it, it will shut off the air, light and view from the dwelling house and premises of the complainant; and will impair the value of said premises of complainant and will ruin said premises

of complainant for dwelling purposes, and will cause irreparable injury to complainant.

That complainant is without adequate remedy in the courts of law and therefore prays:

1. That the defendant be restrained by an order or orders of this Court from building upon its aforesaid premises any building upon that part of its aforesaid premises which is included within the boundary lines of Lot 19 on Map of property on file in the Register's office of Hudson County, entitled Map of Property of William Jewett and William S. L. Jewett, situated in South Bergen, Hudson County, N. J., as well as from building any building upon the premises of the defendant as aforesaid nearer to the building line of Kensington Avenue than a point twelve feet distant therefrom.

2. That a final decree may be made in this cause restraining the defendant as aforesaid; and that a writ of injunction may be issued out of this Court directed to the defendant restraining the defendant and its agents and servants as aforesaid.

3. That complainant may have such other and further relief in the premises as the nature of the case may require.

4. That not only the State's writ of injunction shall issue out of and under the seal of this Honorable Court to be directed to the said The Sisters of Charity of St. Elizabeth, a corporation of New Jersey, and its agents and servants, restraining them and each of them from building upon its aforesaid premises any building which is included within the boundary lines of Lot 19

on map on file in the Register's office of Hudson County entitled Map of Property of William Jewett and William S. L. Jewett, situated in South Bergen, Hudson County, N. J., as well as from building any building upon the premises of the defendant as aforesaid nearer to the building line of Kensington Avenue, then a point twelve feet distant therefrom; but also a Writ of Subpoena may issue commanding the said defendant to answer this bill of complaint and to abide by such decree as this Court shall make in the premises.

JAMES E. PYLE,
Solicitor for and of Counsel with Complainant.

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

FRANK C. KLIEM, being duly sworn according to law, on his oath says that he is the complainant named in the foregoing bill of complaint and that he has read the foregoing bill of complaint and that the matters and things therein set forth are true; and that at the time he purchased the premises described in the bill of complaint there was erected upon the premises of the defendant a frame one-family house which was built more than twelve feet from the building line of Kensington Avenue and did not occupy any part of the Lot 19 on Map of Property of William Jewett and William S. L. Jewett as mentioned in the bill of complaint, but that recently the defendant tore down said building and started the erection of a brick building upon its premises, which building as contemplated is to occupy practically the entire area of the land of the defendant and is to be built out to the building line of Kensington Avenue and will not set back twelve feet from the said building line;

that as soon as deponent ascertained that the defendant was going on with said building he at once consulted counsel and gave notice to the defendant that it was violating the restrictions against the property as set out in the foregoing bill, and that he objected to its proceeding with the said building in violation of the restrictions; that the neighborhood in which said properties are located is a residential neighborhood and practically all of the dwelling houses on the south side of Kensington Avenue set back twelve feet or more from the building line and that if said defendant is permitted to build its said new building as contemplated, it will shut off the light, air and view from the premises of deponent, and his home erected thereon, and will result in irreparable injury to deponent; that deponent purchased said premises as a home for himself and his family, and has resided thereon from the time of the deed to him from Charles H. Smith and wife up to the present time and desires to continue to live there; that because said new building contemplated on the premises of the defendant has actually been started and the excavation therefor dug out, shows very clearly that they intend to build upon practically the entire area of the lot of land as claimed in the aforesaid bill.

FRANK C. KLIEM.

Subscribed and sworn to before me
this 17th day of November, 1924.

GEORGE A. WARDELL,
Notary Public of
New Jersey.

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

JAMES E. PYLE, being duly sworn according to law, on his oath says that he examined the records in the Register's Office of Hudson County as to the title of the premises belonging to the complainant and defendant as set forth in the foregoing bill of complaint, and he finds of record therein the deeds of said two premises as alleged in the bill of complaint and also the restrictions and covenants in said deeds as set forth in the foregoing bill of complaint.

JAMES E. PYLE.

Subscribed and sworn to before me }
this 17th day of November, 1924. }

GEORGE A. WARDELL,
Notary Public
of New Jersey.

Answer.

(Filed February 9, 1925.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK C. KLIEM,
Complainant,

and

SISTERS OF CHARITY OF ST. ELIZABETH,
Defendant.

} On Bill, &c.

The answer of the defendant, Sisters of Charity of St. Elizabeth, a corporation of the State of New Jersey.

This defendant, Sisters of Charity of St. Elizabeth, answering the bill of complaint, says that:

1. It admits Paragraph One, except that it has no knowledge or information sufficient to form a belief as to the statements in said paragraph in reference to complainant's knowledge of the alleged restriction and his reliance thereon.

2. It admits Paragraph Two.

3. It admits Paragraph Three, except that it denies that William S. L. Jewett and his heirs, provided a general scheme of restrictions which were in effect the same or similar to those mentioned in said Paragraph Three.

4. It admits Paragraph Four, except that it denies that any valid and subsisting restrictions will be violated by its building.

Answer.

5. It admits Paragraph Five, except that it denies that the restrictions mentioned therein were placed on defendant's lands for the benefit of complainant's land, or in accordance with any general scheme of restrictions.

6. It admits Paragraph Six, except that it denies that the building will be a violation of any valid restriction.

7. It admits Paragraph Seven.

8. It admits Paragraph Eight.

9. It denies Paragraph Nine.

10. The restrictions imposed by William S. L. Jewett as recited in Paragraph Three of the bill of complaint upon his property applied to both sides of the street, now known as Kensington Avenue and such restrictions have been generally ignored by a majority of the owners of the land to which they originally applied.

MARK A. SULLIVAN,
Solicitor of Defendant.

Amended Replication.

IN CHANCERY OF NEW JERSEY.

Between

FRANK C. KLIEM,
Complainant,

and

SISTERS OF CHARITY OF
ST. ELIZABETH,
Defendant.

} On Bill, &c.

The complainant joins issue on the answer of the defendant except as to Paragraph 10 thereof and Paragraph 10 thereof the complainant denies.

JAMES E. PYLE,
Solicitor of Complainant.

Stipulation as to Facts.

IN CHANCERY OF NEW JERSEY.

Between

FRANK C. KLIEM,
Complainant,

and

SISTERS OF CHARITY OF
ST. ELIZABETH,
Defendant.

} On Bill, &c.

It is stipulated between the respective parties that the following shall be considered as facts at

the trial of the above entitled cause, in like manner as if the same had been properly testified to or proper proof thereof offered by legal evidence:

1. That on May 17th, 1864, William Jewett owned all of the property on the north side of Linden Avenue now Kensington Avenue from Bergen Avenue to West Side Avenue, and his son William S. L. Jewett owned all of the property on the south side of said Kensington Avenue from Bergen Avenue to West Side Avenue, and that thereupon the said William Jewett and William S. L. Jewett laid said land out into lots each of fifty foot frontage on the south and of one hundred foot frontage on the north side of Kensington Avenue, excepting the corner plots, and filed said map in the Register's office of Hudson County, on May 17th, 1864, entitled Map of Property of William Jewett and William S. L. Jewett, situate in South Bergen, Hudson Co., N. J., March, 1864, a copy of which map is annexed hereto and made a part hereof;

2. Said William S. L. Jewett then proceeded to sell his land on the south side of Kensington Avenue (then called Linden Avenue) by the following deeds:

(a) To Stephen Girard Wood dated June 6th, 1864, recorded the same day in the Register's office of said Hudson County in Liber 110 of Deeds page 391 and conveying Lots 1 to 7 inclusive on said map; no restrictions being set out in said deed. By a written agreement bearing date the same day—June 6th, 1864 and recorded in said Register's office on June 17th, 1865 in Liber 121 of Deeds for said County on pages 592, the said William S. L. Jewett and William Jewett and Stephen Girard Wood agreed as

follows: Whereas William S. L. Jewett and wife did on June 6th, 1864 convey Lots 1 to 7 inclusive on the aforesaid map to the said Stephen Girard Wood, and it was agreed between the parties to said deed and said William Jewett, that they, should bind themselves, each to the other, that they would not erect or cause to be erected upon any lots fronting on Linden Avenue any slaughter-house, bone boiling establishment, tallow chandlery, dairymans cow stable, livery stable, steam engine, brass or wire foundry or factory or forges nor any manufactory of gunpowder, gas or fire works glue, vitroil, varnish, ink, lard, oil, soap, candles, starch, turpentine, camphene kerosene, nor any establishment for the tanning, dressing or preserving or keeping of hides, skins or leather nor any chemical, gas or poudrette factory, nor any eating or drinking house or bowling alley, sugar house, brewery or distillery or other nuisance, while the aforesaid lands are in our possession or in our heirs possession and that it was further agreed that each one of the said parties should bind themselves, and their respective heirs that when they or their heirs should convey any portion of said lands fronting on Linden Avenue, that the above restrictions should be taken from the purchaser or purchasers thereof in like manner as in these presents, it being understood however that the said William Jewett shall extend said restrictions to a depth only of 129 feet from the Northerly side of Linden Avenue; now therefore the said parties do for themselves and their respective

heirs, agree each with the other, not to erect or cause to be erected any of the hereinbefore named nuisances, while we are the owners of any of the aforesaid lands and premises, and that we will not convey the same unless upon a like agreement herein, and we hereby covenant and agree that our respective heirs shall not convey the same without taking from the purchaser or purchasers an agreement of like import and effect as in this instrument;

(b) To Catherine Bluxome by deed dated June 13th, 1865 and recorded June 27th, 1865 in the Register's office aforesaid in Book 123 of Deeds page 3, Lots 13, 14, 15 and 16 on said map, which deed contained the following restrictions: That the grantee, her heirs, executors, administrators and assigns in consideration of the execution of said deed, will not build or cause or procure to be built upon said premises more than one house for each 50 foot of the frontage thereof nor of less value than $2,000 for each 50 foot of the frontage thereon. And also that they nor either of their heirs or assigns shall or will build or cause or procure to be built upon the said premises any slaughter-house or bone-boiling establishment, tallow chandlery, dairyman and cow stable, livery stables, smiths shop, furnace, steam engine foundry, forge nor any manufactory of brass wire, gun powder, gas fireworks, glue, vitrol, varnish, ink, oil, soap, candles, starch, turpentine, camphene, kerosine, chemical or poudrette nor any establishment for the tanning, dressing or pre-

serving of or keeping of hides, skins or leather nor any eating or drinking house or bowling alley, sugar house, brewery or distillery or any other nuisance.

(c) To William D. Pendleton by deed dated May 10th, 1866 and recorded May 18th, 1866 in said Register's office in Book 133 of Deeds page 497 conveying Lots 25 and 26 on said map; which deed contained the same restrictions as the said deed to Bluxome;

(d) To Mary S. Jewett, his wife, through an intermediary by deeds hereinafter set forth; Lots 17 and 18 on said map, containing no restrictions;

(e) To Adelaide A. Merwin by deed dated May 16th, 1867 and recorded in the said Register's office May 24th, 1867 in Book 150 of Deeds page 283 conveying Lots 8, 9, 10, 11 and 12; containing following restriction: That party of the second part her heirs and assigns will not erect on said premises, any house to cost less than $3,000 and further that she will not erect nor cause nor procure to be erected within the space of 15 years from and after the date hereof, more than one dwelling house upon any one of said 5 several lots of 50 feet, front herein above mentioned, and further that she will take a covenant of like effect with these covenants with any person or persons to whom she may sell the above described premises or any part or parts thereof; In the deed out of Adelaide A. Merwin and husband to E. Collins Hamblin dated February 26th, 1868 recorded in Book 165 of Deeds page

199, conveying said Lots 9 and 10, after the same restrictions are set forth, it is provided that said restrictions shall not prevent said Hamblin from building a double house under one roof with two front doors to accommodate two separate families.

(f) To Henry J. Carr by deed dated April 11th, 1868 and recorded in the said Register's office on July 21st, 1868 in Book 171 of Deeds page 579, Lots 20, 21, 22, 23 and 24, containing the same restrictions as in said deed to Bluxome;

(g) To Henry J. Carr by deed dated November 12th, 1868, and recorded in the said Register's office on December 3rd, 1868 in Book 181 of Deeds, page 192, Lot 19; (Lot 19 includes the premises of complainant and that portion of defendant's premises in the rear of complainant) with same restrictions as in said deed to Bluxome, except that it includes among the prohibited buildings a private stable and contains also the following clause; "The restrictions as to erecting a private stable, parties of the first part hereby agree to release after the expiration of five years from date to said Carr in case he should sell said lot; if not, then they are to remain in force. And in case of any violation of any of the covenants herein above mentioned, to be kept by said party of the second part, his heirs and assigns, they will forfeit and pay to said William S. L. Jewett, his heirs, executors or administrators, the sum of One Thousand Dollars, as ascertained or liquidated damages for every such violation."

(h) To Henry J. Carr and Richard H. Westervelt by deed dated November 12th, 1868 and recorded in the Register's office of said County on December 3rd, 1868 in Book 181 of Deeds page 196, Lots 27, 28, 29, 30, 31, 32 and 33 with same restrictions as in said deed to Bluxome and same penalty as in said deed to Carr 181-192.

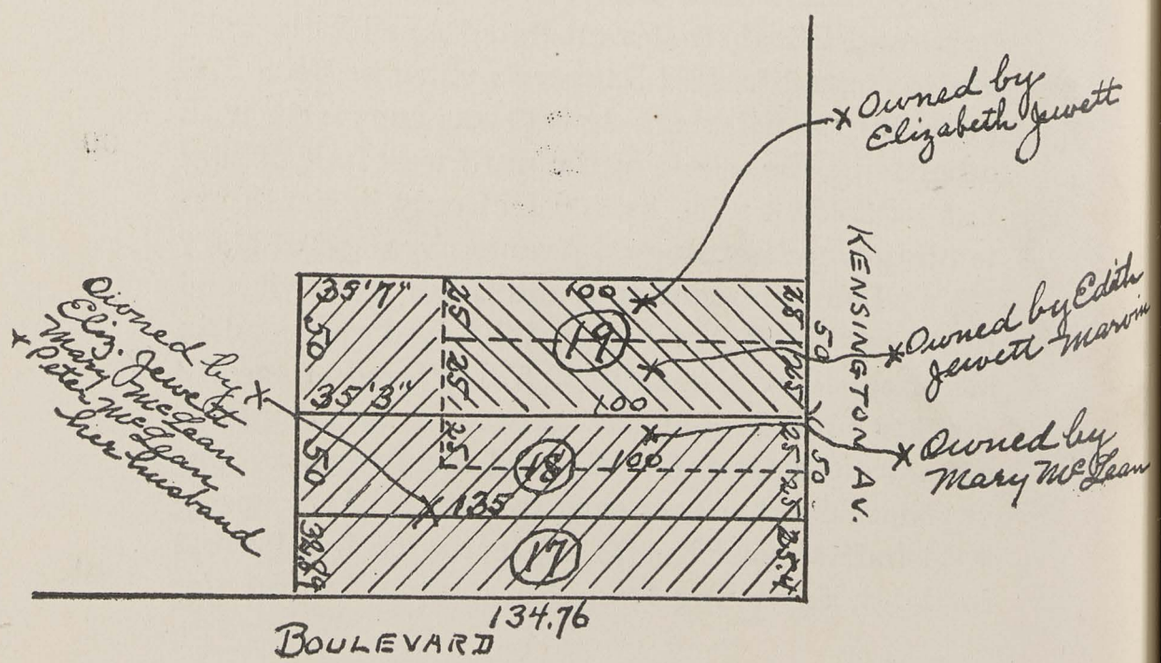
Thereupon all of said Lots of William S. L. Jewett on the south side of Kensington Avenue were conveyed by him except lots 17 and 18 and lots 17 and 18 he conveyed to his wife as aforesaid, through his father William Jewett as intermediary by deeds—William S. L. Jewett to William Jewett and by William Jewett to Mary S. Jewett, wife of William S. J. Jewett, both dated May 24th, 1866, and recorded August 4th, 1866, in said Register's office in Book 136, pages 519 and 522, respectively; no restrictions are mentioned in said deeds; said Mary S. Jewett conveyed said lots 17 and 18 to Richard W. Bliss by a quit claim deed dated December 15th, 1879, and recorded in said Register's office on December 27th, 1879, in Book 340 of Deeds, page 362; no restrictions being mentioned therein; Richard W. Bliss then conveyed said lots 17 and 18 to Charles H. J. Bliss by quit claim deed dated November 1st, 1884, recorded in said Register's office in Book 398 of Deeds, page 219; said Charles H. J. Bliss then conveyed said lots 17 and 18 to Mary M. Jewett, daughter of said Mary S. and William S. L. Jewett, by deed dated October 1st, 1886, and recorded in said Register's office in Book 428 of Deeds, page 319; no restrictions are mentioned in either of said deeds; to correct alleged errors deeds were after obtained from the heirs of Richard W. Bliss and recorded.

Stipulation as to Facts.

The title to said Lot 19 (in which complainants' premises are located, also gets into the same Mary M. Jewett in the following manner: Simultaneously with the deed before mentioned from William S. L. Jewett to Henry J. Carr, recorded in Book 181 of Deeds, page 192, containing the aforesaid restrictions, was given a purchase money mortgage on said Lot 19 by Henry J. Carr to William S. L. Jewett dated November 12th, 1868, and recorded in said Register's office in Book 56, page 644, of Mortgages, in which the restrictions were not mentioned; Henry J. Carr and wife conveyed said Lot 19, together with other property, to Samuel J. Johnson by deed dated November 13th, 1877, and recorded in said Register's office in Book 316 of Deeds, page 525, in which deed no restrictions are mentioned; the said mortgage was assigned September 10th, 1883, by the administratrix of William S. L. Jewett to Mary M. Jewett and the mortgage by her foreclosed by bill in chancery against Henry J. Carr, Samuel J. Johnson and Mrs. Samuel J. Johnson (and a Henry Snyder, assignee) as defendants, pursuant to which proceedings the Sheriff of Hudson County sold and gave a deed of said Lot 19 to Mary M. Jewett dated March 17th, 1884, and recorded in said Register's office in Book 404 of Deeds, page 399, said deed containing no restrictions; Mary M. Jewett then owning said Lots 17, 18 and 19, conveyed a half interest therein to her sisters Elizabeth Jewett and Edith Jewett by deed dated April 23rd, 1887, and recorded in said Register's office in Book 442, page 318 of Deeds; in the meantime both said William S. L. Jewett and his wife Mary S. Jewett having died intestate (William S. L. in 1876 and his wife afterwards) and left as their only heirs three children, viz.:

Mary M. Jewett (after MacLean), Elizabeth Jewett (after Brown) and Edith Jewett (after Marvin); afterwards several deeds were exchanged between these heirs changing the proportion of their various interests in the property; then the Hudson Boulevard, 100 feet wide, was opened through the property shown on said map, the opening map of said Boulevard being filed in said Register's office April 16, 1891, the resolution of the Board of Freeholders of Hudson County authorizing said Boulevard opening having passed April 7th, 1888; the Boulevard was located as shown by dotted line on aforesaid map submitted herewith, and took about 25 feet of the easterly part of said lot 17; then in 1893 these three heirs by mutual deeds terminated their common or joint ownership in parts of said Lots 17, 18 and 19, as well as in other land owned by them, as follows: To Edith J. Marvin was conveyed, with other property, the whole of the southeast half of said Lot 19, 25 feet wide by 100 feet only in depth extending from Kensington Avenue by deed of Mary M. MacLean and husband and Elizabeth Jewett dated April 24th, 1893, and recorded in said Register's office in Book 576, page 205; to Elizabeth Jewett was conveyed, with other land, the whole of the northwest half of said Lot 19, 25 feet wide by 100 feet only in depth extending from Kensington Avenue, by deed of Mary M. MacLean and husband, and Edith J. Marvin and husband, dated April 24th, 1893, and recorded in said Register's office in Book 576 of Deeds, page 210 (said two lots as conveyed now comprise complainant's premises); and to Mary M. MacLean was conveyed, with other property, the whole of the northwest half of said Lot 18, 25 feet wide by 100 feet in depth extending from Kensington Avenue, by

deed of Elizabeth Jewett and Edith J. Marvin and husband, dated April 24th, 1893, and recorded in said Register's office in Book 576 of Deeds, page 201; this left still owned in common by these three heirs a lot on Kensington Avenue at the corner of the Boulevard about fifty feet on Kensington Avenue and about 100 feet in depth along the Boulevard and also the rear 35 feet or thereabouts of said Lots 19, 18 and of 17 (not already taken for the Boulevard); this property still held in common as aforesaid said Edith J. Marvin and husband sold her one-third interest in to Peter B. MacLean, husband of said Mary M. MacLean, and conveyed to him by deed dated June 1st, 1895 (said lot conveyed to Mary M. MacLean as above and said balance of property held in common as aforesaid comprise together, the premises now owned by the defendant); no restrictions are mentioned in any of said mutual deeds between the three Jewett heirs; this put their respective ownership of the premises as set out in the following diagram:



3. While the title to said properties were thus held: Elizabeth Jewett and Mary M. MacLean and Peter B. MacLean her husband conveyed to John Nevin and Nellie D. Nevin his wife, by deed dated June 16th, 1903, and recorded in said Register's office June 26th, 1903, in Book 836 of Deeds, page 568 the property now owned by defendants (being the rear 35 feet of said Lot 19, all of Lot 18 and all of Lot 17 not taken for the Boulevard) by the following description:

> All that certain lot, tract or parcel of land and premises, situate, lying and being in Jersey City, in the County of Hudson and State of New Jersey, described as follows:
>
> BEGINNING at a point where the southwesterly line of Kensington Avenue, formerly Linden Avenue would intersect the Northwesterly line of Hudson Boulevard, said point being the beginning point; and thence running (1) Northwesterly along the Southwesterly side of Kensington Avenue, Seventy-five and forty-five hundredths (75.45) feet to a point being on the Easterly line of Lot 19 on a certain Map entitled "Map of Property of William Jewett and William S. L. Jewett, situated in South Bergen, Hudson County, New Jersey" surveyed by Levi W. Post and filed in the Clerk's now Register's office of Hudson County on May 17, 1864; thence (2) Southwesterly at right angles to Kensington Avenue and along said Easterly line of Lot 19, One hundred (100) feet; thence (3) In a Northwesterly direction and parallel with Kensington Avenue, Fifty (50)

feet; thence (4) Southwesterly at right angles to Kensington Avenue and along the Westerly line of Lot 19 on the aforesaid map, Thirty-five and thirty-eight hundredths (35.38) feet to a point; which is distant One hundred thirty-two and eighty-nine hundredths (132.89) feet Northwesterly from the Northwesterly side of Hudson Boulevard; thence (5) In a Southwesterly direction and parallel or nearly so with Kensington Avenue, One hundred Thirty-two and eighty-nine hundredths (132.89) feet to the Northwesterly side of Hudson Boulevard; thence (6) In a Northerly direction and along the Northwesterly side of Hudson Boulevard One hundred Thirty-four and seventy-six hundredths (134.76) feet to the point or place of beginning;

which deed contained the following covenant: this conveyance is subject to the following restrictions —that the parties of the second part, their heirs and assigns, will not erect or cause to be erected on the lands herein, any building which including stoops or steps thereon, shall be nearer to the building line of Kensington Avenue, than a point distant 12 feet therefrom, and will not erect or cause to be erected any dwelling house upon said premises which will cost less than $2,000 and will not erect or cause to be erected any stable within 100 feet of Kensington Avenue, and will not erect any slaughter house, bone or tallow factory, cow or livery stable, or any factory or foundry, eating or drinking house, bowling alley or other nuisance; said Nevin altered the dwelling house on said premises, which faced on Kensington Avenue and

faced it on the Boulevard and used it as a house; it occupied said Lots 17 and 18 or that part thereof conveyed to him but no part of said Lot 19 and did not extend beyond the restricted line fixed in the said deed to him and his wife, and said dwelling remained in that position until torn down by the defendant herein, just prior to filing the bill herein; said John Nevin and Nellie D. Nevin his wife, conveyed to the defendant herein by deed dated November 19th, 1912, and recorded November 19th, 1912, in said Register's office in Book 1134 of Deeds, page 335, the same premises as in said deed to John Nevin and wife (being the premises as described in bill as belonging to defendant) and containing the same identical restrictive covenant as in said deed as above set out, except that the words "successors and assigns" are used in place of the words "heirs and assigns"; and said premises are still owned by defendants under said deed;

4. Thereafter said Edith J. Marvin and husband conveyed to Charles H. Smith by deed dated February 16th, 1906, and recorded March 16th, 1906, in said Register's office in Book 941, page 119 of Deeds, the said southeast half of said Lot 19—25 feet wide x 100 feet only in depth and containing the following covenant: That the party of the second part hereto, his heirs and assigns, will not erect or cause to be erected on the premises hereby conveyed any structure other than a dwelling house nor erect or cause to be erected any dwelling house nearer the building line of Kensington Avenue than a point distant twenty-five (25) feet therefrom, and that he, his heirs and assigns, will not erect or cause to be erected more than one dwelling house upon the premises hereby conveyed

and the premises lying westerly contiguous thereto and conveyed to the party of the second part hereto by Elizabeth J. Brown and Ashmun N. Brown, her husband, by deed bearing even date herewith, and that any dwelling house so erected thereon shall not cost less than two thousand dollars ($2,000) and that the said party of the second part hereto, his heirs and assigns, shall not erect upon the premises hereby conveyed any slaughter house, bone or tallow factory, stable of any kind, factory or foundry, eating or drinking house, tenement, bowling alley or other nuisance; and at the same time said Elizabeth Jewett (then Brown) and husband conveyed to said Charles H. Smith by deed bearing the same date and recorded the same day and office in Book 941 of Deeds, page 122, the said northwest half of said Lot 19, 25 feet wide by 100 feet only in depth and containing the following covenant: that the party of the second part hereto, his heirs and assigns will not erect or cause to be erected on the premises hereby conveyed any structure other than a dwelling house, or erect or cause any dwelling house to be erected nearer the building line of Kensington Avenue, than a point distant twenty-five feet therefrom; and that he, his heirs and assigns, will not erect or cause to be erected; more than one dwelling house upon the premises hereby conveyed and the premises lying easterly contiguous thereto and conveyed to the party of the second part hereto by Edith J. Marvin and Newton R. Marvin, her husband, by deed bearing even date herewith and that any dwelling house, so erected thereon shall not cost less than $2,000 and that the said party of the second part hereto his heirs or assigns, will not erect upon the premises hereby conveyed, any slaughter house,

bone or tallow factory, stable of any kind, factory or foundry, eating or drinking house, tenement, bowling alley or other nuisance; said Charles H. Smith shortly thereafter erected on said two lots so conveyed to him, one dwelling house complying with said restrictions in said deed to him and occupied same as his home; and said Charles H. Smith and wife conveyed to complainant by deed dated November 4th, 1916, and recorded in said Register's office November 29th, 1916, in Book 1243 of Deeds, page 638 (as one plot), said two lots so conveyed to said Smith and as particularly described in the bill, in which deed it was stated that said premises were conveyed subject to the restrictions in said two deeds to Charles H. Smith, and complainant still owns same and has continuously since then occupied said premises as his home, and the house thereon remains in the same position;

5. That although there appears to have been no restrictions in the deeds out of William S. L. Jewett for property on the south side of Kensington Avenue against building beyond a certain line from the street line, yet all of the buildings built on the south side of Kensington Avenue were set back as shown on Hopkins Map hereinafter mentioned and most of the buildings now built on these lots on the south side of Kensington Avenue were built a great many years ago and all of said buildings built upon said lots were built as private dwelling houses and complied with said restrictions in that there was only one building built upon each fifty foot lot, and are still used as dwellings, excepting that on Lot 20 and the easterly half of Lot 21 were built a double house, that is to say, two houses under one roof with party wall between

them and on the westerly half of Lot 21, a private dwelling house was erected on a twenty-five foot lot and on Lot 22 was erected a double house, that is to say, two houses under one roof with party wall between them, and on Lot 23 the same sort of double house was erected; all of these were built over thirty years ago; also on what was a portion of Plot 1 (not laid out into lots of 50 foot width) on said map located on the southwest corner of Kensington Avenue and Bergen Avenue, was erected a great many years ago a double house on a lot fifty foot frontage, that is to say, two houses under one roof with party wall between them; and which has been torn down to make way for one of the brick apartments next hereinafter mentioned, and recently within the last two years there has been erected on the south side of Kensington Avenue, two brick apartment houses one near West Side Avenue and the other near Bergen Avenue, both of which are built out beyond the line of the old buildings which had theretofore been erected on the lots on the south side of Kensington Avenue; outside of these exceptions the buildings on the south side of Kensington Avenue have complied with the aforesaid restrictions and have been set back from the street line as aforesaid;

6. Page #16 of plat book map of Jersey City, N. J., by G. M. Hopkins Co., 1919, is offered herewith and as part hereof to show the location of buildings and the layout of lots on Kensington Avenue.

7. The above plat book map will show a building at the southeast corner of Boulevard and Kensington Avenue on a lot of about 25 feet frontage on Kensington Avenue, but this is due to the

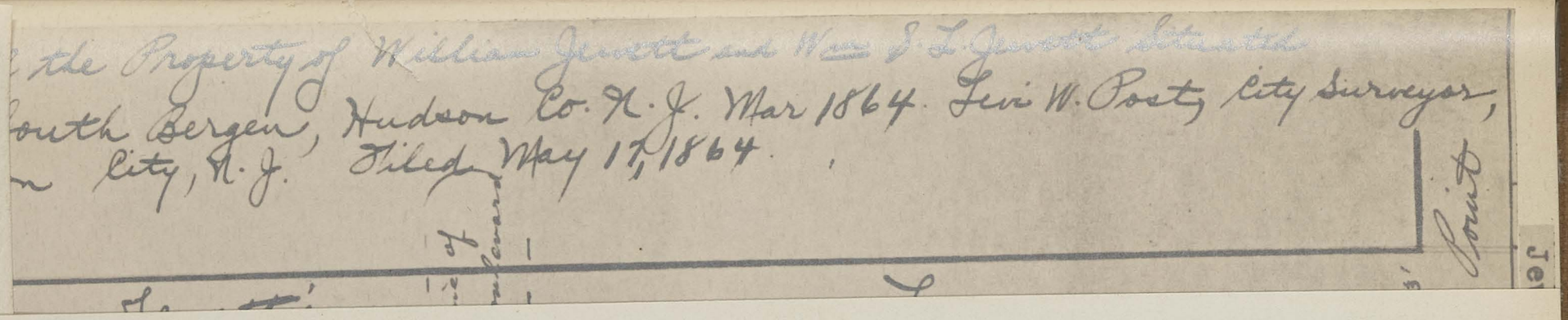
fact that the Boulevard when cut through cut the width of this lot down to that size, from 50 feet in width; the house on this lot was built before the Boulevard was cut through; also shows lot 25 to be 60 feet wide and lot 26 to be 40 feet wide; but as sold by Jewett and built upon these two lots were each 50 feet wide, if since changed it has been done by the respective owners of these lots.

8. Just prior to filing the bill herein the defendant tore down the dwelling house (hereinbefore mentioned) on its said premises and started to erect and intends to erect, unless restrained in this suit, a brick building three stories in height and occupying and covering approximately the entire area of its said premises out to its line on each side of its premises except the line between complainant and defendant's premises viz.—at right angles to Kensington Avenue, and also out to the line of Kensington Avenue, and one of the brick walls of said proposed building of defendant is to be erected to a height of three stories or about forty-five feet along a line about three feet east of the said dividing line between premises of defendant and complainant; which building of defendant is to be used as a school and living and eating accommodations for the instructors; that said dwelling on complainant's property stands back from the line of Kensington Avenue twenty-five feet and is the only building on said premises of complainant and is in full compliance with both sets of restrictions in his title hereinbefore set out. Said dwelling on complainant's property is about 15 feet from said brick wall which defendant proposes to building along a line about

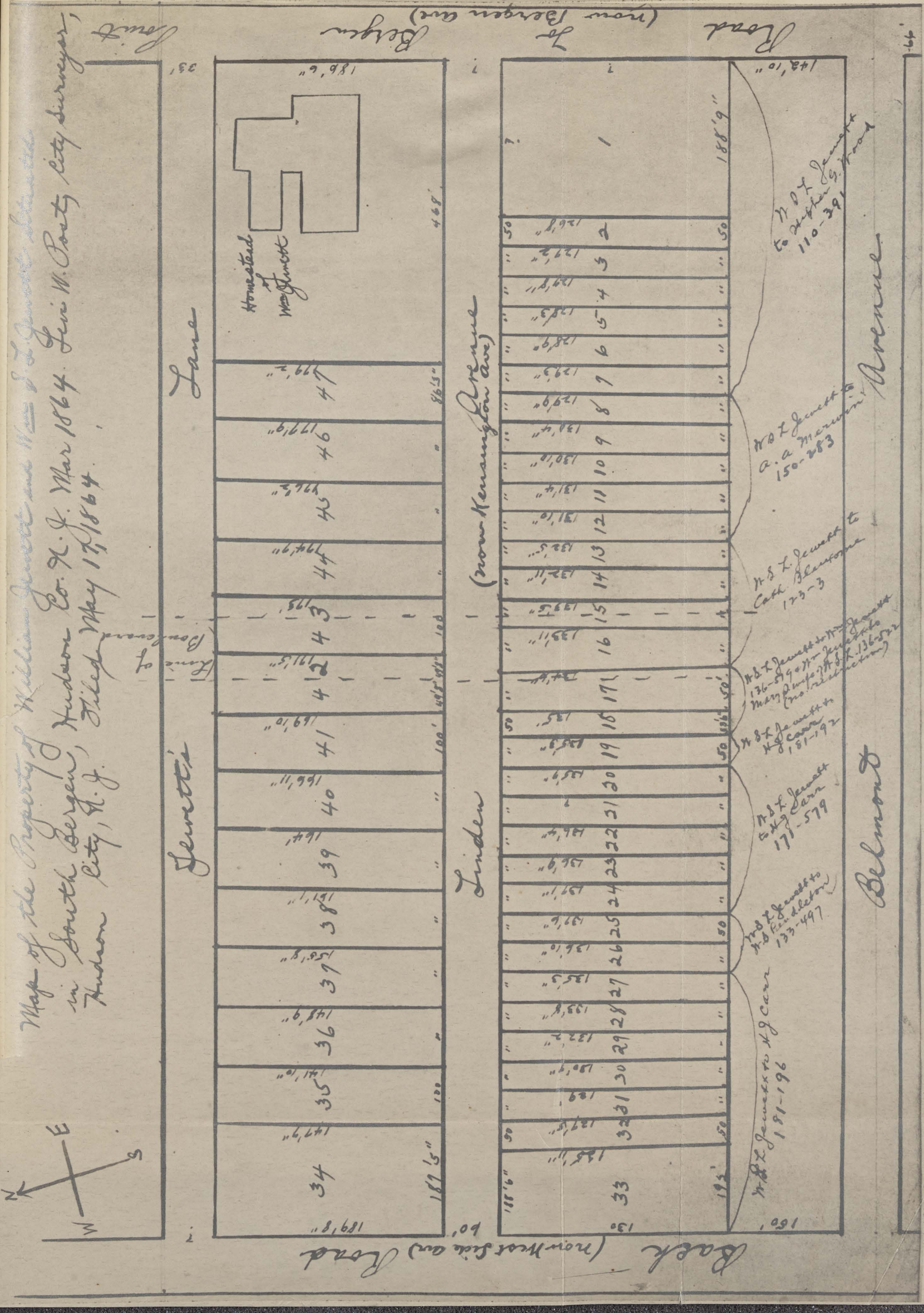
3 feet east of said division line of the premises of complainant and defendant, running at right angles to Kensington Avenue; along the rear line of complainant's premises, defendant proposes to build said building on the division line. That the neighborhood in the vicinity of said premises of said complainant and defendant now is and always has been used exclusively for residence purposes.

JAS. E. PYLE,
Solr. of Complainant.

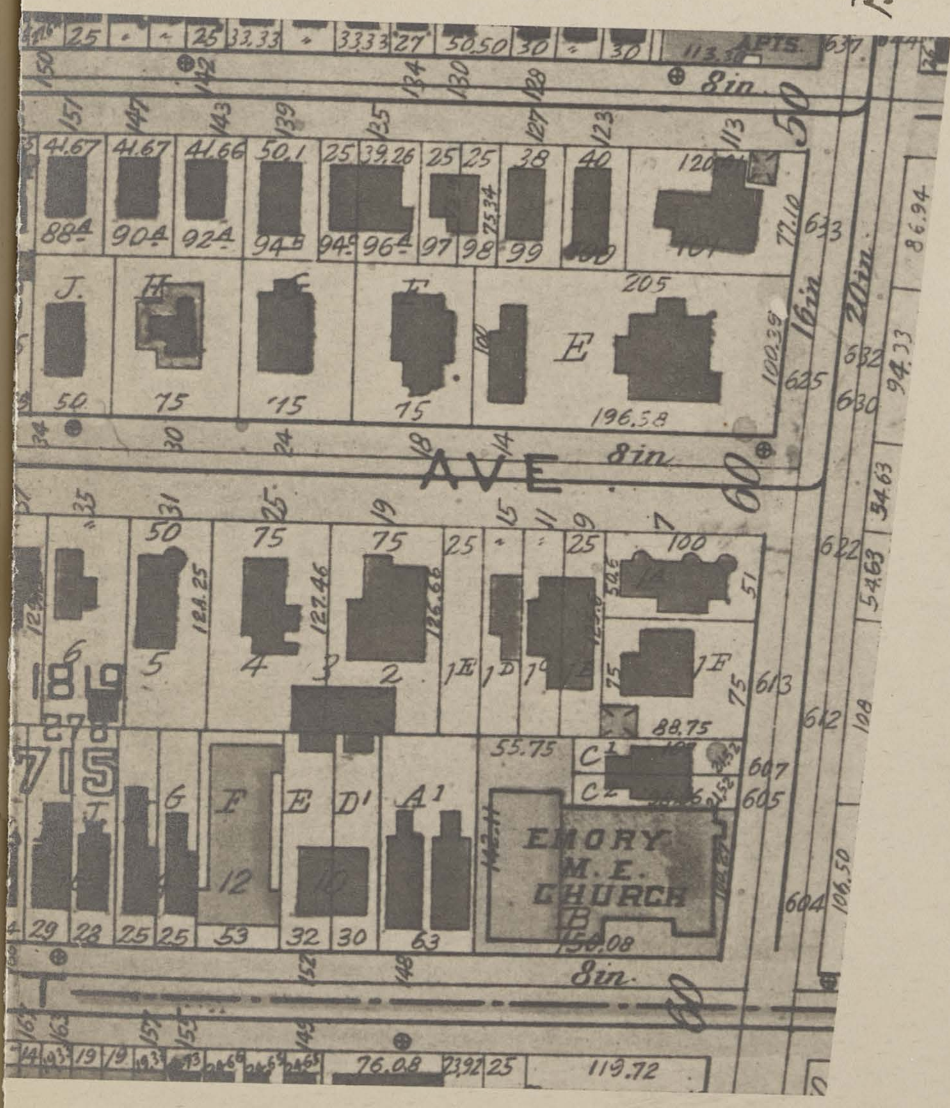
MARK A. SULLIVAN,
Solr. of Defendant.


the Property of William Jewett and Wm S. L. Jewett situate
South Bergen, Hudson Co. N. J. Mar 1864. Levi W. Pooty City Surveyor,
City, N. J. Filed May 17, 1864.
Court

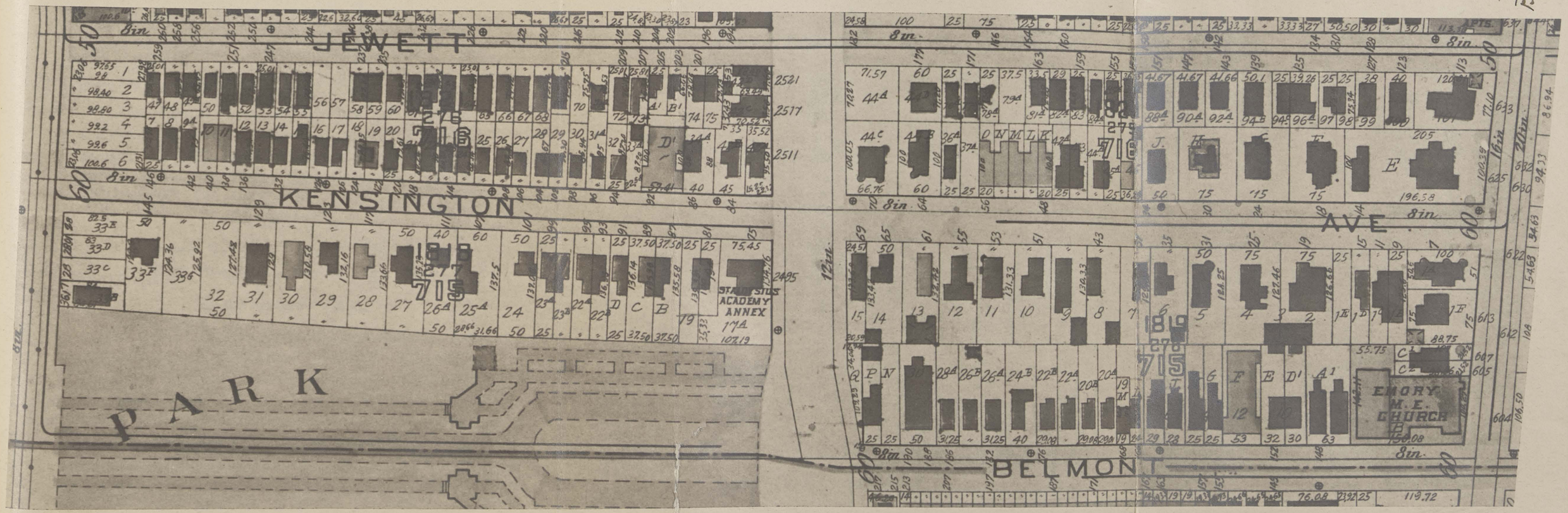
Jewett map referred to in stipulation of facts.



BERGEN AV



Page 16 of Hopkins map of Jersey City referred to in stipulation of facts.



Case.

IN CHANCERY OF NEW JERSEY.

Between

FRANK C. KLIEM,
Complainant,

and

SISTERS OF CHARITY OF ST. ELIZABETH,
Defendant.

On Bill, &c.

Transcript of shorthand notes of testimony taken on final hearing in above stated cause, September 14, 1925, at Chancery Chambers, Jersey City, before his Honor James F. Fielder, Vice Chancellor.

APPEARANCES:

JAMES E. PYLE, Esq., for Complainant.
MARK SULLIVAN, Esq., for Defendant.

COMPLAINANT'S CASE.

Mr. Pylé: Judge Sullivan and myself have agreed upon a stipulation of facts. Of course, the main facts in this case naturally are matters of record and matters which are indisputable. There are a few facts—perhaps material, perhaps not—which Judge Sullivan felt he could not stipulate. As to those facts I have witnesses here whom I would like to put on the stand very briefly.

EDITH J. MARVIN, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Pyle:

Q. You are the daughter of William S. L. Jewett? A. Yes.

Q. Who formerly owned the property on the south side of Kensington Avenue, Jersey City? A. Yes.

Q. The property on what is now the southwest corner of Kensington Avenue and Boulevard was formerly occupied by your father's residence, was it not? A. Yes.

Q. And do you remember when that residence was built? A. Well, before I was born.

Q. A good many years ago? A. A good many years ago.

Q. And that fronted on Kensington Avenue? A. Yes.

Q. Did it sit back on a line with the other buildings on Kensington Avenue in the neighborhood? A. Yes.

Q. Subsequently your father William S. L. Jewett transferred this property to William Jewett, and then William Jewett transferred it to Mary S. L. Jewett, by deeds, each dated May 24, 1866. Now, that William Jewett was your grandfather? A. No; William Jewett was my grandfather. William S. L. Jewett was my father.

Q. Mary S. Jewett was your mother? A. My mother.

Q. So that was a transfer from your father over to your mother, Mary S. Jewett?

Mr. Sullivan: I object to the conclusion counsel is drawing.

The Court: Objection sustained.

Q. Was that a bona fide sale or transfer of convenience?

Mr. Sullivan: I object.

The Court: Objection sustained.

By the Court:

Q. You were not born in 1866, were you? A. 1866 I was born.

By Mr. Pyle:

Q. Subsequently that property was transferred by Mary S. Jewett to Richard W. Bliss, by deed dated December 15, 1879. Who was that Richard W. Bliss? A. My uncle.

Mr. Sullivan: I object on the ground that it is immaterial.

The Court: Objection overruled.

Q. What relation was he to your mother? A. Brother.

Q. Your mother's brother? A. Yes.

Q. Do you know whether that was an actual sale or transfer of convenience?

Mr. Sullivan: I object upon the ground that it is immaterial in this case. If there is to be any restriction imposed upon us, it must be a restriction found in the public records.

The Court: Objection sustained.

Mr. Pyle: I am trying to show why these deeds have no restrictions in them, being transfers from one member of the family to another. I am not trying to read in some restrictions which are not in the deeds at all. I am simply trying to explain why there are

no restrictions in these transfers, and that is the only way I see I can do it. I think I am entitled to show these facts and circumstances incident to these transfers.

The Court: There is nothing more to be said. Objection sustained.

Mr. Pyle: I have several other questions.

The Court: You may ask them if you want a ruling on them.

Q. This same property was afterwards transferred by Richard W. Bliss to Charles H. J. Bliss, by deed dated November 1, 1884. Do you know who Charles H. J. Bliss was?

Mr. Sullivan: Same objection; it is immaterial.

The Court: Objection overruled.

A. Richard Bliss' son.

Q. That is, the son of Richard W. Bliss, the grantor? A. Yes.

Q. Do you know whether or not that was an actual sale or a transfer of convenience?

Mr. Sullivan: Objection.

The Court: Objection sustained.

Q. There were no restrictions placed in that deed from Richard W. Bliss to Charles H. J. Bliss. Do you know why no restrictions were placed in that deed?

Mr. Sullivan: Objected to.

The Court: Objection sustained.

Q. Said Charles H. J. Bliss afterwards conveyed the same property to Mary M. Jewett, by deed dated October 1, 1886. Do you know who that Mary M. Jewett was? A. My sister.

Edith J. Marvin, cross.

Q. Do you know whether there was any consideration paid for that transfer, or whether it was a transfer of convenience?

Mr. Sullivan: Objection.
The Court: Objection sustained.

Q. There were no restrictions placed in that last named deed. Do you know why no restrictions were placed in that deed?

Mr. Sullivan: Same objection.
The Court: Objection sustained.

Q. You and your sisters afterwards conveyed the defendant's property, or the same as was conveyed to the defendants, to John J. Nevin, and the complainant's property to Charles H. Smith. You remember those transfers, do you? A. Yes.

Q. At that time you and your sisters owned other property on Kensington Avenue? A. Yes.

Q. And still have some property there? A. Still have some there, yes.

Cross examination by Mr. Sullivan:

Q. You did not join in any deed to Nevin for that corner property, did you? A. Well, I was part owner in it, and I sold to my sister just before that.

Mr. Sullivan: I object to the answer on the ground that it is not responsive.

Q. I say, you did not join in any deed to John Nevin for that property, did you? A. No.

Q. You had theretofore made a deed for your interest in that property to the husband of your sister, Mary M. Jewett; isn't that right? A. Yes.

Q. So that at the time the property was con-

veyed to Nevin, you had no interest in that property on the record? A. In that, no.

Q. And that property that your sisters then conveyed to Dr. Nevin was a plot on the corner, on the southwest corner of Kensington Avenue and the Boulevard? A. Right.

Q. About seventy-five feet on Kensington Avenue and running back on the Boulevard to— A. Well, seventy-five feet or more; I think seventy-five or a hundred feet.

Q. Now, Mrs. Marvin, you say that when your father built his house, he set it back to the line of the other houses. A. We built the first house. Ours was the first house built, and then we placed restrictions on the rest.

By the Court:

Q. Was that house built after 1866? A. No.

Q. When you were born the house was there? A. I think it was just before that or just after that. It was built just before or just after I—

Q. After what? A. After I was born. Just before I was born or just after; I cannot tell which.

By Mr. Sullivan:

Q. So you really don't know whether any houses were there? A. Yes; ours was the first house.

Q. I mean from your own knowledge you don't know? A. Yes; my mother told me many a time.

By the Court:

Q. Judge Sullivan asked you: From your own knowledge, do you know whether that was the first house built on the south side of Kensington Avenue? A. I believe it was.

Edith J. Marvin, cross.

By Mr. Sullivan:

Q. I didn't ask you that. From your own knowledge, do you know whether that was the first house built on the south side of Kensington Avenue? A. Well, I don't know how I can tell, except my mother told me so.

Q. That is the only way you can tell? A. Certainly. I was just born. I was a baby. I don't remember, of course.

By the Court:

Q. As far back as you can remember, were there any other houses on the south side of Kensington Avenue, other than your father's house, when you first remember that property? A. Yes; I remember the house built by Mr. Hamilton, but I think that was built after we built ours, and two more houses.

By Mr. Pyle:

Q. This residence of your father's was one of the first houses built? A. Yes; one of the first, if not the first.

By Mr. Sullivan:

Q. You and your sisters were the owners of quite a lot of property on the north side of Kensington Avenue also? A. Yes.

Q. Between the Boulevard and West Side? A. Yes.

Q. When you sold these lots between the Boulevard and West Side, were they split up into fifty foot wide plots or twenty-five foot wide plots, if you recall? A. I don't remember.

Q. Did you and your sisters have a map pre-

pared known as "Map of Property of William Jewett"? A. Yes.

Q. Do you know whether you ever saw that map, Mrs. Marvin? A. Yes.

Q. Would you recognize a copy of it, if you saw it, do you think? A. I think so.

Q. (Showing witness.) Can you say whether or not that looks like a copy of the map? A. Yes; it looks like it.

Q. That is a map only of property on the north side of what is here called Linden Avenue, which was the old name for Kensington Avenue; isn't that so? A. Yes.

Q. It does not show the Boulevard cut through there at all. Now, looking at these lots on the north side of Linden Avenue, beginning down at West Side Avenue and leaving out the corner lot which is fronting on West Side Avenue, what width are these lots?

Mr. Pyle: I object. This is not a proper way of proving the map. You are asking the witness to testify from something that is not in evidence.

The Court: I suppose the form of the question may be objectionable, but I think the witness may be asked: After looking at this paper which purports to be a copy of the "Map of Property of William Jewett," can you say whether that refreshes your recollection as to what the width of the lots were?

A. Some were sold fifty feet and some were twenty-five feet.

Q. Do you see any fifty-foot lots on that map at all? A. Well, we could sell the plot fifty feet wide.

Q. You mean you could sell two lots together. A. Twenty-five feet or fifty feet wide.

Q. And do you know, Mrs. Marvin, whether or not in the block between the Boulevard and West Side Avenue on the north side of Kensington Avenue, houses have been erected on twenty-five foot plots of ground?

Mr. Pyle: I object on the ground that it is not proper cross examination.

The Court: Objection sustained.

Mr. Sullivan: Then I will call her later as my own witness.

The Court: You may make her your witness now, if you wish, while she is on the stand.

Direct examination by Mr. Sullivan:

Q. And do you know, Mrs. Marvin, whether or not in the block between the Boulevard and West Side Avenue on the north side of Kensington Avenue, houses have been erected on twenty-five foot plots of ground? A. Yes.

Q. Are not all of the houses, as a matter of fact, on that north side, with possibly one or two exceptions, on twenty-five foot lots of ground? A. I cannot answer that because I don't know.

Q. But there are a great many, are there not? A. I know there were a few.

No Cross Examination.

FRANK C. KLIEM, the complainant, sworn as a witness in his own behalf, testifies as follows:

Direct examination by Mr. Pyle:

Q. You are the complainant in this matter? A. Yes.

Q. When this work was started by the defendant on the property adjoining yours, were you at home or away? A. I was away.

Q. When you first learned of the operations or construction on the adjoining property, the foundation was started? A. Yes.

Q. Did you take any steps to notify the defendant of your objections? A. I did.

Q. You did notify them through me? A. I did.

Q. Your property is occupied as your residence, is it not, for yourself and your family? A. Yes.

Q. How long have you lived there? A. About eight years.

Q. And up to the present time tell us about the surroundings of your particular lot, so far as light and air and view are concerned.

Mr. Sullivan: I object upon the ground that it is immaterial.

The Court: Objection overruled.

A. The house faces Kensington Avenue and sits back from the building line approximately twenty-five feet.

Q. Is that generally on the line of all the other houses on that side of Kensington Avenue? A. Yes.

Q. They are all about on the same line, are they not?

Mr. Sullivan: I object upon the ground that it is immaterial that people have actually built approximately on a line, unless there is something in the deeds that would establish such a line.

By the Court:

Q. You said your house sits back from the building line. A. From the sidewalk.

By Mr. Pyle:

Q. From the curb line? A. No; from the sidewalk.

Q. You mean the— A. The street line.

Q. The building line? A. The building line, whatever you call it.

Q. And with respect to the rear of the house? A. The rear of the house is toward what is known as West Side Park,—unobstructed view.

Q. That is, you have a view of the West Side Park entrance? A. Yes; we always have had.

Q. And your westerly side, have you a view and light there? A. Always.

Q. Can you see the Boulevard from your windows? A. On the easterly side.

The Court: Did you mean easterly when you said westerly?

Mr. Pyle: Easterly.

Q. On the easterly side? A. On the easterly side it was an unobstructed view of the Boulevard.

Q. There was a house on this plot of ground? A. There was formerly a house before the present owners tore it down.

Q. I am speaking of the time when that house was there. A. Well, sitting on any portion of the porch or any part of the house, in the front of the house, you had an unobstructed view of the Boulevard.

Q. You could see the Boulevard? A. Yes; from the front, the easterly side of the house, you could see the Boulevard very well as far east almost half way up Kensington Avenue.

Q. Now, if the wall of the defendant's proposed building on the east side of your property, I under-

stand, is going to be built about three feet inside their line— A. (Interrupting.) I should say it seems to be about that much.

Q. On the rear of your property, this wall, I understand, is to be built right on the line? A. Right flush with the line.

Q. If that wall is built, will that obstruct your former view?

Mr. Sullivan: I object on the ground that it is immaterial.

The Court: Objection overruled.

A. It will completely.

Q. Will that affect the value of your property?

Mr. Sullivan: I object upon the same ground.

The Court: Objection sustained.

Q. Will that make the use of your property as residence property less desirable?

Mr. Sullivan: Objected to.

The Court: For him, do you mean?

Mr. Pyle: Yes; or for anybody.

The Court: He cannot answer for anybody else.

Q. We will limit it to yourself. Will it make it less desirable to you as a residence?

Mr. Sullivan: Objected to on the same grounds.

The Court: Objection overruled.

A. It certainly will.

Q. Do you know whether or not that will affect the value of your property? A. It will affect it very much.

Q. Will it reduce the value of your property?

Mr. Sullivan: I object.

The Court: Objection sustained.

Mr. Pyle: Judge Sullivan and I have been trying to eliminate technicalities. I suppose I should have brought a real estate man here to testify to these facts.

Mr. Sullivan: I do not object to it because Mr. Kliem has not been proved to have an adequate knowledge to enable him to testify to value. I say it is immaterial testimony. I am not objecting to the competency of Mr. Kliem.

The Court: I will overrule the objection on the ground of competency.

Mr. Sullivan: I waive any objection to Mr. Kliem's competency to testify as to value.

The Court: Then I overrule the rest of your objection.

Q. Will it reduce the value of your property as a residence? A. It certainly will.

Q. Will it affect its general value? A. I should say it would.

Q. How would it reduce the value? A. It would very much. May I express my own opinion on that particular point?

Mr. Sullivan: I object to Mr. Kliem's expressing any opinion.

No Cross Examination.

Complainant Rests.

DEFENDANT'S CASE.

Mr. Sullivan: We have a copy of the Map of William Jewett to show the way the

lots were mapped out on the north side of Kensington Avenue, across the way.

Mr. Pyle: I do not think it is material how they were mapped out.

Mr. Sullivan: Your Honor will find in the stipulation that originally this Grandfather Jewett and William Jewett owned the property on both sides of Kensington Avenue, north and south, and it was split up so that the son owned the south side of Kensington Avenue and the father owned the north side, and the first property sold was a plot of ground, seven lots, which were on the southwest corner of Kensington Avenue and Bergen Avenue and an agreement was entered into between the purchaser of those lots and the two Jewetts, who owned on both sides of the avenue all the way down to West Side Avenue, as to certain restrictions that were to be placed upon the property; and it is going to be the defendant's contention that that is the only conveyance that there ever was showing a general scheme of restriction in that neighborhood, and that the general scheme that was then put on the record applied to both sides of the avenue and not only to the south side of Kensington Avenue.

The Court: I will permit you to offer the Jewett map on the north side of Kensington Avenue, but it is a question how you are going to prove it.

Mr. Pyle: I have no objection if the judge says it is correct. I have no objection to the map, but I do not think it is material.

(Further argument.)

The Court: I am going to admit this copy of the map, if there is no objection to the fact that it is a copy.

(Map is marked Exhibit D-1.)

Defendant Rests.

Case Closed.

(Upon motion of complainant case was reopened and October 13, 1925, at 11 A. M., fixed for the taking of further testimony.)

(Further testimony taken on final hearing, at Jersey City Chancery Chambers, October 13, 1925, at 11 o'clock in the forenoon.)

Appearances as heretofore.

DAVID W. McCREA, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Pyle:

Q. You are a practising lawyer of this city? A. Yes.

Q. Were you the attorney for Miss Elizabeth Jewett afterward Mrs. Brown and her sister, Mrs. McLean? A. Yes, sir.

Q. Did you represent them when this property was sold by them to John J. Nevin and wife? A. Yes, sir.

Q. On the southwest corner of Kensington Avenue and the Boulevard? A. Yes.

Q. Did Miss McLean and Miss Jewett consult you about the drawing of the contract and deed in that matter? A. Yes.

Q. Was Mrs. McLean here in Jersey City at that time? A. No, sir.

Q. Where was she? A. In the State of Washington at Tacoma.

Q. Who acted for her in the transaction? A. Her sister Elizabeth Jewett.

Q. She lived here in Jersey City? A. Yes, sir.

Q. Is Elizabeth Jewett still living? A. No, sir.

Q. Did she consult you with regard to restrictions to be placed upon the property? A. She did.

Q. As I understand it, Mrs. McLean was not present at all during the transaction? A. I do not recall of her having been here at all during that transaction.

Q. And did you advise her to put in the contract and deeds the restriction that appears in this deed about no building being nearer to Kensington Avenue than twelve feet therefrom.

Mr. Sullivan: I object to that question upon the ground that it is immaterial.

The Court: Objection overruled.

A. I did.

Q. What advice did you give her on that subject?

Mr. Sullivan: Same objection.

The Court: Objection sustained.

Mr. Pyle: It is my understanding that it is my duty to prove by testimony that this restriction was placed on this property for the benefit of our complainant's lot. How am I going to show that unless I show it by the testimony of somebody who was present and negotiated and conducted this transaction?

The Court: I do not think it ought to go in, in just that shape—what advice he gave to Miss Jewett. I think the question might be the reason he had in mind for putting this restriction in the deed.

Q. What was the reason for your inserting in

your deed to John Nevin and wife these restrictions, especially the restrictions relating to the building being set back at least twelve feet?

Mr. Sullivan: I object. Even assuming the reason that would be in Mr. McCrea's mind would be the reason that actuated these ladies in putting the restriction in the deed, it seems to me that what they had in the backs of their minds at the time they made this deed is not evidential in a case of this kind.

(Further argument.)

The Court: Objection overruled.

A. The reason for it was that the Jewett sisters owned the property lying west of this property on Kensington Avenue.

Q. Map I interrupt there? By that, do you mean the property afterwards sold to Smith? A. Charles Smith; yes.

Q. Charles Smith? A. Yes, sir.

Q. Go on with your answer. A. The object in putting that covenant in also was to protect that property from having a building built on the corner projecting out to the street line and thereby blocking off the property adjoining.

Q. How do you know that to be so? A. How do I know what to be so?

Q. That that was the reason?

The Court: That is his reason.

Q. Did Miss Elizabeth Jewett tell you that that was her reason?

Mr. Sullivan: I object to that on the ground that it is immaterial and also on the ground that it is a leading question.

The Court: Objection sustained.

Q. Did Miss Elizabeth Jewett tell you anything relating to that set-back? A. Yes.

Q. What did she tell you?

Mr. Sullivan: Objected to on the same ground.

The Court: Objection overruled.

A. She told me that she entirely approved of that covenant.

Q. Did she tell you anything else, with regard to the reason for it? A. For the reason of protecting the lots lying adjacent to the property, the lots that were being sold.

Q. What lots? A. The lots that were being sold to Nevin.

Q. Sold to Smith, you mean?

Mr. Sullivan: I object.

A. I say the lots lying contiguous to those sold to Nevin.

Q. What lots do you mean? A. The lots that were sold to Smith subsequently; owned by the Jewett sisters at that time.

Q. Did you make known that reason to John J. Nevin and his wife when the contract was signed or the deed given?

Mr. Sullivan: I object.

The Court: Objection sustained.

Mr. Pyle: I want now, if I may—I think it is of some importance—to be able to show or try to show that this fact was not only the fact but that it was brought to the attention of the grantees of the Nevin deed—

The Court: The present defendant?

Mr. Pyle: Their grantors.

David W. McCrea, cross.

The Court: I cannot see that anything the Jewett sisters or Mr. McCrea said to Dr. Nevin would be binding upon Nevin's grantees, unless they had their notice through the deed. I will sustain the objection.

Q. Did any of these grantors in the Smith deed own any other property at that time on the south side of Kensington Avenue, or was this all there was?

Mr. Sullivan: I object on the ground that it is immaterial.

The Court: Objection sustained.

Q. You had been acting for a long time prio to that as their attorney? A. Oh, yes.

Q. As attorney for each one of the sisters? A. Yes; many years.

Q. Mrs. McLean, Miss Elizabeth Jewett and Mrs. Marvin? A. Yes.

Q. And you drew all their conveyances for them? A. Latterly I do not think I drew Mrs. Marvin's, but I drew all those of Miss Elizabeth Jewett and Mrs. McLean.

Q. Are you in a position, then, to know whether this was all that they had left—all that Elizabeth Jewett and Mary McLean had left—on the south side of Kensington Avenue? A. My best recollection would be that that was the last property that they owned on that side of Kensington Avenue.

Cross examination by Mr. Sullivan:

Q. Do you know in whom the title was to the property that was subsequently sold to Smith at the time of the deed to Nevin? A. Part of it was in Miss Jewett and part of it was in Mrs. Marvin.

Q. Now, take the adjoining property to the land

that was sold to Nevin. In whose name was that title? A. The one adjoining Nevin—I think that was Mrs. Marvin's.

Q. Mrs. Marvin's? A. I think so.

Q. And she is not a grantor in the deed to Nevin at all? A. No, sir.

Q. Is that right? A. That is right.

By Mr. Pyle:

Q. In the presence of John J. Nevin and his wife was anything said, before the deed was delivered to him, as to the reason for those restrictions being placed in the deed to him?

Mr. Sullivan: I object.

The Court: That question has already been asked before and ruled upon. Objection sustained.

EDITH J. MARVIN, a witness heretofore sworn on the part of the complainant, recalled and further examined as follows:

Further direct examination by Mr. Pyle:

Q. You and Elizabeth Jewett and Mary McLean are sisters? A. Yes.

Q. You know the property which was sold to Dr. John J. Nevin and wife by Mrs. Brown, Elizabeth Jewett and Mary McLean? A. Yes.

Q. You are also, of course, familiar with the property which was sold to Charles Smith adjoining? A. Yes.

Q. Before either of these properties was sold, or, I will say, before the sale to John J. Nevin and wife, did you and your sisters have any agreement or understanding as to the restrictions to be placed on these two properties?

Mr. Sullivan: I object upon the ground that it is immaterial.

Mr. Pyle: This is corroborating what the Court has already allowed Mr. McCrea to testify to. I want to show by this witness the purpose of putting the restriction in there, namely, that it was put in there for the benefit of the other property.

The Court: Objection sustained.

Mr. Pyle: I want to show that there was an understanding and agreement between this witness, Mrs. Marvin, and her sister Elizabeth Jewett, who was co-owner, that these two tracts should be restricted for the mutual benefit of each of these two tracts.

The Court: You maintain that even if that agreement was not carried out by the insertion of the restrictions in the deed, it would still be binding upon subsequent purchasers?

Mr. Pyle: No; I cannot say that.

The Court: I will take the testimony, subject to Judge Sullivan's motion to strike it out.

A. We did.

Q. What was that understanding? A. That if we sold it, there would be mutual protection for each one, that the restriction would set the houses back to a certain depth.

Q. From the street do you mean? A. From the street.

Q. Why did you have that agreement? A. To mutually protect each other. I owned the middle, the center, lot, and my sisters owned each side of me.

Q. You owned twenty-five feet of the Smith property? A. Twenty-five feet.

Q. And Elizabeth Jewett owned the other twenty-five feet? A. The other twenty-five feet.

Q. Making altogether a plot fifty feet in front? A. That is correct.

Q. Did you have any agreement with your sister as to how that property should be sold, that is, whether it should be sold separately in twenty-five foot lots or not?

Mr. Sullivan: I object. It is entirely immaterial to this case whether there was any such agreement as that. It has nothing to do with the issues in this case.

The Court: Objection sustained.

Q. From whom did you and your sister get this property that was sold to Mr. Smith?

Mr. Sullivan: I object upon the ground that it is immaterial.

The Court: Objection sustained.

Q. Can you tell us why that tract sold to Smith was divided up into two twenty-five foot lots?

Mr. Sullivan: I object for the same reason.

The Court: Objection sustained.

Q. Did you or your sisters, Elizabeth Jewett and Mary McLean, own any other property on the south side of Kensington Avenue at the time of the sale to Nevin? A. No.

Cross examination by Mr. Sullivan:

Q. I understand you to say that the reason for the restriction of the Nevin property was to pre-

vent it from jutting out beyond the building on the adjoining property, on the Smith property? A. That was one of the reasons.

Q. You understand my question, don't you? A. I do not.

Q. The restriction on the Nevin property provides that the building should be set back a certain distance from the street line. You know that, don't you? A. Yes; I know that.

Q. I understand you to say that that was put in the Nevin deed in order to protect the adjoining property on the west, so that when a building was put on that property on the west, it would not be blanked, so to speak, by the building on the Nevin lot. Is that right? A. The restriction was put on to protect us all, so that none of us could come out to the front.

Q. Was your agreement that there should be a uniform line, upon which you would put your buildings? A. The agreement was that the main part of the house would be about twenty-five feet. In some cases—in one case there was about twelve or twelve and a half feet—the main part of the house was twenty-five feet, which was practically the same thing.

Q. Twenty-five feet and twelve feet are just the same? A. One included the porches and stoops and the other included just the main part of the house.

Q. Is that the only thing that was discussed at the time of the making of this restriction between you and your sisters? A. No; one house to go on fifty feet.

Q. One house was to go on fifty feet? A. Yes.

Q. What else? A. That we would mutually protect each other and there should be—no house—

no steps of houses should come out beyond the main part of the old home—on the Nevin lot no house should come out beyond that.

Q. Don't you know that when the Smith property was sold the restriction was twenty-five feet and not twelve feet? A. Well, they were both—the main part of the house was twenty-five feet and the other part twelve feet.

Q. Don't you know that the restriction that was imposed on the Smith property was a set back of twenty-five feet from the building line?

Mr. Pyle: I think she has a right to explain what she means.

The Court: I don't think that Mrs. Marvin's interpretation of the restriction in the Smith deed is necessary. What the Smith deed says is one thing, and what Mrs. Marvin thinks it says may be something entirely different.

Mr. Sullivan: Except that she has been testifying to what the agreement was between the parties.

Mr. Pyle: I object.

The Court: Objection sustained.

By Mr. Pyle:

Q. In response to one of Judge Sullivan's questions, you said that only one house was to be built on fifty feet. Why was that?

Mr. Sullivan: I understand that this is taken subject to my objection.

The Court: It seems to me we are getting nowhere at all by asking Mrs. Marvin to tell us what was in the minds of herself and her sisters at the time they wrote something in

black and white in a deed. I think that what they wrote is what governs the situation. I will sustain the objection.

NEWTON H. MARVIN, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Pyle:

Q. You are the husband of Mrs. Marvin, who was just on the stand? A. I am.

Q. Are you familiar with her real estate transfers on Kensington Avenue? A. Very much so.

Q. Why very much so? A. For the reason that I had about everything to do with them as far as transferring the deeds.

Q. Did you actually draw the deeds yourself? A. I did. She had told me she would not take the deeds unless I did.

Q. Did you represent her in all of these transactions? A. I only represented as a clerk you might say.

Q. You never were really admitted as an attorney? A. I never had a power of attorney or even a proxy.

Q. You heard your wife testify just now, did you not? A. Yes.

Q. You heard her testify to an agreement that she had with her sister, Elizabeth Jewett, in regard—

Mr. Sullivan: I object to the form of the question.

The Court: Objection sustained.

Q. Were you ever present at any meeting between your wife and Elizabeth Jewett when they had an agreement as to the restrictions on the Smith and Nevin properties? A. I was.

Q. Can you tell us what that arrangement was between your wife and Elizabeth Jewett?

Mr. Sullivan: I object. Unless it is in the deed, it is not binding on us.

The Court: Objection sustained.

Q. Were you ever present, before the delivery of the deed to John J. Nevin and wife, when he and his wife were told the reason the restrictive covenants were put in his deed.

Mr. Sullivan: I object on the ground it is immaterial.

The Court: Objection sustained.

Q. Do you know why these restrictive covenants were put in this deed to John J. Nevin and wife by Mary MacLean and her sister?

Mr. Sullivan: Unless it is shown in the deed, I object to the question.

The Court: Objection sustained.

Complainant Rests.

Defendant Rests.

Case Closed.

map above
mentioned

#279

MAP OF ~~TRUSTEES'~~ → 105 Building Lots belonging to the Est
W.S.L. JEWETT DEC'D
JERSEY CITY, N.J. 1878.

JEWETT AVENUE

JEWETT AVE

WEST SIDE AVENUE

BERGEN AVE

LINDEN AVE

LINDEN AVE

249

E 51 ①

E 51 ②

Conclusions.

November 13, 1925.

IN CHANCERY OF NEW JERSEY.

Between

FRANK C. KLIEM,
Complainant,

and

SISTERS OF CHARITY OF ST. ELIZABETH,
Defendant.

57-71.

On Bill for Injunction.

MR. JAMES E. PYLE, for Complainant.
MR. MARK A. SULLIVAN, for Defendant.

FIELDER, V. C.:

William S. L. Jewett owned a tract of land in Jersey City fronting on the southerly side of Kensington (formerly Linden) Avenue, running easterly from West Side Avenue approximately 2,000 feet to Bergen Avenue and his father, William Jewett, owned a tract of similar frontage on the opposite side of the same street. In March, 1864, they caused a map to be made of their lands and filed the same in the Hudson County Register's office. This map shows the William S. L. Jewett tract laid out into thirty-one lots of fifty feet front, numbered from 2 to 32 inclusive and the William Jewett tract laid out into thirteen lots of one hundred feet front. The corners at Bergen and Kensington Avenue of each tract were not divided into lots, but were shown on the map as large plots all of different frontages. By deed dated

Conclusions.

June 6, 1864, William S. L. Jewett conveyed to one Wood the unplotted southwesterly corner of Bergen and Kensington Avenues and lots 2 to 7 inclusive, adjoining the same and on the same day William S. L. Jewett, William Jewett and Wood entered into a written agreement, duly recorded in the Register's office, whereby the parties agreed that they would not erect upon any of the lots owned by them, fronting on Kensington Avenue, any slaughter house, or other nuisance and that when they, or their heirs, should convey any portion of said lands, the same restrictive covenant should be taken from their grantee.

William S. L. Jewett then proceeded to make conveyance of the remainder of his tract by reference to his map, as follows, ~~his last deed being dated in 1868~~:

Lots 13, 14, 15 and 16, with the restrictive covenant against nuisances and the further covenant that the grantee, her heirs or assigns, will not build upon the premises conveyed more than one house for each fifty feet of front thereof, nor any house to cost less than $2,000.

Lots 25 and 26, with the same restrictive covenants applying to the lots last above.

Lots 17 and 18 (being part of the land involved in this suit) with no covenants:×

Lots 8, 9, 10, 11 and 12, with restrictive covenants that the grantee, her heirs or assigns, will not erect on said premises any house to cost less than $3,000 and that within fifteen years from the date of the deed, no more than one dwelling house will be erected on any one of the lots conveyed.

Lots 20, 21, 22, 23 and 24, with restrictive covenants the same as those covering lots 13 to 16 inclusive.

× these lots were occupied as the residence ~~Lemoteo~~ of grantor and the deed was to grantor's father who by deed made & recorded ~~thereafter~~ simultaneously therewith conveyed the same lots to Mary [illegible] and Wm S L Jewett

Conclusions.

Lot 19 (being the balance of the lands involved in this suit) with restrictive covenants the same as those covering lots 13 to 16 inclusive and an additional restriction against the erection of a stable, with an agreement on the part of the grantor to release the restriction against a stable after five years from the date of the deed, in case the grantee should sell the lot. The deed for this lot contains a provision which does not appear in any previous conveyance made by the grantor, namely, that for any and every violation of the covenants contained therein, the grantee, his heirs, or assigns, will forfeit and pay to the grantor, his heirs, executors, or administrators, $1,000 as ascertained and liquidated damages.

Lots 27, 28, 29, 30, 31 and 32 and the unplotted corner adjoining the same on the southeasterly corner of West Side and Kensington Avenues, with restrictive covenants the same as those covering lots 13 to 16 inclusive and the same provision for penalty in case of violation, as contained in the deed last above.

Thus all the land owned by William S. L. Jewett was conveyed by him and came into the ownership of various persons by mesne conveyances through his grantees. In or about 1891 the Hudson County Boulevard, running in a northerly and southerly direction, was cut through the tract, taking the easterly part of lot 17, with other property.

By mesne conveyances executed in or prior to 1886, title to lots 17, 18 and 19 (being all the land involved in this suit) was in Mary M. Jewett (afterward MacLean) a daughter of William S. L. Jewett which deeds contained no restrictions and in 1887 she conveyed an interest in the three lots to her sisters Elizabeth Jewett (afterward Brown) and

Edith Jewett (afterward Marvin) by deeds containing no restrictions. In 1893 these three owners rearranged their interests by mutual conveyances to each other and the easterly one-half of lot 19, twenty-five feet wide by one hundred feet deep, was conveyed to Edith J. Marvin; the westerly one-half of lot 19, twenty-five feet wide by one hundred feet deep, was conveyed to Elizabeth Jewett and the westerly one-half of lot 18, twenty-five feet wide by one hundred feet deep, was conveyed to Mary M. MacLean. Lots 17, 18 and 19 are shown on the Jewett map as being approximately one hundred and thirty-five feet in depth. After the mutual conveyances between the sisters, title to the rear thirty-five feet in depth of lots 18 and 19, the easterly one-half of lot 18 and the portion of lot 17 remaining after the opening of the Hudson County Boulevard remained in the three sisters as tenants in common, until 1895, when Edith J. Marvin conveyed her undivided interest in the lands held in common, to Peter B. MacLean (husband of Mary M. MacLean). No restrictions of any kind appear in the deeds for lots 17, 18 and 19 from the time Mary M. MacLean had title in 1886, down to the deeds next hereinafter mentioned.

By deed dated June 16, 1903, Elizabeth Jewett, Mary M. MacLean and Peter B. MacLean, then owning so much as remained of lot 17, the easterly one-half of lot 18 and the rear thirty-five feet in depth of lots 18 and 19, as tenants in common and the said Elizabeth Jewett owning in severalty the said westerly one-half of lot 18, conveyed said lands to John Nevin and wife, with restrictions that the grantees, their heirs and assigns, should not erect any building nearer the building line of

Kensington Avenue than twelve feet, including stoops and steps; that no dwelling house thereon should cost less than $2,000; that no stable should be erected within one hundred feet of Kensington Avenue and that no slaughter house or other nuisance should be permitted. John Nevin and wife conveyed the same premises to defendant by deed dated November 19, 1912, containing the same covenant as to restrictions on the part of defendant, its successors and assigns.

By deed dated February 16, 1906, Elizabeth J. Brown conveyed to Charles H. Smith the westerly one-half of lot 19, twenty-five feet wide by one hundred feet in depth, said deed containing a covenant on the part of the grantee that he, his heirs or assigns would not erect on the premises conveyed any structure other than a dwelling house; or any dwelling house nearer the building line of Kensington Avenue than twenty-five feet; or more than one dwelling house upon the premises conveyed and upon the premises adjoining easterly contiguous thereto, conveyed to grantee by Edith J. Marvin by deed of even date; or any dwelling house to cost less than $2,000; or any slaughter house or other nuisance. By deed of even date, Edith J. Marvin conveyed to Charles H. Smith the easterly one-half of lot 19, twenty-five feet wide by one hundred feet in depth, which deed contained an identical restrictive covenant as the deed from Elizabeth J. Brown to said Smith. By deed dated November 4, 1916, Charles H. Smith conveyed to complainant the whole front of lot 19, being a lot fifty feet wide by one hundred feet in depth, which deed contained the same restrictive covenants as in the deeds to Smith.

On its lands, defendant has commenced the erec-

tion of a school building which extends out to the line of Kensington Avenue and will cover practically the entire area of its lands. Complainant contends that this structure will be in violation of restrictions imposed on defendant's lands and that it will shut off the light, air and view from complainant's dwelling house, which is erected on his lands in strict compliance with the restrictions applying thereto, and he seeks to enjoin defendant from proceeding with the erection of its school building.

Complainant's first point is that defendant has no right to erect any structure on so much of its lands as forms part of lot 19 as shown on the Jewett map. This claim is based solely upon the restriction contained in the deed dated November 12, 1868, by which William S. L. Jewett conveyed the whole of lot 19, with the restriction, among others, that the grantee, his heirs and assigns, should not build more than one house on said lot. As I have said, lot 19 is shown on the Jewett map as fifty feet wide throughout by one hundred and thirty-five feet deep. Defendant owns the rear thereof, being a plot fifty feet wide by thirty-five feet deep and complainant owns the front, fifty feet wide by one hundred feet deep. Upon complainant's portion of the lot is a dwelling house erected fifteen years ago. Complainant claims that William S. L. Jewett had a general scheme for the improvement of so much of his land as remained after his conveyance to Wood, by restricting the use of each fifty-foot lot to the erection of a single building thereon and counsel for complainant points to the fact that in each deed, after his conveyance to Wood, he inserted such restriction, except in his conveyance of lots 17 and 18, which lat-

ter lots he conveyed to his wife through an intermediary, without restrictions of any kind.

William S. L. Jewett had filed his map showing all his property from West Side Avenue to Bergen Avenue (except the corners) laid out in fifty foot lots, prior to his conveyance to Wood, which conveyance referred to said map and contained no restrictions. When he entered into the agreement with Wood and William Jewett, the only general scheme of restriction upon which the three owners then agreed, was against the use of their properties for any purpose which might be considered a nuisance and it was not until a year later that William S. L. Jewett made his first conveyance of lots within his remaining tract, being the conveyance of Lots 13, 14, 15 and 16. If he then had a general scheme in mind, it is disclosed by the restrictions contained in that deed, which were against nuisances, against the erection of more than one dwelling on each fifty foot of front and against the erection of any house to cost less than $2,000, but he did not covenant with his grantee to insert identical restrictions in his deeds conveying the remainder of his land. He did however place the same restrictions in subsequent deeds for Lots 20 to 26, inclusive, but when he conveyed Lots 17 and 18 he imposed no restrictions and when he conveyed Lots 8 to 12, inclusive, 19, 27 to 32, inclusive, and the unplotted corner of West Side and Kensington Avenues, the restrictions were different in form and effect.

A general scheme of restrictions to be effective and enforceable must have certain characteristics. It must be universal, that is, the restrictions must apply to all lots of like character brought within the scheme. Unless it be universal it cannot be

reciprocal. If it be not reciprocal, then it must as a neighborhood scheme fall, for the theory which sustains a scheme or plan of this character is that the restrictions are a benefit to all The consideration to each lot owner for the imposition of the restriction upon his lot is that the same restrictions are imposed upon the lots of others similarly situated. If the restrictions upon all lots similarly located are not alike, or some lots are not subject to the restrictions while others are, then a burden would be carried by some owners without a corresponding benefit. The burden follows the benefit, and where there is no benefit there should be no burden. (Scull *v.* Eilenberg, 94 N. J. Equity., 759.) Hence the restriction in question cannot be considered as having been imposed on Lot 19 pursuant to a general scheme of restriction applicable to all lots of the common owner similarly located and the covenant is not enforceable by a subsequent grantee of adjoining or adjacent land, as part of a general building scheme. It is rather a bare restrictive covenant reserved by a grantor in favor of his retained lands and which a subsequent grantee of the retained lands may enforce against the lands of the covenantor, if enforcement be equitable and reasonable in view of the circumstances at the time enforcement is sought. That a definite sum was named in the covenant as ascertained or liquidated damages for every violation, does not indicate that the grantee, or the defendant, who claims under him, was given the option to violate the restriction and pay the specified damages in lieu of performance (Rittenhouse *v.* Swiecicki, 94 N. J. Equity, 36).

Complainant is not a grantee of lands retained by William S. L. Jewett at the time he conveyed

Lot 19. Complainant is the owner of part of the very lot made subject to the restriction. While Lot 19 was still vacant, it was subdivided and title to the front fifty feet wide by one hundred feet deep thereafter took a different course from title to the rear fifty feet wide by thirty-five feet deep. It so happened that the owner of the front part built first, but suppose the owner of the rear part had been the first to erect some kind of a structure within his rights. Could it be said that he thereby acquired the equitable right to prevent the owner of the front of the lot from building thereon and thus render the front of no value to its owner? I think not and therefore, reversing the situation, I do not think complainant entitled to equitably enforce the restriction now in question against defendant.

If it was the plan of William S. L. Jewett to create a residential neighborhood of single family dwellings, each on a lot no less than fifty feet wide, such plan has failed. The land owned by his father, William Jewett, on the north side of Kensington Avenue from the Hudson County Boulevard to West Side Avenue, is wholly built on. Most of the houses on that tract are erected on less than fifty feet front; many are two-family houses and almost opposite complainant's land is a large apartment house. On the William S. L. Jewett tract are two apartment houses, one near West Side Avenue and the other near Bergen Avenue. It further appears that owners of lots in the William S. L. Jewett tract have disregarded the restrictions against building more than one house on fifty feet and have generally acquiesced in its violation by lot owners. Lots 20, 21, 22 and 23, immediately adjoining complainant's lands on

the west, were conveyed subject to the restrictions, but on lot 20 and the easterly half of lot 21 stands a double house, that is, two houses under one roof with party wall between, on seventy-five feet; on the westerly half of lot 21, which is a lot twenty-five feet wide, stands a dwelling house; on lot 22 stands a double house, that is, two houses under one roof with party wall between, on fifty feet, and on lot 23, also fifty feet front, stands the same kind of a double house as on lot 22. These houses were erected over thirty years ago. The opening of the Hudson County Boulevard took a portion of lot 15 and on the remaining part of that lot, which is about twenty-five feet wide, is a dwelling house built before the Boulevard was cut through. An owner of lot 26 sold ten feet of the width thereof and on the remaining forty feet in width stands a house. On one of the fifty foot lots conveyed by Jewett to Wood stand two houses. It should be noted that lots 17 and 18, immediately adjoining complainant's lands on the east, now owned by defendant, are unrestricted as to the number of buildings which may be erected thereon and that the restrictions on lots 8 to 12 inclusive were for fifteen years and having expired the owner is not now restricted as to the number of buildings thereon. The neighborhood of complainant's property therefore is no longer a neighborhood built up with single family dwellings each erected on a lot fifty feet or more in width and since all lots in the William S. L. Jewett tract are not bound by the restriction complainant would enforce against defendant's land, it would be inequitable and unreasonable to enforce such restriction in this suit (Fisher *v.* Griffith Realty Co., 88 N. J. Equity, 204).

Conclusions.

Complainant's next point is that he is entitled to enforce against defendant the restriction covering lots 17 and 18 contained in the deed from Elizabeth Jewett, Mary M. MacLean and Peter B. MacLean to John Nevin and wife and in the deed from John Nevin and wife to defendant, which in effect is that no building shall be erected nearer the building line of Kensington Avenue than twelve feet. He asserts that this restriction was placed in the deeds to Nevin and to the defendant for the benefit of the adjoining lot 19. The burden is on complainant to establish his assertion as a fact and to prove that defendant is chargeable with notice of such fact. The deeds in which the restriction is found contain no statement that the restriction was for the protection or benefits of adjoining or adjacent land; nor does the covenant provide that it may be enforced by an adjoining or adjacent lot owner, his heirs or assigns; nor did the grantor, for himself, or for the owners of adjoining or adjacent land, covenant that he and they would create and enforce similar restrictions against such adjoining or adjacent land. There are cases where a restrictive covenant entered into by a grantee of a lot which is part of a general development scheme, will be enforced in equity at the suit of a subsequent grantee from the common owner, of another lot included in such scheme, but the lots now owned by complainant and defendant are not restricted alike and at the time the restrictions were imposed on lots 17 and 18, the grantors did not own lot 19. Lots 17 and 18 were owned and conveyed by Elizabeth Jewett, Mary M. MacLean and Peter B. MacLean. At that time the easterly half of lots 19, lying next west of lots 17 and 18 was owned by Edith J. Marvin

and the westerly half of lot 19 was owned by Elizabeth Jewett. It cannot be inferred that the restriction was placed in the deed to Nevin for the benefit of his grantor's retained lands, because none of his grantors owned adjoining land; two owned no adjacent land and one owned a lot twenty-five feet west of the restricted land. Complainant sought to prove a parol agreement entered into between Edith J. Marvin, Elizabeth Jewett and Mary M. MacLean, that they would restrict their respective properties for their mutual benefit and that pursuant to such agreement and for the benefit of Edith J. Marvin and Elizabeth Jewett, each owning in severalty a part of lot 19, the restrictions were placed in the deed to Nevin.

The restrictive covenant as contained in the deeds to Nevin and to defendant, is in form but the personal covenant of each grantee of Lots 17 and 18 with his grantor. It purports to state the whole agreement between the parties to it and it gives notice to subsequent purchasers of the extent to which the covenantors bound themselves. I am not persuaded that anything can be read into it to make it mean something more than what the parties to it stated and therefore testimony as to what the owners of these several lots agreed among themselves as to restrictions, is not admissible to show its meaning and effect as against a covenantor who was not a party to such parol agreement. No inference can be drawn from the covenant itself that it was intended for the benefit of adjoining lot owners and if testimony could be admitted to show such intention as between the covenantees, Elizabeth Jewett, Mary M. MacLean and Peter B. MacLean and adjoining and adjacent lot owners, there is nothing in the case to charge de-

fendant with notice of such agreement. I shall hold that defendant is bound only by notice of the restriction and of its intent and effect as it appears of record and that the restriction does not impose a burden on defendant's lands for the benefit of the lands adjoining and adjacent, now owned by complainant. (Hemsley *v.* Marlborough Hotel Co., 62 N. J. Equity, 164; McNichol *v.* Townsend, 72 N. J. Equity, 276; Sailer *v.* Podolski, 82 N. J. Equity, 459.)

The bill of complaint will be dismissed.

Final Decree.

(Filed November 30, 1925.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK C. KLIEM,
Complainant,

and

SISTERS OF CHARITY OF ST. ELIZABETH,
Defendant.

On Bill, &c.

This cause coming on to be heard in the presence of James E. Pyle, of counsel with the complainant, and Mark A. Sullivan, of counsel with defendant, and the pleadings and stipulations having been read and the proofs taken and the argument of respective counsel having been heard and considered, and the Court having duly considered said pleadings, stipulations, proofs and arguments and it appearing to the Court that the

complainant is not entitled to the relief sought for by him in his bill of complaint;

It is on this 30th day of November, 1925, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, that the complainant's bill be and the same is hereby dismissed with costs.

AND IT IS FURTHER ORDERED AND DECREED, that the complainant pay to the defendant the costs of this suit, to be taxed, and that execution issue therefor according to the practice of this Court.

E. R. WALKER, C.

Respectfully advised:
JAMES F. FIELDER, V. C.

Notice of Appeal.

(Filed November 27, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK C. KLIEM,
Complainant,

and

SISTERS OF CHARITY OF ST. ELIZABETH,
Defendant.

} On Bill, &c.

The complainant Frank C. Kliem hereby appeals from the final decree made on November 30th, 1925, in the above entitled cause by the Chancellor on the advice of Vice-Chancellor James F.

Fielder, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all cases.

Dated November 26th, 1926.

JAS. E. PYLE,
Solicitor for and of Counsel with
Complainant Frank C. Kliem.

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

JAS. E. PYLE,
Of Counsel with the Complainant
Frank C. Kliem.

Due service of the above notice of appeal is hereby acknowledged this November 26th, 1926.

MARK A. SULLIVAN,
Solicitor of Defendant.

Petition of Appeal.

(Filed December 17, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANK C. KLIEM, Complainant-Appellant, *v.* SISTERS OF CHARITY OF ST. ELIZABETH, Defendant-Appellee.	On Appeal from the Court of Chancery.

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

Petition of Appeal.

The petition of Frank C. Kliem the appellant in the above entitled cause, respectfully shows that, your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing dated November 30th, 1925, wherein said Frank C. Kliem was complainant, and said Sisters of Charity of St. Elizabeth was defendant, in this respect, to wit: The said decree orders, adjudges and decrees that complainant's bill be dismissed with costs.

And your petitioner humbly appeals from the whole of said decree upon the ground that the same is erroneous for that:

1. Said decree failed to order that said defendant be restrained from erecting any building, on that part of Plot 19, on "Map of property of William Jewett and Wm. S. L. Jewett, situated in South Bergen, Hudson Co., N. J.," now owned by defendant (being the rear 35 feet) pursuant to restrictions or covenants, in the deed for said Lot 19, made by William S. L. Jewett to Henry Carr, recorded in the Hudson County Register's office in Book 181 of Deeds, page 192, or that part thereof which provides that the "grantee, his heirs, executors, administrators and assigns will not build or cause or procure to be built upon said premises more than one house for each fifty feet of frontage," although the complainant was entitled to such restraint, because,

(a) The proofs in the case showed that said restriction was imposed pursuant to a general scheme of similar restrictions applicable to all the lots of the common owner (William S. L. Jewett) in the vicinity or neighborhood of said Lot 19; and the Court erroneously failed to so hold;

(b) The proofs in the case showed that there had not been such a general abandonment of said restriction in the neighborhood of said Lot 19, or such a waiver thereof by the said complainant, as to affect complainant's right to enforcement thereof; and the Court erroneously failed to so hold;

(c) Complainant though the owner of only a part of said lot 19 (the defendant being the owner of the other part of said lot 19), had not thereby lost the right to enforce said restriction against the owner of the other part thereof; and the Court erroneously failed to so hold;

2. Said decree failed to order that said defendant be restrained from erecting on any part of its premises, any building which including stoops or steps thereon shall be nearer to the building line of Kensington Avenue, than a point distant twelve feet therefrom, pursuant to the restrictions or covenants in the deed of said defendant's premises made by Elizabeth Jewett and Mary MacLean and husband to John J. Nevin and wife, recorded in the Register's office of Hudson County in Book 836 of Deeds page 568, as well as pursuant to the same restrictions or covenant in the deed of said premises from said John J. Nevin and wife to defendant, recorded in said Register's office in Book 1134 of Deeds page 335, although complainant was entitled to such restraint, because:

(a) The proofs and testimony showed that said restriction was placed in said deed to Nevin expressly for the benefit of said Lot 19 (now owned by complainant), and the Court erroneously refused to consider said evidence or to hold it admissible as against the said defendant, and further erroneously held that defendant was bound only

by such notice of the restriction and its effect and intent, as appears of record, that is to say as appears in said deed containing the restriction.

(b) The facts and circumstances surrounding the placing of said restriction in said deed to Nevin (and among them the fact that one of the grantors in said deed retained land adjoining or in close proximity to the premises therein conveyed), showed that it should have been inferred therefrom, that said restrictions were placed therein for the benefit of complainant's premises or a part thereof, being the premises so retained; and the Court erroneously refused to consider said facts and circumstances, or to infer therefrom that said restrictions were made for the benefit of complainant's premises or a part thereof.

(c) The failure of the deed containing said restriction to further set forth therein, that same was placed therein for the benefit of complainant's premises or the owner thereof (or words of similar import) did not bar complainant from enforcing said restriction, against defendant; and the Court erroneously so held.

JAS. E. PYLE,
Solicitor for and of Counsel
with Complainant-Appellant.

Answer to Petition of Appeal.

(Filed January 17, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANK C. KLIEM, Complainant-Appellant, *v.* SISTERS OF CHARITY OF ST. ELIZABETH, Defendant-Respondent.	On Appeal from the Court of Chancery.

The answer of the above named respondent to the petition of appeal of the above named appellant. This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless says, and admits that a decree was on the thirtieth day of November, 1925, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent 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 adjudged to this respondent.

MARK A. SULLIVAN,
Solicitor and of Counsel
with Sisters of Charity of
St. Elizabeth, Respondent.

In Chancery of New Jersey

Between

FRANK C. KLEIM,
Complainant-Appellant,

and

SISTERS OF CHARITY OF ST. ELIZABETH,
Defendant-Respondent.

On Bill, &c.

BRIEF FOR COMPLAINANT-APPELLANT.

Statement of Facts.

Complainant-appellant sought below to restrain defendant-respondent

(1) from erecting any building on the rear end (about 35 feet) of Lot 19 on Map of Property of William Jewett and William S. L. Jewett, because of the restrictions in the deed for said Lot 19, by William S. L. Jewett to Henry Carr recorded in Book 181, page 192 of Deeds, or that part which provides that the "grantee, his heirs, executors, administrators and assigns will not build or cause or procure to be built upon said premises, more than one house for each fifty feet of frontage." (2) from erecting any building on any part of its premises within 12 feet of Kensington Avenue, because of the restrictions in the deed from Elizabeth Jewett and Mary McLean and husband to John

J. Nevin and wife recorded in Book 836 of Deeds, page 568, or that part which provides that "the parties of the second part, their heirs and assigns will not erect or cause to be erected on the lands herein any building which including stoops or steps thereon, shall be nearer to the building line of Kensington Avenue, than a point distant 12 feet therefrom"; as well as because of the same restriction in the deed by Nevin to defendant.

Complainant-appellant bases his right as to (1) on the theory that William S. L. Jewett owning all the land on the south side of Kensington Avenue from Bergen to West Side Avenues, laid the same out into lots of 50 feet frontage and sold them off (or all left after the agreement with and sale to Wood hereinafter mentioned) by a series of deeds under a general scheme of improvement and restriction as to the use thereof; one of which deeds constitutes part of the chain of title of defendant-respondent's premises; and as to (2) on the theory that the common grantor of both complainant-appellant's and defendant-respondent's premises, viz., Elizabeth Jewett (after Brown) conveyed first defendant-respondent's premises creating said setback restriction thereon for the benefit of the remaining adjoining 50-foot lot belonging 25 feet thereof to herself and 25 feet thereof to her sister Edith J. Marvin and thereafter they conveyed said adjoining 50-foot lot to complainant-appellant similarly restricted. The Court below declined to grant either relief.

William S. L. Jewett owned a tract of land in Jersey City, fronting on the southerly side of Kensington (formerly Linden) Avenue, running easterly from West Side Avenue approximately 2,000 feet to Bergen Avenue, and his father, Wil-

liam Jewett, owned a tract of similar frontage on the opposite side of the same street. In March, 1864, they caused a map to be made of their lands and filed the same in the Hudson County Register's office, being the map above mentioned. This map shows the William S. L. Jewett tract laid out into thirty-one lots of fifty feet front, numbered from to to 32 inclusive, and the William Jewett tract laid out into thirteen lots of one hundred feet front. The corners at Bergen and Kensington Avenue of each tract were not divided into lots, but were shown on the map as large plots all of different frontages. By deed dated June 6, 1864, William S. L. Jewett conveyed to one Wood the unplotted southwesterly corner of Bergen and Kensington Avenues and lots 2 to 7, inclusive, adjoining the same and on the same day William S. L. Jewett, William Jewett and Wood entered into a written agreement, duly recorded in the Register's office, whereby the parties agreed that they would not erect upon any of the lots owned by them, fronting on Kensington Avenue, any slaughter house, or other nuisance and that when they, or their heirs, should convey any portion of said lands, the same restrictive covenant should be taken from their grantee.

William S. L. Jewett then proceeded to make conveyance of the remainder of his tract by reference to his map, as follows:

Lots 13, 14, 15 and 16, with the restrictive covenant against nuisances and the further covenant that the grantee, her heirs or assigns, will not build upon the premises conveyed more than one house for each fifty feet of front thereof, nor any house to cost less than $2,000.

Lots 25 and 26, with the same restrictive covenants applying to the lots last above.

Lots 17 and 18 (being part of the land involved

in this suit) with no covenants. These lots were occupied as the residence of grantor and the deed was to grantor's father, who, by deed made and recorded simultaneously therewith, conveyed the same lots to Mary S. Jewett, the wife of said William S. L. Jewett.

Lots 8, 9, 10, 11 and 12, with restrictive covenants that the grantee, her heirs or assigns, will not erect on said premises any house to cost less than $3,000 and that within fifteen years from the date of the deed, no more than one dwelling house will be erected on any one of the lots conveyed.

Lots 20, 21, 22, 23 and 24, with restrictive covenants the same as those covering lots 13 to 16 inclusive.

Lot 19 (being the balance of the lands involved in this suit) with restrictive covenants the same as those covering lots 13 to 16 inclusive and an additional restriction against the erection of a stable, with an agreement on the part of the grantor to release the restriction against a stable after five years from the date of the deed, in case the grantee should sell the lot. The deed for this lot contains a provision which does not appear in any previous conveyance made by the grantor, namely, that for any and every violation of the covenants contained therein, the grantee, his heirs or assigns, will forfeit and pay to the grantor, his heirs, executors or administrators, $1,000 as ascertained and liquidated damages.

Lots 27, 28, 29, 30, 31 and 32 and the unplotted corner adjoining the same on the southeasterly corner of West Side and Kensington Avenues, with restrictive covenants the same as those covering lots 13 to 16 inclusive and the same provision for penalty in case of violation, as contained in the deed last above.

Thus, all the land owned by William S. L. Jewett

was conveyed by him and came into the ownership of various persons by mesne conveyances through his grantees. In or about 1891 the Hudson County Boulevard, running in a northerly and southerly direction, was cut through the tract, taking the easterly part of lot 17, with other property.

By mesne conveyances executed in or prior to 1886, title to lots 17, 18 and 19 (being all the land involved in this suit) was in Mary M. Jewett (afterward MacLean) a daughter of William S. L. Jewett, which deeds contained no restrictions and in 1887 she conveyed an interest in the three lots to her sisters Elizabeth Jewett (afterward Brown) and Edith Jewett (afterward Marvin) by deeds containing no restrictions. In 1893 these three owners rearranged their interests by mutual conveyances to each other, and the easterly one-half of lot 19, twenty-five feet wide by one hundred feet deep, was conveyed to Edith J. Marvin; the westerly one-half of lot 19, twenty-five feet wide by one hundred feet deep, was conveyed to Elizabeth Jewett, and the westerly one-half of lot 18, twenty-five feet wide by one hundred feet deep, was conveyed to Mary M. MacLean. Lots 17, 18 and 19 are shown on the Jewett map as being approximately one hundred and thirty-five feet in depth. After mutual conveyances between the sisters, title to the rear thirty-five feet in depth of lots 18 and 19, the easterly one-half of lot 18 and the portion of lot 17 remaining after the opening of the Hudson County Boulevard remained in the three sisters as tenants in common, until 1895, when Edith J. Marvin conveyed her undivided interest in the lands held in common, to Peter B. MacLean, (husband of Mary M. MacLean). No restrictions of any kind appear in the deeds for lots 17, 18 and 19 from the time Mary M. MacLean had title in 1886, down to the deeds next hereinafter mentioned.

By deed dated June 16, 1903, Elizabeth Jewett, Mary M. MacLean and Peter B. MacLean, then owning so much as remained of lot 17, the easterly one-half of lot 18 and the rear thirty-five feet in depth of lots 18 and 19, as tenants in common and the said Elizabeth Jewett owning in severalty the said westerly one-half of lot 18, conveyed said lands to John Nevin and wife, with restrictions that the grantees, their heirs and assigns, should not erect any building nearer the building line of Kensington Avenue, than twelve feet, including stoops and steps; that no dwelling house thereon should cost less than $2,000; that no stable should be erected within one hundred feet of Kensington Avenue, and that no slaughter house or other nuisance should be permitted. John Nevin and wife conveyed the same premises to defendant-respondent by deed dated November 19, 1912, containing the same covenant as to restrictions on the part of defendant-respondent, its successors and assigns.

By deed dated February 16, 1906, Elizabeth J. Brown conveyed to Charles H. Smith the westerly one-half of lot 19, twenty-five feet wide by one hundred feet in depth, said deed containing a covenant on the part of the grantee that he, his heirs or assigns would not erect on the premises conveyed any structure other than a dwelling house; or any dwelling house nearer the building line of Kensington Avenue than twenty-five feet; or more than one dwelling house upon the premises conveyed and upon the premises adjoining easterly contiguous thereto, then being conveyed to grantee by Edith J. Marvin by deed of even date; or any dwelling house to cost less than $2,000; or any slaughter house or other nuisance. Simultaneously by deed of even date, Edith J. Marvin conveyed to Charles H. Smith the easterly one-half of lot 19, twenty-five feet wide by one hundred feet in depth,

which deed contained an identical restrictive covenant as the deed from Elizabeth J. Brown to said Smith, and in like manner referring to said deed of Brown to Smith. By deed dated November 4, 1916, Charles H. Smith conveyed to complainant-appellant the whole front of lot 19, being a lot fifty feet wide by one hundred feet in depth, which deed contained the same restrictive covenants as in the deeds to Smith.

On its lands defendant-respondent has commenced the erection of a school building which extends out to the line of Kensington Avenue, and will cover practically the entire area of its land. Complainant-appellant claims that this structure will be in violation of both sets of restrictions imposed on defendant-respondent's lands, and that it will shut off the light, air and view from complainant-appellant's dwelling house, which is erected on his lands in strict compliance with the restrictions applying thereto.

STATEMENT OF LAW.

AS TO RESTRICTION ABOVE REFERRED TO AS (1) PROHIBITING MORE THAN ONE BUILDING ON EACH 50 FEET OF FRONTAGE.

POINT I.

Said restriction was imposed pursuant to a general scheme of similar restrictions applicable to all lots of the common owner (William S. L. Jewett) in the vicinity of said lot 19.

The first thing done after filing the map was the deed to Wood and the making at the same time of agreement between William S. L. Jewett, Wil-

liam Jewett and Wood to impose certain general restrictions against nuisances upon their respective lands. This shows a purpose on the part of William S. L. Jewett to adopt a general scheme of restrictions and recording the agreement gives notice thereof; William S. L. Jewett went further than the other two parties to the agreement, and to his lots thereafter sold by him adds the additional restrictions that only one house should be erected on each 50 feet of frontage; and this same limitation is found in every deed thereafter by him of his lots, except lots 17 and 18 on which he lived and which he never sold, but transferred same to his wife, and which in turn his wife never sold, but which through mesne conveyances through relatives reached finally her children, and except further that in the deed for lots 8 to 12 for some unknown reason, this restriction was limited to 15 years from the date of the deed. It is true that in two of the deeds he added a fixed sum as damages for violation of the restrictions, but that does not in any way affect the question here involved. This uniformity of restriction as to one house on each 50 feet in each deed, and filing of the map laying the land out into lots of 50 foot frontage, further confirms this general restrictive scheme; and it is further confirmed by the general compliance therewith by the buildings built upon the land and even now after many years of change the land is with few exceptions improved in that way. See Hopkins Map made in 1919 (p. 32 of State of Case); (lot 15 shown thereon was made less than 50 feet frontage by cutting through the Boulevard (see p. 30 of State of Case). And years after two of his children having title each to 25 feet frontage of lot 19, join in selling to one grantee, viz.: Charles Smith, so that he shall have

50 feet frontage to build on and thus restrict him from carrying out the old restrictive scheme.

We come within the rule laid down in

DeGray v. *Monmouth Beach,* 50 N. J. E. 329.

POINT II.

There has not been such a general abandonment of the said restriction in the neighborhood of said lot 19 or waiver thereof by complainant-appellant as to affect his right to enforcement.

The Court below in its conclusions held that the neighborhood of complainant-appellant's property is so changed that it would be inequitable to enforce this restriction, and in supporting that proposition cites:

(1) Many houses on the north side of Kensington Avenue are built on less than 50 feet front; but we have nothing to do with property on the north side of Kensington Avenue, it was never the property of William S. L. Jewett, and we make no claim that it was intended to be so restricted; what was done with that property we have no power to control so long as it complies with the agreement between William S. L. Jewett, William Jewett and Stephen G. Wood, and that it does;

(2) Two apartment houses now erected on the William S. L. Jewett land on the south side of Kensington Avenue, one near Bergen Avenue (on the land sold to Wood) and the other near West Side Avenue; although they are not private dwellings they do not violate the restriction, and if they did they are at the extreme ends of the original tract, and so far from complainant-appellant's land as not to affect or disturb him, and

he is not therefore bound thereby—*Pearson* v. *Staord*, 88 N. J. E. 385;

(3) That owners of lots in the William S. L. Jewett tract have acquiesced in violations of the restriction and cites the three double houses each on less than 100 feet front just west of complainant-appellant's and one house on a 25 foot lot, which were built some 30 years ago; they were built long before complainant-appellant acquired his property and while the double houses do not strictly comply, they were built in such a way as not to offend the neighbors of that time, they offend no one now; it may even be there was then doubt whether they legally violated the restriction, since then the case of *Brigham* v. *Mulock*, 74 N. J. E. 287, decided that such a house does; these with a similar violation on one of the lots sold to Wood near Bergen Avenue about a block away (and this was part of the corner plot not laid out in 50 foot lots), are the only violations cited out of all the land sold; a general abandonment must be shown, not several violations only, not seriously affecting complainant-appellant; see *Barton* v. *Slifer*, 72 N. J. E. 812 and *Pearson* v. *Stafford* (*supra*);

(4) On lots 8 to 12 the restriction was limited to 15 years from date of deed, and that time has expired; on these lots houses complying with the restriction were long ago built and still remain and until the restriction is violated no complaint can be made against them; the fact that the restriction has expired does not in itself create a changed neighborhood, or an abandonment of the scheme; the buildings thereon may remain as they are. I doubt if very many restrictive schemes could show so few violations over a period running from 1864 to the present time.

POINT III.

Complainant-appellant though the owner of only the front part of lot 19, the defendant-respondent being the owner of the other part thereof, has not thereby lost the right to enforce the restriction.

The Court below in its conclusions holds to the contrary; and further says that is so although complainant-appellant built on his part first, and by way of illustration asks if the owner of the rear part built first would that bar the owner of the front part from building? I maintain it would; and that the restriction means what it says. Some building must necessarily be the first to be built thereon and thereafter no other can be built without violating the restriction. Whether lot 19 be owned by one or more than one person, only one building can be built thereon, and that must necessarily be the first one.

AS TO RESTRICTION ABOVE REFERRED TO AS (2) PROHIBITING ANY BUILDING WHICH WITH STOOP AND STEPS SHALL BE NEARER TO KENSINGTON AVENUE THAN 12 FEET THEREFROM:

POINT I.

The proofs below showed that the restriction was placed in the deed to Nevin for the benefit of premises of complainant-appellant.

POINT II.

The facts and circumstances surrounding the placing of said restriction in the deed to Nevin (and among them the fact that one of the grantors in said deed retained land adjoining or in close proximity to the premises therein conveyed), showed that it should have been inferred therefrom, that said restrictions were placed therein for the benefit of complainant-appellant's premises or a part thereof, being the premises so retained.

POINT III.

The failure of the deed containing said restriction to further set forth therein that same was placed therein for the benefit of complainant-appellant's premises or the owner thereof (or words of similar import) did not bar complainant-appellant from enforcing said restriction against defendant-respondent.

The above Points I, II and III can conveniently be argued together.

On this subject the Court below admitted some evidence and excluded some (as we think erroneously) and some was admitted subject to motion to strike out, which however was never made (see State of Case, pp. 49, 50, 53 and 54).

Before arguing this point, I wish to explain what the other side has claimed to be a difference in the setback restriction on the respective properties of complainant-appellant and defendant-respondent; that on the defendant's property being 12 feet to stoop and steps, and that on complainant's being 25 feet to the house itself; the apparent

intention being to allow about 13 feet for front stoop and steps on complainant's premises as is further shown by testimony (see State of Case, p. 55), thus making a uniform line; although it was not necessary that the two should be the same in order to bind the defendant's land.

The Court below followed the observations made by Vice-Chancellor Leaming in *Sailer* v. *Podolski*, 82 N. J. E. 459; in which he says in effect that the deed containing such restriction must state for whose benefit it is made, and that evidence outside the deed is not admissible to show for whose benefit it was made, nor is there any presumption to be drawn from the circumstances. These observations are mere dicta, the decision being based on the fact that no circumstances in the case showed the restriction was made for the benefit of the complainant. This rule seems to be one developed by Vice-Chancellor Leaming and was first suggested by him in his opinion in *McNichol* v. *Townsend*, 73 N. J. E. 276. I am unable to find any other case in this State that goes so far. In fact our other cases on the subject seem to take for granted that just opposite is the correct rule—

Brewer v. *Marshall*, 19 N. J. E. 537;
Hayes v. *Waverly R. R.*, 51 N. J. E. 345;
Robert v. *Scull*, 58 N. J. E. 396;
Meaney v. *Stark*, 80 N. J. E. 60;
Newberry v. *Barkalow*, 75 N. J. E. 128.

And this Court has already settled the question in this State, holding adversely to the rule stated by Vice-Chanceller Leaming in *Sailer* v. *Podolski*, *supra*.

Hemsley v. *Marlborough House*, 68 N. J. E. 596. *Hemsley* v. *Marlborough*, *supra*, reversed a decision by Vice-Chancellor Reed in which he dis-

missed the bill of complaint (65 N. J. E. 167), and in which he followed a similar decision by himself in a suit between the same parties involving another clause of the same restrictive covenant (62 N. J. E. 164), in which he attempted to lay down the same rule as Vice-Chancellor Leaming in *Sailer* v. *Podolski, supra.*

If we wish to go outside of this State there is ample authority for the rule not only that evidence may be offered as to whom the restriction was for the benefit of, but that there is a presumption that it is for the benefit of the retained land of the grantor. And in our case it must be borne in mind that there is not only evidence of whose benefit it was intended for, but that the premises of complainant-appellant were the only lands which the common grantor had then left (see State of Case, p. 54); and that fact together with the fact that a setback restriction is involved, should make the inference strong that the restriction was intended for the benefit of that retained land.

For English cases to that effect, see

Master v. *Hansard,* 4 Ch. Div. 724;
Tulk v. *Moxhay,* 2 Phil. 774;
Mann v. *Stephens,* 15 Sim. 376;
Childs v. *Douglas Kay* 500 (criticized in *Keats* v. *Lyons L. R.,* 4 Ch. App. Cas. 218).

Also in Massachusetts, see *Peck* v. *Conway,* 119 Mass. 546, which says (at p. 549):

> "The question whether such easement is a personal right or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement aided if necessary by the situation of the property and

> the surrounding circumstances," also, "The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate."

And see also *Beals* v. *Case,* 138 Mass. 138 (at p. 140), which in speaking of the intent of the parties says:

> "But it is always a question of the intention of the parties and in order to make this rule applicable it must appear from the terms of the grant or *from the situation and surrounding circumstances* that it was the intention of the grantor in inserting the restrictions to create a servitude or right which should enure to the benefit of the plaintiff's land."

In New York, *Post* v. *Weil,* 115 N. Y. 361 (at 373), says:

> "I think we will all agree that the presumption here as in every other case where a restriction is inserted in a deed against undesirable structures or trades is that the insertion was for the purpose of protecting rights which the grantor had in adjacent property."

In Missouri, *Coughlin* v. *Barker,* 46 Mo. Opp. 54 (at 61), says:

> "We fully concede the general rule which is invoked in behalf of plaintiff. That rule is that where the common grantor of 2 adjoining lots sells one and retains the other, and puts in the deed of the one which he sells a covenant against building in a certain way, which covenant is manifestly intended for the benefit of the lot which is retained, and he afterwards sells this lot to another, the covenant passes to the assign of such lot, as an appurtenant to it or as an easement for the benefit of it, and such assign may enforce it against the owner of the other lot, whether he acquired the other lot immediately from the original vendor or through mesne conveyances or by

> devise, descent or otherwise, from him, provided he took with notice of it actual or constructive,"

and,

> "such a restriction with land conveyed is generally construed to have been intended by the parties to the deed for the benefit of the land retained by the grantor in the deed, since in most cases it could obviously have no other purpose—nor does it defeat this conclusion that the purpose is not expressed in the deed or that the deed contains no reciprocal covenant on the part of the grantor to observe a like restriction in respect of the land retained by him."

and again at page 63,

> "In determining this question it must be conceded that there is at the outset in every case where the owner of a piece of property divides it and sells a part of it, imposing upon his vendee a restriction as to its uses, a presumption that he imposes such restriction for the benefit of the part which he retains."

Such rule upheld by the foregoing cases would seem to be founded on logic and good common sense. The contrary rule as maintained by the Court below is not only contrary to the foregoing cases but is at variance with the long-established rule in real estate transfers, that whatever appears in the record chain of title of the land, is notice to any subsequent purchaser thereof, and furthermore whatever puts one on inquiry is notice of such facts as reasonable inquiry would ascertain.

Lee v. *Woodworth,* 3 N. J. E. 37;
Schwoebel v. *Storrie,* 76 N. J. E. 466;
Wahl v. *Stoy,* 72 N. J. E. 607;
Majewski v. *Trienberg,* 4 N. J. Adv. Rep. 566;
39 *Cyc.,* 1710-1711-1717.

Therefore, if it can be said the defendant-respondent, because his title deeds did not specifically say for whose benefit the restrictions were intended, lacked legal notice thereof, he at least had sufficient notice to put him on inquiry as to whose benefit the restrictions were intended, just as any other purchaser of real estate would be put on inquiry as to any outstanding rights mentioned in any of his title deeds of record. And can there be any doubt, that if defendant-respondent had made such inquiry, it could readily have ascertained for whose benefit the restrictions were made? Instead the defendant-respondent elected to erect its proposed building in utter disregard of the restrictions in its title deeds of record, and in defiance of the restrictions which it in solemn form covenanted to keep in the deed to it for its property.

The Court below in its opinion gives as one of its reasons for refusing relief, that it cannot be inferred that the restriction was placed in the deed to Nevin for the benefit of grantors' retained lands because none of his grantors owned adjoining lands. The common grantor was really Elizabeth Jewett (Brown) and Edith Jewett Marvin acting together as one owner of the fifty-foot plot sold to Smith, of which they each owned 25 feet frontage, they conveyed to Smith simultaneously and their respective deeds refer the one to the other in such a way as to show the tract was treated as one plot of 50 feet front. But assuming that is not so and that Elizabeth Jewett (Brown) was the common grantor, her two parcels of land while they did not adjoin at the front or street line, they did at rear line of complainant-appellant's land; but the rule that the restrictions are inferred to be for the benefit of the grantors' retained land does not mean that such retained land must border or adjoin the land sold; it only means the land

must be in such proximity as to be affected; most of the cases use the term adjacent; the land may even be on the opposite side of the street as was the case in *Hemsley* v. *Marlborough*, 62 N. J. E. 164.

The decree below should be reversed.

Respectfully submitted,

JAMES E. PYLE,
Solicitor for the Complainant-Appellant.

New Jersey Court of Errors and Appeals

Between

FRANK C. KLIEM,
Complainant-Appellant,

and

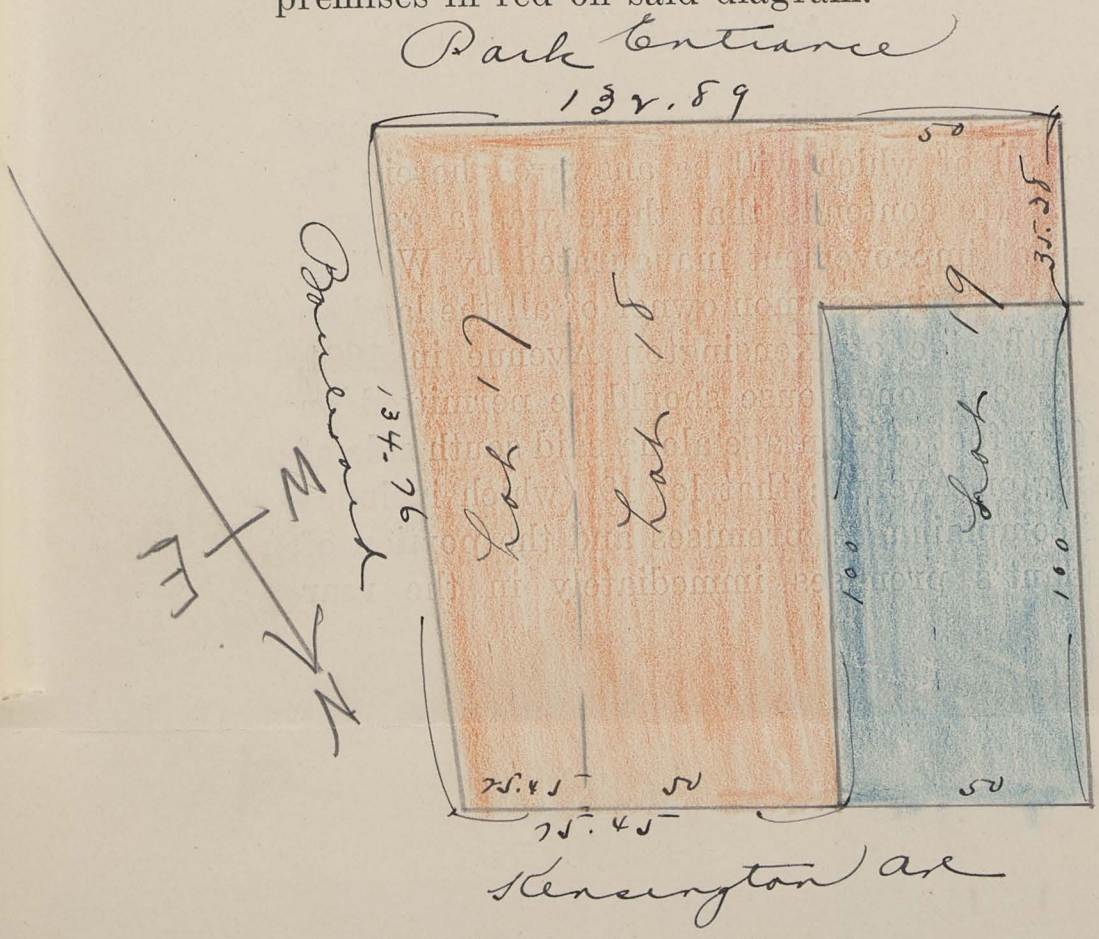
SISTERS OF CHARITY OF ST. ELIZABETH,
Defendant-Respondent.

On Appeal from Chancery.

BRIEF FOR DEFENDANT-RESPONDENT.

Statement of Facts.

Complainant-appellant is the owner in fee of premises shown in blue on diagram below and defendant-respondent is the owner in fee of the premises in red on said diagram.



Defendant-respondent has begun construction and has the foundation completed on a building to be used as a school and convent which will practically cover its whole plot, the walls of which will extend along its property lines on all sides except the easterly side of complainant's premises, where defendant's wall will be three feet east of complainant's easterly line.

Complainant-appellant contends that defendant should be restrained from erecting

(A) any structure whatever on the plot 50 x 35, being the balance of lot 19 immediately in the rear of his premises;

(B) from erecting any part of its building within twelve feet of Kensington Avenue.

The Decree dismissing complainant-appellant's bill was signed and filed November 30th, 1925. The Notice of Appeal from such decree was filed November 27th, 1926.

All of the references herein to lot numbers refer to the lots as they appear on the map of property of William Jewett and William S. L. Jewett attached to the Stipulation (S. of C., p. 32).

Argument.

As to (A) complainant-appellant makes three points, all of which will be answered herein together. He contends that there was a general scheme of improvement inaugurated by William S. L. Jewett, the common owner of all the land on the south side of Kensington Avenue in 1864, whereby only one house should be permitted on each fifty foot of frontage along said south side of Kensington Avenue; that lot 19 (which includes all of complainant's premises and the portion of defendant's premises immediately in the rear

thereof) was conveyed by said William S. L. Jewett in 1868 by a deed containing such restriction and that as complainant's house is already on said lot, no building can be erected on any other portion of said original lot 19, although such other portion is now owned by another.

Defendant's answer to this is

1. There was no such general scheme.

2. If there was such a scheme it has been largely disregarded and is now not binding.

3. That the opening of the Hudson County Boulevard has produced a changed condition which would make it inequitable to enforce such restriction on defendant.

4. That lot 19 was relieved from such restriction.

5. That there is no such restriction in the deed to defendant nor in the deed to defendant's grantor.

6. That complainant as an owner of but part of the original Lot 19 is not entitled to enforce such restriction as against the owner of the remainder of Lot 19.

POINT I.

There was no such general scheme.

No such general scheme of improvement can be found set out in any instrument and implication must be resorted to, to sustain it. The only ground for such implication is that William S. L. Jewett, the common grantor inserted some such form of restriction in most of the deeds given by him for land along the south side of Kensington Avenue.

But this of itself is not sufficient to show any general scheme of improvement.

Sailer v. *Podolski,* 82 N. J. E., 459, at p. 462;
Mulligan v. *Jordan,* 50 N. J. E., 363, at p. 365;
Roberts v. *Scull,* 58 N. J. E., 396, at p. 404;
Haines v. *Einwochter,* 55 Atl. 38;
Webber v. *Landrigan,* 215 Mass. 221.

The only general scheme of restrictions affecting the properties in question is the one set forth in the Stipulation (S. of C., p. 16, par. a) which was entered into by the owners of all property on both sides of Kensington Avenue from Bergen Avenue to West Side Avenue and which forbids the erection of any nuisances, and the fact that such scheme was entered into indicates that the owners considered that for the purposes of development all the property on both sides of Kensington Avenue, between Bergen and West Side Avenues, should be taken as a unit. To say now that there was another general scheme of development within this one, but applying only to the lots on the south side of Kensington Avenue is rather incongruous, particularly, as both are supposed to have been inaugurated about the same time.

It is true that William S. L. Jewett in conveying from time to time over a period of four and a half years, lots 8 to 33 inclusive, on the south side of Kensington Avenue, put into such deeds (excepting the deeds for lots 17 and 18) in some manner a restriction against the erection of more than one house on each fifty foot of frontage but such restrictions were not declared to be in pursuance of any general scheme, nor did he in any deed covenant on his part to observe such restriction in disposing of his remaining property. In fact, in

disposing of various parcels he varied the restriction in very important particulars, to wit:

In the deed to Adelaide A. Merwin for lots 8 to 12 inclusive (S. of C., p. 19, par. e) he limited the restriction to a period of fifteen years from the date of the deed, which was May 16th, 1867.

In the deed to Henry J. Carr for Lot 19, which includes the premises in question (S. of C., p. 20, par. g) he provided for the payment of $1,000 to himself, his heirs, executors and administrators as liquidated damages for every violation of the restriction, thus showing that it was a personal covenant with him and not a restriction for the common benefit of the lots on said side of Kensington Avenue.

In the deed last mentioned he agreed to release the said Lot 19 from the burden of such restriction insofar as it applied to private stables, after a period of five years and under certain conditions. This he could not have done if the restriction was not a personal covenant with him.

In the deed to Henry J. Carr and Richard Westervelt for Lots 27 to 33 inclusive (S. of C., p. 21, par. h) he provided for a like payment of damages to himself, his heirs, executors and administrators as in the deed to Lot 19, which necessarily implied a personal covenant and not a general scheme binding on him.

No restrictions whatever were placed on Lots 17 and 18 (S. of C., p. 21, ll. 13-40) and Lots 1 to 7 were free of restrictions, except as to nuisances (S. of C., p. 16, par. a). It thus appears that out of the 33 lots on the south side of Kensington Avenue, 9 were conveyed without restriction as to the number of houses that could be erected on each fifty foot of frontage, 5 were conveyed with a restriction of one house to each fifty foot of frontage, which restriction was to last fifteen years from 1867, 8 were conveyed with such a restric-

tion but providing for the payment of damages for its violation to the grantor, his heirs, executors and administrators and but 11 or one-third of the total number with a restriction of one house to each fifty foot of frontage without qualifications. These last named 11 are not contiguous to one another and the opening of the Boulevard has taken away approximately 1½ of such lots, so that the number is now reduced to 9½ lots out of 33.

Such a condition certainly does not show any general scheme.

Sailer v. *Podolski,* 82 N. J. E. 459, at pp. 461, 462;
Scull v. *Eilenberg,* 94 N. J. E. 759;
McNichol v. *Townsend,* 73 N. J. E. 276, at p. 279;
Hemsley v. *Marlborough Hotel Co.,* 62 N. J. E. 164, at p. 169;
Roberts v. *Scull,* 58 N. J. E. 396, at pp. 403, 404;
De Gray v. *Monmouth Beach Hotel Co.,* 50 N. J. E. 329.

POINT II.

If there was such a scheme it has been largely disregarded and is now not binding.

The four lots immediately adjoining complainant's on the west, to wit, Lots 20, 21, 22, 23 have seven houses built on them, which have been standing over thirty years (S. of C., p. 29, par. 5; see Hopkins Map of J. C., S. of C., p. 32), long before complainant's house was built or complainant bought his land (S. of C., p. 29, ll. 7-15). Two apartment houses have also been erected, one at either end of the tract (S. of C., p. 30, ll. 20-26).

There was also erected on fifty feet of Lot 1, two houses (S. of C., p. 30, ll. 11-17).

In the deed from Merwin to Hamblin for Lots 9 and 10 (S. of C., p. 20, ll. 1-10) it was provided that the restriction should not prevent the erection of a double house under one roof with two front doors to accommodate two separate families.

In the deed to Adelaide A. Merwin for Lots 8 to 12 (S. of C., p. 19, par. e), the restriction is limited to a period of fifteen years from May 16th, 1867, and has therefore long ago expired and the owners of these lots can and will undoubtedly use them without regard to such restriction.

In addition to the above facts almost all the houses on the opposite side of Kensington Avenue, between the Boulevard and West Side Avenue are built on twenty-five foot front lots (S. of C., p. 30, par. 6; Map, p. 32) and it would be inequitable to enforce such restriction against defendants under the circumstances.

Fisher v. *Griffith Realty Co.*, 88 N. J. E. 204.

POINT III.

The opening of the Hudson County Boulevard has produced a changed condition which would make it inequitable to enforce such restriction on defendant.

When William S. L. Jewett made his map and began to sell lots on the south side of Kensington Avenue in 1864, there was no street crossing Kensington Avenue between Bergen Avenue and West Side Avenue (see Map attached to Stipulation, S. of C., p. 32). By November, 1868, he had sold all the lots on the south side of Kensington Avenue (S. of C., p. 21, ll. 13-22). The Hudson

County Boulevard was opened about 1891 (S. of C., p. 23, ll. 9-18). It is a road 100 feet wide and at the point where it crosses Kensington Avenue runs parallel to West Side Avenue (See p. 16 of Plat Book of Jersey City, S. of C., p. 32). As opened it gave the owner of Lot 17 an additional frontage on a new street of about 135 feet which if used with Lot 18 or 19 made a very desirable location for houses fronting on the Boulevard. The rear part of Lot 19 was attached to and sold in connection with Lots 17 and 18 undoubtedly for this very reason. As a matter of fact, defendant's predecessor in title, Nevin, when he bought the plot, changed the house erected thereon so that instead of it facing on Kensington Avenue, it fronted on the Boulevard (S. of C., p. 26, ll. 39, 40, p. 27, l. 1).

POINT IV.

Lot 19 was relieved from such restriction.

The only deed conveying Lot 19 in which the restriction is mentioned is the deed to Henry J. Carr (S. of C., p. 20, par. g). This deed contained the clause imposing a certain sum as liquidated damages to be paid to the grantor, his heirs, executors and administrators, in case of the violation of the restriction, thus showing that the covenant was personal to the grantor and not for the benefit of all the lots on Kensington Avenue. The deed also contained an agreement on the part of the grantor to release the lot from one of the restrictions after five years under certain conditions, again proving the covenant to be a personal one. When the deed was given a purchase money mortgage containing no restrictions, was taken back by the grantor which mortgage was subsequently assigned and foreclosed and the holder of

the mortgage purchased the property at the execution sale. If the original grantor had foreclosed the mortgaged and purchased the property, he would have taken it free of restrictions because such restrictions were only personal covenants with him and he could release them, but all of his rights as holder of the mortgage passed to his assignee and when such assignee took title, the land was free of restrictions. That such was the understanding of the new owner is evident from the fact that no restriction of this character was imposed by such owner in subsequently conveying the property (S. of C., pp. 22, 23, 24) although such new owners were the children of said William S. L. Jewett, the original grantor.

The following from *Sailer* v. *Podolski, supra,* is pertinent:

> "The covenants contained in the deed of conveyance from the common grantors to defendant's predecessor in title are solely covenants of the grantee; grantors neither bind themselves to enforce or perpetuate the covenants against their grantee and his assigns nor to create or enforce similar or any covenants against subsequent purchasers of other parts of their land, nor do the covenants in any way state that they are for the benefit of subsequent purchasers of all or any part of the unsold lots of grantors; the covenants are in form purely personal covenants of the grantee to his grantors, restricting the manner in which the grantee should use the land granted. If these covenants were intended by the parties to embody stipulations which were not expressed, if they were intended by the parties to include by implication the Stipulation that they were for the benefit of the purchasers of all or some particular portion of the unsold lots of the grantors, or were to be enforceable at the instance of subsequent grantees of remaining lots, the accurate ascertainment of that intention is clearly nec-

essary to clothe the subsequent purchaser with the right of enforcement of the covenants. This has been the view uniformly accepted by the Courts of this State of Coudert *v.* Sayre, 46 N. J. E. 386, and De Gray *v.* Monmouth Beach, 50 N. J. E. 329, to the present time.

Sailer v. *Podolski,* 82 N. J. E. 459, at p. 463.

POINT V.

There is no such restriction in the deed to defendant nor in the deed to defendant's grantor.

In the whole chain of title of the portion of Lot 19 now owned by defendant, in only one deed, namely the deed to Carr, does such a restriction appear (see preceding point). In the deed for defendant's premises from the children of William S. L. Jewett to Nevin and from Nevin to defendant, no such restriction appears (S. of C., pp. 25, 26, 27, par. 3).

POINT VI.

Complainant as owner of but part of the original Lot 19 is not entitled to enforce such restriction as against the owner of the remainder of Lot 19.

No part of Lot 19 is dominant as to any other part, and it is only in favor of a dominant estate that a restriction can be enforced. The restriction was either a personal covenant with William S. L. Jewett, the grantor, in which event, of course, complainant would have no case, or else it was imposed for the benefit of neighboring property;

but complainant does not own any neighboring property to Lot 19, he owns a part of Lot 19, the servient tenement itself, consequently he can have no right to enforce the restriction as against the owner of another part of said Lot 19.

Jewell v. *Lee,* 14 Allen (Mass.), 145; 92 Amer. Dec. 744;
Graham v. *Hite,* 93 Ky. 474; 20 S. W. Rep. 506.

As to the Restriction Above Referred to as (B).

As to (B). Complainant-appellant makes three points which he argues together and which will be answered herein together; he contends that defendant should be restricted from building within 12 feet of Kensington Avenue, because in the deed to defendant's grantor Nevin, there is a covenant on the part of the grantees that they "their heirs and assigns will not erect or cause to be erected on the lands herein, any building which including stoops or steps thereon, shall be nearer to the building line of Kensington Avenue, than a point distant 12 feet therefrom" and this covenant was also included in the deed for defendant's property from the Nevins to defendant.

In order to sustain this contention, complainant must show that such restriction was in pursuance of a general scheme of improvement or that it was imposed for the benefit of complainant's lot.

Sailer v. *Podolski,* 82 N. J. E. 459, at p. 462.

POINT I.

There was no such general scheme.

No such restriction appears in any of the deeds out of William S. L. Jewett for the 33 lots on the south side of Kensington Avenue (S. of C., pp. 16-21; p. 29, ll. 23-28). The mere fact that the houses as built along said south side of Kensington Avenue did set back from the street, in the absence of any restrictions in the deeds, imposes no restrictions as to where they or future buildings shall be placed and that the owners realized this is evident from the fact that the houses set back at varying distances (See Map, S. of C., p. 32) and the two-brick apartments recently built, one near Bergen Avenue and the other near West Side Avenue were both set nearer the building line than any of the old houses (S. of C., p. 30, ll. 20-27).

With the exception of William S. L. Jewett, already referred to, the only common owners of the property of complainant and defendant, were Mary Jewett, his daughter, who conveyed an interest therein to each of her two sisters (S. of C., p. 22, ll. 32-36), which deeds contained no restrictions (S. of C., p. 24, ll. 22-24), thus making the said three sisters common owners and when they conveyed the land now owned by complainant out of the common ownership by two separate deeds, one to Edith J. Marvin and the other to Elizabeth Jewett (S. of C., p. 23, ll. 22-37) and also when they conveyed a part of defendant's premises, 25 x 100, and adjoining on the east complainant's premises, by deed to Mary McLean (S. of C., p. 23, ll. 37-40; p. 24, ll. 1-7) no restrictions were placed in such deeds (S. of C., p. 24, ll. 22-24). In-

deed, when the title to complainant's and defendant's land stood as depicted on the diagram (S. of C., p. 24), no restriction as to building line had ever been inserted in any of the deeds for said property down to that time.

A glance at the diagram on p. 24 of the S. of C. will also show that the properties were not then in a common ownership.

If a common scheme of development could be imposed upon such a small plot under these circumstances, manifestly there would have to be a covenant or agreement binding upon all of the owners and setting out such scheme. No such covenant or agreement exists.

In this posture of affairs when the title was as set out on the diagram on page 24 of the State of Case, defendant's property was conveyed to defendant's grantor by deed from Elizabeth Jewett, Mary McLean and Peter McLean, her husband, which deed contained the restriction above set out as to the building line (S. of C., p. 25, par. 3). *Said grantors did not then own the adjoining property* (S. of C., p. 24, diagram).

In the deed to defendant's grantor, the building was to be set back 12 feet from Kensington Avenue, but it need not be a dwelling (S. of C., p. 26, ll. 25-31).

In the deed to complainant's grantors some three years thereafter, the building was to be set back 25 feet from Kensington Avenue and was limited to a dwelling house (S. of C., p. 27, par. 4). Certainly no general scheme of development is apparent under these circumstances.

For the reasons set out above such restriction cannot be considered as carrying out any general scheme of development.

POINT II.

The restriction as to building line was not imposed for the benefit of complainant's lot.

The burden is on the complainant to prove that the covenant was made for the benefit of his lot.

> *Sailer* v. *Podolski,* 82 N. J. E. 459, at p. 462;
> *Hemsley* v. *Marlborough Hotel Co.,* 62 N. J. E. 164, at 170.

The deed containing the restriction does not recite that it was imposed for the benefit of adjoining or any other property (S. of C., p. 25, par. 3).

The adjoining property was not owned by the grantors named in the deed containing the restriction (S. of C., p. 24, diagram).

The restriction in the deed to defendant's property prohibited the erection of any structure within 12 feet of the building line (S. of C., p. 26, ll. 25-31) while the restriction in the deed to complainant's property placed the limit at 25 feet from the building line (S. of C., p. 27, par. 4) indicating that the restriction in the deed to defendant's property was not intended for the benefit of complainant's lot. Complainant-appellant attempts to show, in his brief, that these restrictions amount to the same thing, but manifestly, that is not so. Defendant could in strict conformity to the letter of such restrictions build the wall of its building 12 feet from the building line while complainant to conform to the restrictions in his deed would have to stay 25 feet away from such line. Such conclusion must also obtain when it be noticed that complainant's land was restricted

to be used only for dwelling house purposes (S. of C., p. 27, par. 4) while defendant's land contained no such restriction (S. of C., p. 26, ll 25-31).

Upon what reasonable ground, therefore, can it be said that such restriction was imposed upon defendant's property for the benefit of complainant's land?

As was pertinently said in *Sailer* v. *Podolski,* 82 N. J. E. 459, at page 465:

> "The lot now owned by complainant is indeed adjacent to the lot of defendant, but in the absence of a general scheme of development that circumstance cannot, in my judgment, be deemed operative to enlarge or define the covenant of the parties in such manner that it can with certainty be said to have been made for the benefit of subsequent purchasers of such adjacent lot. In *Fortescue* v. *Carroll,* 76 N. J. E. 583, our Court of Errors and Appeals has pointed out with the greatest emphasis that in cases of this class the right of complainant must be entirely clear before a court of equity can be justified in restricting another in the uses to which he may lawfully put his property".

See also:

> *Hemsley* v. *Marlborough Hotel Co.,* 62 N. J. E. 164 at p. 171, affirmed on the opinion below 63 N. J. E. 804.

Complainant-appellant in his brief argues that the rule expressed in *Sailer* v. *Podolski,* 82 N. J. E. 459 is contrary to the rule established in this State and cites six cases to support this contention. Of the six cases so cited, two of them, to wit, *Brewer* v. *Marshall,* 19 N. J. E. 537 and *Robert* v. *Scull,* 58 N. J. E. 396 do not treat the question at all; in another of the cases cited, to wit, *Hayes* v. *Waverly R. R.,* 51 N. J. E. 345 the covenant stated expressly it was for the benefit of the remaining

property; in two others of such cases, to wit, *Meaney* v. *Stark,* 80 N. J. E. 60 and *Newbury* v. *Barkalow,* 75 N. J. E. 128, the Court found a general scheme to exist, and in the last case cited, to wit, *Hemsley* v. *Marlborough House,* 68 N. J. E. 596, the restriction itself specifically said for whose benefit it was imposed.

Where there is no general plan or scheme, and no language in the deed conveying lots with restrictions from which any intent can be gathered to annex the benefit of the restrictions to another lot, the owner of the other lot is not entitled to enforce the restriction against the former. *St. Patrick's Religious E. & C. Assn.* v. *Hale,* 227 Mass. 175; *Webber* v. *Landrigan,* 215 Mass. 221; *McNichol* v. *Townsend,* 74 N. J. E. 618; *Sailer* v. *Podolski,* 82 N. J. E. 459.

It is respectfully submitted that the decree should be affirmed.

MARK A. SULLIVAN,
Solicitor for and of counsel
with Defendant-Appellant.

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