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New Jersey State Library

Petition of Appeal.

(Filed, .)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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OLIVE C. JENNINGS and GEORGE F. BUELL, <i>Complainants-Respondents,</i> <i>v.</i> ANNA BAROFF and JULIUS BAROFF, <i>Defendants-Appellants.</i>	
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To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Anna Baroff and Julius Baroff, the appellants in the above stated cause, respectfully shows:

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1. That your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 31st day of October, 1927, wherein the said Olive C. Jennings and George F. Buell were complainants, and said Anna Baroff and Julius Baroff were defendants, in this respect, to wit: that the said decree adjudges that said Anna Baroff and Julius Baroff and each of them, their agents, servants or employees, be jointly and severally restrained and enjoined from proceeding with the excavation, erection and construction of the apartment house upon the lands and premises described in the bill of complaint, and that said Anna Baroff and Julius

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Petition of Appeal.

Baroff, their agents, servants or employees be jointly and severally restrained and enjoined from erecting any building or dwelling upon the premises described in the bill of complaint, in violation of the conditions and restrictions contained in deed from Alexander L. Oliver and wife to the Bayonne Building Company, a corporation of the State of New Jersey, which said deed is dated December 2, 1910, and recorded in the Register's Office of Hudson County, in Book 1087, page 248; and that said Anna Baroff and Julius Baroff, their agents, servants or employees, be jointly and severally restrained and enjoined from erecting any building or buildings to be used or occupied for any purpose other than a one-family residence, dwelling or church, and from erecting the front line of such residence, dwelling or church (not including bay windows or porches) at any point less than twenty (20) feet off the line of the street or avenue; and from erecting any building or dwelling upon the said premises which shall cost less than \$2,500.00; and further, that defendants-appellants pay to the counsel of the complainants a counsel fee of \$1,500.00.

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2. Your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, in that the said conditions and restrictions or either of them, contained in the deed from said Alexander L. Oliver and wife to the said Bayonne Building Company, as aforesaid, are inoperative; and that said restrictions and conditions or either of them have been released and discharged and are of no further force or effect; that the said alleged restrictions or conditions do

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Answer to Petition of Appeal.

not run with the land, and are unenforceable by the said complainants; and that the said bill of complaint should have been dismissed.

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

GROSS & GROSS,
Solicitors and of Counsel
with Appellants.

ISAAC GROSS,
Of Counsel with Appellants.

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Answer to Petition of Appeal.

(Filed, .)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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Between
OLIVE C. JENNINGS and GEORGE F. BUELL,
Complainants-Respondents,
and
ANNA BAROFF and JULIUS BAROFF,
Defendants-Appellants.

On Appeal from
the Court of
Chancery.

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The answer of the above named respondents, Olive C. Jennings and George F. Buell, to the petition of appeal of the above named appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal,

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are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the day in said petition mentioned, made and entered in the Court of Chancery in the causes for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof these respondents refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity and pray that the same may be affirmed with costs to be adjudged to these respondents.

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FEINBERG & FEINBERG,
Solicitors of Respondents.

Bill of Complaint.

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(Filed March 2, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
OLIVE C. JENNINGS and GEORGE F. BUELL,
Complainants,
and
ANNA BAROFF and JULIUS BAROFF,
Defendants.

On Bill, &c.

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To His Honor, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The complainants, residing in the City of Bayonne, County of Hudson and State of New Jersey, respectfully show to your Honor:

1. That on the 2nd day of December, 1910,

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Bill of Complaint.

Alexander L. Oliver and Marguerite A. Oliver, his wife, by warranty deed conveyed to the Bayonne Building Company, a corporation of the State of New Jersey, a plot of ground, described as follows, to wit:

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FIRST TRACT. Beginning at a corner formed by the intersection of the southwesterly side of West 40th Street and the Southeasterly side of Avenue B; thence running (1) Southwesterly along said side of Avenue B, two hundred feet (200) to the Northeast-erly side of 39th St., thence (2) Southeast-erly along said side of West 39th St., two hundred eighty-five feet (285); thence (3) Northeast-erly parallel with Avenue B, one hundred feet (100); thence (4) Northwest-erly parallel with West 39th St., one hun-
20 dred fifty feet (150); thence (5) Northeast-erly parallel with Avenue B, one hundred feet (100) to the said side of West 40th St., thence (6) Northwest-erly one hundred thirty-five feet (135) to point or place of be-
ginning.

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SECOND TRACT. Beginning at a point on the southwesterly side of West 38th St., dis-
30 tant thereon two hundred forty-two and three tenths (242.3) feet northwesterly from the corner formed by the intersection of said side of West 38th St. and the north-
westerly side of Avenue C; thence (1) south-
westerly parallel with Avenue C, eighty-nine
and eighty-two one hundredths (89.82) feet;
then returning to the place of beginning and
40 from thence running (2) Northwest-erly
along said side of West 38th St., two hun-

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Bill of Complaint.

dred twelve and fifty-one one hundredths
10 (212.51) feet; thence (3) Southeasterly along
the division line between lots 20 and 21 on
the tax map of the City of Bayonne in use
at the present time, two hundred twenty-one
and fifty-seven one hundredths (221.57) feet; 10
thence (4) southerly thirty and sixty-one one
hundredths (30.61) feet to the end of the
course first run.

Being lot 20 in Block 150 on the tax map
of the City of Bayonne.

The said deed was recorded in the Register's Office
of Hudson County in book 1087 of deeds for said
County on page 248.

2. In the said conveyance recited in paragraph 20
one of this complaint, it was expressly understood
by the party of the second part of that conveyance,
the Bayonne Building Company, its successors and
assigns, that the said conveyance is made subject
to the following restrictions and conditions, viz.:

1st. That no building or buildings here-
after erected on said lands shall be used or
occupied for any purpose other than a one-
family residence, dwelling or church. 30

2nd. That the front line of such resi-
dence, dwelling or church (not including
bay windows or porches) shall not be at any
point less than twenty feet off the line of the
street or avenue.

3rd. That each of such residences, dwell-
ings or churches shall not cost less than
twenty-five hundred dollars (\$2,500).

3. That the complainant, Olive C. Jennings, is 40

Bill of Complaint.

the owner of the following tract, situate, lying and being in the City of Bayonne, County of Hudson and State of New Jersey, described as follows:

10 Beginning at a point in the northeasterly line of West Thirty-ninth Street, distant along the same one hundred (100) feet southeasterly from the southeasterly line of Avenue B; and from thence running (1) Northeasterly, parallel with Avenue B, one hundred (100) feet; thence (2) Southeast-
erly, parallel with West Thirty-ninth Street, thirty-seven (37) feet; thence (3) Southwest-
erly, parallel with Avenue B, one hundred (100) feet to the northeasterly line of West
20 Thirty-ninth Street; and thence (4) North-
westerly, along the northeasterly line of West Thirty-ninth Street, thirty-seven (37) feet to the point or place of beginning.

4. That the said complainant, Olive C. Jennings, is still the owner of the said premises, and there is erected on the said premises, a one-family house which is now valued at fifteen thousand dollars.

30 5. That at the time the said complainant, Olive C. Jennings, purchased the said premises, and at the present time, the same were and are a part of the premises described in paragraph one of this bill of complaint, and the said premises were and are subject to the conditions and restrictions contained in the said deed, as more particularly set forth in paragraph two of this bill of complaint.

40 6. That the said complainant, George F. Buell, is the owner of the following tract of land, situate, lying and being in the City of Bayonne, County of Hudson and State of New Jersey, described as follows:

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Beginning at a point in the southeasterly line of Avenue B, distant along the same thirty-seven and one-half (37½) feet north-easterly from the northeasterly line of West Thirty-ninth Street; and from thence run-
ning (1) southeasterly, parallel with West
10 39th Street, one hundred (100) feet; thence
(2) Northeasterly, parallel with Avenue B, thirty-three (33) feet to the point or place
erly, parallel with West 39th Street, one hun-
dred (100) feet to the southeasterly line of
Avenue B; and thence (4) Southwesterly,
along the southeasterly line of Avenue B,
thirty-three (33) feet; thence (3) Northwest-
of beginning.

20 7. That the said complainant, George F. Buell, is still the owner of the said premises, and there is erected on the said premises, a one-family house which is now valued at twenty thousand dollars.

8. That at the time the said complainant, George F. Buell, purchased the said premises, and at the present time, the same were and are a part of the premises described in paragraph one of this bill of complaint, and the said premises were and are subject to the conditions and restrictions con-
tained in the said deed, as more particularly set
30 forth in paragraph two of this bill of complaint.

9. That the defendant, Anna Baroff, by war-
ranty deed dated January 7th, 1925, which said
deed is recorded in the Register's Office of Hudson
County, in book 1546 of deeds for said County,
page 554, became the owner of the tract of land
in the City of Bayonne, County of Hudson, and
State of New Jersey, more particularly described
40 as follows:

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Beginning at a point in the southeasterly line of Avenue B where the same is intersected by the northeasterly line of West 39th Street; and from thence running (1) northeasterly along the southeasterly line of Avenue B, 37.50 feet; thence running (2) southeasterly and parallel with West 39th Street, 100 feet; thence running (3) southwesterly parallel with Avenue B, 37.50 feet to the northeasterly line of West 39th Street; and thence running (4) northwesterly along the northeasterly line of West 39th Street, 100 feet to the point or place of beginning.

10. That the deed of conveyance by which the defendant, Anna Baroff, became the owner of the said premises, contained a recital that the said premises were purchased by the said Anna Baroff subject to certain restrictions contained in deed made by Alexander L. Oliver and wife to Bayonne Building Company, a corporation, dated December 2nd, 1910, and recorded in liber 1087 of deeds for Hudson County, page 248.

11. The restrictions referred to in said deed are the same restrictions as particularly set forth in paragraph two of this bill of complaint.

12. The premises owned by the defendant, Anna Baroff, are a part of the lands and premises described in paragraph one of this bill of complaint, and are a part of the premises restricted, as particularly set forth in paragraph two of this bill of complaint.

13. On January 10th, 1925, Marguerite A. O. Mellor and John Mellor, her husband, the said Marguerite A. O. Mellor being the devisee of Alex-

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ander L. Oliver, entered into an agreement with the defendant, Anna Baroff, a copy of which agreement is hereto attached and made a part hereof and marked Schedule "A."

14. That on the 2nd day of December, 1910, the premises contained in the said deed from Alexander L. Oliver to Bayonne Building Company, a corporation, was vacant and unimproved property.

15. That the said restriction was entered into for the purpose of creating a land development and land scheme within the section described in the said deed as a residential section for one-family dwellings.

16. That since the 2nd day of December, 1910, the said Bayonne Building Company, a corporation, has cut up the tract described in paragraph one of this bill of complaint, into numerous parcels and sold all the said parcels to different persons, subject to the restrictions created in the said deed between Alexander L. Oliver and the Bayonne Building Company, a corporation.

17. That all the purchasers of said tracts from the Bayonne Building Company, a corporation, have since the purchase of said tracts erected on each of said tracts one-family dwellings, the value of each of the said one-family dwellings averaging from fifteen thousand dollars to thirty-five thousand dollars.

18. That when the defendant, Anna Baroff, purchased the lands described in her deed, subject to the said restrictions, there remained no vacant ground in the said tract described in deed from Alexander L. Oliver to Bayonne Building Com-

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pany, a corporation, with the exception of the tract purchased by the defendant, Anna Baroff.

10 19. That the defendant Anna Baroff and Julius Baroff, her husband, or either or both of them, have obtained a building permit to erect upon the said lands and premises owned by them, an apartment house for the use of fourteen families, being four stories in height. That in pursuance with the authority under said permit, the said defendants have commenced building operations thereunder, and on March 21st, 1925, have commenced excavating the said premises, for the purpose of erecting the said apartment house, and the said excavation work is still being carried on by the said defendants.

20 20. That the erection of the said apartment house by the defendants is in violation of the restrictions contained in the deed from Alexander L. Oliver to Bayonne Building Company, a corporation, and in violation of the building scheme and general land scheme entered into between Alexander L. Oliver and Bayonne Building Company, a corporation, for their benefit and for the benefit of their successors in title.

30 21. That the complainants are the successors in title of the Bayonne Building Company to part of the said premises, their title being derived through the said conveyance and subject to the restrictions contained in the said deed.

40 22. That the complainants purchased their respective premises relying upon the restrictions as aforesaid and relying upon the fact that the whole neighborhood would be a residential section for one-family dwellings.

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23. That the defendants purchased the said premises subject to the said restrictions and knew or should have known that the said premises purchased by them was within the said restricted residential area.

10 24. That Marguerite A. O. Mellor and John Mellor, her husband, reside in the City of Montclair, New Jersey, and own no land within the said restricted area.

20 25. That by reason thereof the said Marguerite A. O. Mellor and John Mellor, her husband, have no interest in the said restriction. That the rights and benefits derived under the said restrictions have since passed from the said Marguerite A. O. Mellor to the complainants.

30 26. That the complainants have been informed and therefore charge, that the agreement entered into between Marguerite A. O. Mellor and John Mellor, her husband and the defendants, a copy of which is hereto attached, does not release and discharge the lands from the restrictions hereinbefore more particularly described, and that the said restrictions are still in force and effect, as upon the date that the same were created.

27. That since the creation of the said restrictions on December 2nd, 1910, the character of the neighborhood has not changed so as to necessitate an abandonment of the said land scheme, but that on the contrary, the area has been developed into a residential section containing no other property excepting one-family dwellings.

40 28. That if the defendants are permitted to erect the apartment house which they are now in the course of erecting, the land scheme will fail,

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and the property owned by the complainants and that of the other persons within said area will depreciate in value, and greatly suffer as a private residential section.

10 29. That the complainants have applied to the defendants in a friendly manner to refrain from erecting the said apartment house in violation of the said building and land scheme.

30. That the said defendants have refused and still refuse so to do and are proceeding in the erection of the said apartment house.

20 31. That the actions of the defendants are contrary to the covenants contained in the agreements and conveyances hereinbefore described and contrary to equity and good conscience.

32. That the complainants are without adequate remedy in the courts of law, and therefore pray:

30 1. That Anna Baroff and Julius Baroff, her husband, who are the defendants in this suit, may answer this bill of complaint, and each statement therein contained without oath, oath being waived.

2. That a subpoena may be issued commanding the said defendants to answer this bill of complaint, and abide by such decree as this Court may make in the premises.

40 3. That the defendants and their agents, servants and employees, be restrained and enjoined from proceeding with the erection and construction of the apartment house upon the said lands and premises owned by them.

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4. That the said defendants and their agents, servants and employees be restrained and enjoined from erecting any building or dwelling upon said premises in violation of the conditions and restrictions contained in the deed from Alexander L. Oliver and wife to the Bayonne Building Company, a corporation. 10

5. That an order may be made during the pendency of this suit restraining and enjoining the defendants, or their agents, servants and employees, from erecting any building or dwelling upon said premises in violation of the conditions and restrictions contained in the deed from Alexander L. Oliver and wife to the Bayonne Building Company, a corporation. 20

6. That the complainants may have such other and further relief in the premises as to the court will seem equitable and just.

And your complainants will ever pray, &c.

FEINBERG & FEINBERG,
Solicitors for and of Counsel
with Complainants. 30

Bill of Complaint.

SCHEDULE "A."

10 Marguerite A. O. Mellor :
 and John Mellor, her :
 husband, of the City : MEMORANDUM OF
 of Montclair, County : AGREEMENT.
 of Essex and State of :
 New Jersey, : Dated January 10, 1925.
 —to— : Ack'd January 10, 1925.
 Anna Baroff, of the : Rec'd January 17, 1925.
 City of Bayonne, : Liber 155 p. 292.
 County of Hudson : Cons. \$1.00 c. v. c.
 and State of New :
 Jersey. :

20 WITNESSETH that whereas the lands hereinafter
 described form part of the lands of which David
 W. Oliver died seized and which were conveyed
 by Alexander L. Young, executor of the last will
 and testament of the said David W. Oliver, de-
 ceased, to Susan O. Brookes, a daughter of the said
 David W. Oliver, and,

30 WHEREAS the said premises form part of the
 land of which the said Susan O. Brookes died
 seized and which were conveyed by Selden P.
 Spencer, Harry F. Knight and David Williams,
 executors of the last will and testament of Susan
 O. Brookes to Alexander L. Oliver, and,

40 WHEREAS the said Alexander L. Oliver and the
 said Marguerite A. O. Mellor (she having been the
 wife of the said Alexander L. Oliver, now de-
 ceased) did by deed dated December second, one
 thousand nine hundred ten, and recorded in liber
 1087 of Deeds for Hudson County on page 248, con-
 vey a plot including the premises hereinafter de-
 scribed to The Bayonne Building Company; a cor-
 poration of the State of New Jersey, subject to cer-

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tain restrictions and conditions in said deed con-
 tained in words and figures as follows:

"Subject to the following restrictions and
 conditions:

FIRST—That no building or building here- 10
 after erected on said lands shall be used or
 occupied for any purpose other than a one-
 family residence, dwelling or church.

SECOND—That the front line of such resi-
 dence, dwelling or church (not including bay
 windows or porches) shall not be at any
 point less than twenty (20) feet off the line
 of the street or avenue.

THIRD—That each of such residences, 20
 dwelling or churches, shall not cost less than
 Twenty-five hundred (\$2500) dollars"

AND WHEREAS, the said Alexander L. Oliver since
 the making of said deed to The Bayonne Building
 Company as aforesaid, departed this life and by
 his last will and testament did devise and bequeath
 all of his real and personal property to his wife,
 the said Marguerite A. Oliver, now the said
 Marguerite A. O. Mellor, and, 30

WHEREAS the said Anna Baroff desires to hold
 the said lands free from the operation of said re-
 strictions and conditions, and has applied to the
 said Marguerite A. O. Mellor for a deed releasing
 the said lands therefrom,

Do give, grant, remise, release, and forever quit-
 claim unto the party of the second part, and to her
 heirs and assigns forever,

ALL their right, title and interest, property claim 40
 and demand whatsoever, in law or in equity, of in

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and to all that certain lot or plot of land, situate, lying and being in the City of Bayonne, County of Hudson and State of New Jersey, bounded and described as follows:

10 BEGINNING at the corner formed by the intersection of the northerly line of West Thirty-ninth Street with the easterly line of Avenue B and thence running (1) northerly and along the easterly line of Avenue B, thirty-seven and fifty one-hundredths (37.50) feet; thence (2) easterly and parallel with the northerly line of West thirty-ninth Street, one hundred (100) feet; thence (3) southerly and parallel with the easterly line of Avenue B, thirty-seven and fifty one-hundredths (37.50) feet to the northerly line of West Thirty-ninth Street; and thence (4) Westerly and along
20 said northerly line of West Thirty-ninth Street, one hundred (100) feet to the point or place of beginning.

Being a portion of the premises conveyed by Alexander L. Oliver and wife to The Bayonne Building Company by deed dated December second, one thousand nine hundred and ten, and recorded in liber 1087 of Deeds for Hudson County on page 248, together with all and singular the appurtenances to the same belonging or in any wise appertaining, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, her heirs and assigns forever, and to her and their own use and behoof forever, free and discharged and released from each and every of the above conditions and restrictions contained in said deed so made by the said Alexander
30 L. Oliver and wife to the said The Bayonne Build-
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Bill of Complaint.

ing Company, dated December second, one thousand nine hundred and ten, and recorded in liber 1087 of deeds for Hudson County on page 248, in as full and ample a manner as if the said restrictions and conditions had never been made.

MARGUERITE A. O. MELLOR (S) 10
JOHN MELLOR (S)

Acknowledged in due form before Percival G. Cruden, Master in Chancery of New Jersey.

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

OLIVE C. JENNINGS, of full age, being duly sworn on her oath, according to law, deposes and says:

1. That she is one of the complainants in the foregoing action. 20

2. That on the 2nd day of December, 1910, Alexander L. Oliver and Marguerite A. Oliver, his wife, by warranty deed conveyed to the Bayonne Building Company, a corporation of the State of New Jersey, a plot of ground described as follows, to wit:

FIRST TRACT. Beginning at a corner 30
formed by the intersection of the southwest-
erly side of West 40th Street and the South-
easterly side of Avenue B; thence running
(1) Southwesterly along said side of Ave-
nue B, two hundred feet (200) to the north-
easterly side of 39th St., thence (2) south-
easterly along said side of West 39th St.,
two hundred eighty-five feet (285); thence
(3) Northeasterly parallel with Avenue B,
one hundred feet (100); thence (4) North- 40

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10 westerly parallel with West 39th St., one hundred fifty feet (150); thence (5) North-easterly parallel with Avenue B, one hundred feet (100) to the said side of West 40th St., thence (6) Northwesterly one hundred thirty-five feet (135) to point or place of beginning.

20 SECOND TRACT. Beginning at a point on the southwesterly side of West 38th St., distant thereon two hundred forty-two and three tenths (242.3) feet northwesterly from the corner formed by the intersection of said side of West 38th St. and the northwesterly side of Avenue C; thence (1) southwesterly parallel with Avenue C, eighty-nine and eighty-two one hundredths (89.82) feet; then returning to the place of beginning and from thence running (2) Northwesterly along said side of West 38th St., two hundred twelve and fifty-one one-hundredths (212.51) feet; thence (3) Southeasterly along the division line between lots 20 and 21 on the tax map of the City of Bayonne in use at the present time, two hundred twenty-one and fifty seven one-hundredths (221.57) feet; thence (4) southerly thirty and sixty-one one-hundredths (30.61) feet to the end of the course first run.

30 Being lot 20 in Block 150 on the tax maps of the City of Bayonne.

The said deed was recorded in the Register's Office of Hudson County in book 1087 of deeds for said County on page 248.

40 3. That in the said conveyance recited in paragraph two of this affidavit, it was expressly under-

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stood by the party of the second part of that conveyance, the Bayonne Building Company, its successors and assigns, that the said conveyance is made subject to the following restrictions and conditions, viz:

10 1st. That no building or buildings hereafter erected on said lands shall be used or occupied for any purpose other than a one-family residence, dwelling or church.

2nd. That the front line of such residence, dwelling or church (not including bay windows or porches) shall not be at any point less than twenty feet off the line of the street or avenue.

20 3rd. That each of such residences, dwellings or churches shall not cost less than twenty-five hundred dollars (\$2500.).

4. That the deponent is the owner of the following tract of land, situate, lying and being in the City of Bayonne, County of Hudson and State of New Jersey, described as follows:

30 Beginning at a point in the northeasterly line of West Thirty-ninth Street, distant along the same one hundred (100) feet southeasterly from the southeasterly line of Avenue B; and from thence running (1) Northeasterly, parallel with Avenue B, one hundred (100) feet; thence (2) Southeast-erly, parallel with West Thirty-ninth Street, thirty-seven (37) feet; thence (3) Southwesterly, parallel with Avenue B, one hundred (100) feet to the northeasterly line of West Thirty-ninth Street; and thence (4) 40 Northwesterly, along the northeasterly line

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of West Thirty-ninth Street, thirty-seven (37) feet to the point or place of beginning.

10 5. That the deponent is still the owner of the said premises, and there is erected on the said premises, a one-family house which is now valued at fifteen thousand dollars.

6. That at the time the deponent purchased the said premises, and at the present time, the same were and are a part of the premises described in paragraph two of this affidavit, and the said premises were and are subject to the conditions and restrictions contained in the said deed as more particularly set forth in paragraph two of this affidavit.

20 7. That the defendant, Anna Baroff, by warranty deed dated January 7th, 1925, which said deed is recorded in the Register's Office of Hudson County, in book 1546 of deeds for said County, page 554, became the owner of the tract of land in the City of Bayonne, County of Hudson and State of New Jersey, more particularly described as follows:

30 Beginning at a point in the southeasterly line of Avenue B where the same is intersected by the northeasterly line of West 39th Street; and from thence running (1) northeasterly along the southeasterly line of Avenue B, 37.50 feet; thence running (2) southerly and parallel with West 39th Street, 100 feet; thence running (3) southwesterly parallel with Avenue B, 37.50 feet to the northeasterly line of West 39th Street; and thence running (4) northwesterly along the northeasterly line of West 39th Street, 100 feet to the point or place of beginning.

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8. That the deed of conveyance by which the defendant, Anna Baroff, became the owner of the said premises, contained a recital that the said premises were purchased by the said Anna Baroff subject to certain restrictions contained in deed made by Alexander L. Oliver and wife to Bayonne Building Company, a corporation, dated December 2nd, 1910, and recorded in liber 1087 of deeds for Hudson County, page 248. 10

9. That the restrictions referred to in said deed are the same restrictions as particularly set forth in paragraph three of this affidavit.

10. That the premises owned by the defendant, Anna Baroff, are a part of the lands and premises described in paragraph two of this affidavit, and are a part of the premises restricted, as particularly set forth in paragraph three of this affidavit. 20

11. That on January 10th, 1925, Marguerite A. O. Mellor and John Mellor, her husband, the said Marguerite A. O. Meller being the devisee of Alexander L. Oliver, entered into an agreement with the defendant, Anna Baroff, a copy of which agreement is annexed to the bill of complaint and made a part thereof and marked Schedule "A." 30

12. That on the 2nd day of December, 1910, the premises contained in the said deed from Alexander L. Oliver to Bayonne Building Company, a corporation, was vacant and unimproved property.

13. That the said restriction was entered into for the purpose of creating a land development and land scheme within the section described in the said deed as a residential section for one-family dwellings. 40

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10 14. That since the 2nd day of December, 1910, the said Bayonne Building Company, a corporation, has cut up the tract described in paragraph two of this affidavit, into numerous parcels and sold all the said parcels, to different persons, subject to the restrictions created in the said deed between Alexander L. Oliver and the Bayonne Building Company, a corporation.

20 15. That all the purchasers of said tracts from the Bayonne Building Company, a corporation, have since the purchase of said tracts erected on each of said tracts one-family dwellings, the value of each of the said one-family dwellings averaging from fifteen thousand dollars to thirty-five thousand dollars.

20 16. That when the defendant, Anna Baroff, purchased the lands described in her deed, subject to the said restrictions, there remained no vacant ground in the said tract described in deed from Alexander L. Oliver to Bayonne Building Company, a corporation, with the exception of the tract purchased by the defendant, Anna Baroff.

30 17. That Anna Baroff and Julius Baroff, her husband, or either or both of them, have obtained a building permit to erect upon the said lands and premises owned by them, an apartment house for the use of fourteen families, being four stories in height. That in pursuance with the authority under said permit the said Anna Baroff and Julius Baroff have commenced building operations thereunder, and on March 21st, 1925, have commenced excavating the said premises, for the purpose of erecting the said apartment house, and the said excavation work is still being carried on by the
40 said Anna Baroff and Julius Baroff.

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10 18. That the erection of the said apartment house by the said Anna Baroff and Julius Baroff is in violation of the restrictions contained in the deed from Alexander L. Oliver to Bayonne Building Company, a corporation, and in violation of the building scheme and general land scheme entered into between Alexander L. Oliver and Bayonne Building Company, a corporation, for their benefit and for the benefit of their successors in title.

20 19. That the deponent is the successor in title of the Bayonne Building Company to part of the said premises, her title being derived through the said conveyance and subject to the restrictions contained in the said deed.

20 20. That the deponent purchased her respective premises relying upon the restrictions as aforesaid and relying upon the fact that the whole neighborhood would be a residential section for one-family dwellings.

30 21. That the said Anna Baroff and Julius Baroff purchased the said premises subject to the said restrictions and knew or should have known that the said premises purchased by them was within the said restricted residential area.

22. That Marguerite A. O. Mellor and John Mellor, her husband, reside in the City of Montclair, New Jersey, and own no land within the said restricted area.

40 23. That by reason thereof the said Marguerite A. O. Mellor and John Mellor, her husband, have no interest in the said restriction. That the rights and benefits derived under the said restrictions

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have since passed from the said Marguerite A. O. Mellor to the deponent.

10 24. That the deponent has been informed and therefore charges, that the agreement entered into between Marguerite A. O. Mellor and John Mellor, her husband and Anna Baroff and Julius Baroff, a copy of which is attached to the bill of complaint, does not release and discharge the lands from the restrictions hereinbefore more particularly described, and that the said restrictions are still in force and effect, as upon the date that the same were created.

20 25. That since the creation of the said restrictions on December 2nd, 1910, the character of the neighborhood has not changed so as to necessitate an abandonment of the said land scheme, but that on the contrary, the area has been developed into a residential section containing no other property excepting one-family dwellings.

30 26. That if the said Anna Baroff and Julius Baroff are permitted to erect the apartment house which they are now in the course of erecting, the land scheme will fail, and the property owned by the deponent and that of the other persons within the said area will depreciate in value, and greatly suffer as a private residential section.

27. That the deponent has applied to the said Anna Baroff and Julius Baroff in a friendly manner to refrain from erecting the said apartment house in violation of the said building and land scheme.

40 28. That the said Anna Baroff and Julius Baroff have refused and still refuse so to do and are

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proceeding in the erection of the said apartment house.

29. That the actions of the said Anna Baroff and Julius Baroff are contrary to the covenants contained in the agreements and conveyances hereinbefore described and contrary to equity and good conscience. 10

OLIVE C. JENNINGS.

Sworn and subscribed to before }
me this 23rd day of March, 1925. }

CHARLES DEMBE,
Master in Chancery,
of New Jersey.

State of New Jersey, }
County of Hudson, } ss.: 20

GEORGE F. BUELL, of full age, being duly sworn on his oath, according to law, deposes and says:

1. That he is one of the complainants in the foregoing action.

2. That on the 2nd day of December, 1910, Alexander L. Oliver and Marguerite A. Oliver, his wife, by warranty deed conveyed to the Bayonne Building Company, a corporation of the State of New Jersey, a plot of ground described as follows, to wit: 30

FIRST TRACT. Beginning at a corner formed by the intersection of the southwesterly side of West 40th Street and the Southeasterly side of Avenue B; thence running (1) Southwesterly along said side of Avenue B, two hundred feet (200) to the northeasterly side of 39th St., thence (2) southeasterly 40

Bill of Complaint.

10 along said side of West 39th St., two hundred eighty-five feet (285); thence (3) Northeasterly parallel with Avenue B, one hundred feet (100); thence (4) Northwest-
erly parallel with West 39th St., one hundred fifty feet (150); thence (5) Northeast-
erly parallel with Avenue B, one hundred feet (100) to the said side of West 40th St.,
thence (6) Northwesterly one hundred thirty-five feet (135) to point or place of beginning.

20 SECOND TRACT. Beginning at a point on the southwesterly side of West 38th St., distant thereon two hundred forty-two and three tenths (242.3) feet northwesterly from the corner formed by the intersection of said side of West 38th St. and the northwesterly side of Avenue C; thence (1) southwesterly parallel with Avenue C, eighty-nine and eighty-two one-hundredths (89.82) feet; then returning to the place of beginning and from thence running (2) Northwesterly along said side of West 38th St., two hundred twelve and fifty-one one-hundredths (212.51) feet;
30 thence (3) Southeasterly along the division line between lots 20 and 21 on the tax map of the City of Bayonne in use at the present time, two hundred twenty-one and fifty seven one-hundredths (221.57) feet; thence (4) southerly thirty and sixty-one one-hundredths (30.61) feet to the end of the course first run.

Being lot 20 in Block 150 on the tax maps of the City of Bayonne.

40 The said deed was recorded in the Register's Office

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of Hudson County in book 1087 of deeds for said County on page 248.

3. That in the said conveyance recited in paragraph two of this affidavit, it was expressly understood by the party of the second part of that conveyance, the Bayonne Building Company, its successors and assigns, that the said conveyance is made subject to the following restrictions and conditions, viz.:

1st. That no building or buildings hereafter erected on said lands shall be used or occupied for any purpose other than a one-family residence, dwelling or church.

2nd. That the front line of such residence, dwelling or church (not including bay windows or porches) shall not be at any point less than twenty feet off the line of the street or avenue.

3rd. That each of such residences, dwellings or churches shall not cost less than twenty-five hundred dollars (\$2,500).

4. That the deponent is the owner of the following tract of land, situate, lying and being in the City of Bayonne, County of Hudson and State of New Jersey, described as follows:

Beginning at a point in the southeasterly line of Avenue B, distant along the same thirty-seven and one-half ($37\frac{1}{2}$) feet northeasterly from the northeasterly line of West Thirty-ninth Street; and from thence running (1) southeasterly, parallel with West 39th Street, one hundred (100) feet; thence (2) Northeasterly, parallel with Avenue B,

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thirty-three (33) feet; thence (3) Northwest-
erly, parallel with West 39th Street, one
hundred (100) feet to the southeasterly line
of Avenue B; and thence (4) Southwesterly,
10 along the southeasterly line of Avenue B,
thirty-three (33) feet to the point or place
of beginning.

5. That the deponent is still the owner of the
said premises, and there is erected on the said
premises, a one-family house which is now valued
at twenty thousand dollars.

6. That at the time the deponent purchased the
said premises, and at the present time, the same
were and are a part of the premises described in
20 paragraph two of this affidavit, and the said prem-
ises were and are subject to the conditions and re-
strictions contained in the said deed as more par-
ticularly set forth in paragraph two of this affi-
davit.

7. That Anna Baroff, by warranty deed dated
January 7th, 1925, which said deed is recorded in
the Register's Office of Hudson County, in book
1546 of deeds for said County, page 554, became
30 the owner of the tract of land in the City of Bay-
onne, County of Hudson and State of New Jersey,
more particularly described as follows:

Beginning at a point in the southeasterly
line of Avenue B where the same is inter-
sected by the northeasterly line of West 39th
Street; and from thence running (1) north-
easterly along the southeasterly line of Ave-
nue B, 37.50 feet; thence running (2) south-
easterly and parallel with West 39th Street,
40 100 feet; thence running (3) southwesterly

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parallel with Avenue B, 37.50 feet to the
northeasterly line of West 39th Street; and
thence running (4) Northwesterly along the
northeasterly line of West 39th Street, 100
feet to the point or place of beginning.

8. That the deed of conveyance by which the
said Anna Baroff became the owner of the said
premises, contained a recital that the said prem-
ises were purchased by the said Anna Baroff sub-
ject to certain restrictions contained in deed made
by Alexander L. Oliver and wife to Bayonne Build-
ing Company, a corporation, dated December 2nd,
1910, and recorded in liber 1087 of deeds for Hud-
son County, page 248.

9. That the restrictions referred to in said deed
are the same restrictions as particularly set forth
in paragraph three of this affidavit.

10. That the premises owned by the said Anna
Baroff, are a part of the lands and premises de-
scribed in paragraph two of this affidavit, and are
a part of the premises restricted, as particularly
set forth in paragraph three of this affidavit.

11. That on January 10th, 1925, Marguerite A.
O. Mellor and John Mellor, her husband, the said
Marguerite A. O. Mellor being the devisee of Alex-
ander L. Oliver, entered into an agreement with
the said Anna Baroff, a copy of which agreement
is annexed to the bill of complaint and made a
part thereof and marked Schedule "A."

12. That on the 2nd day of December, 1910, the
premises contained in the said deed from Alex-
ander L. Oliver to Bayonne Building Company, a
corporation, was vacant and unimproved property.

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13. That the said restriction was entered into for the purpose of creating a land development and land scheme within the section described in the said deed as a residential section for one-family dwellings.

10 14. That since the 2nd day of December, 1910, the said Bayonne Building Company, a corporation, has cut up the tract described in paragraph two of this affidavit, into numerous parcels and sold all the said parcels, to different persons, subject to the restrictions created in the said deed between Alexander L. Oliver and the Bayonne Building Company, a corporation.

20 15. That all the purchasers of said tracts from the Bayonne Building Company, a corporation, have since the purchase of said tracts erected on each of said tracts one-family dwellings, the value of each of the said one-family dwellings averaging from fifteen thousand dollars to thirty-five thousand dollars.

30 16. That when the said Anna Baroff purchased the lands described in her deed, subject to the said restrictions there remained no vacant ground in the said tract described in deed from Alexander L. Oliver to Bayonne Building Company, a corporation, with the exception of the tract purchased by the said Anna Baroff.

40 17. That Anna Baroff and Julius Baroff, her husband, or either or both of them, have obtained a building permit to erect upon the said lands and premises owned by them, an apartment house for the use of fourteen families, being four stories in height. That in pursuance with the authority under said permit the said Anna Baroff and Julius

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Baroff have commenced building operations thereunder, and on March 21st, 1925, have commenced excavating the said premises, for the purpose of erecting the said apartment house, and the said excavation work is still being carried on by the said Anna Baroff and Julius Baroff. 10

18. That the erection of the said apartment house by the said Anna Baroff and Julius Baroff is in violation of the restrictions contained in the deed from Alexander L. Oliver to Bayonne Building Company, a corporation, and in violation of the building scheme and general land scheme entered into between Alexander L. Oliver and Bayonne Building Company, a corporation, for their benefit and for the benefit of their successors in title. 20

19. That the deponent is the successor in title of the Bayonne Building Company to part of the said premises, his title being derived through the said conveyance and subject to the restrictions contained in the said deed.

20. That the deponent purchased his respective premises relying upon the restrictions as aforesaid and relying upon the fact that the whole neighborhood would be a residential section for one-family dwellings. 30

21. That the said Anna Baroff and Julius Baroff purchased the said premises subject to the said restrictions and knew or should have known that the said premises purchased by them was within the said restricted residential area.

22. That Marguerite A. O. Mellor and John Mellor, her husband, reside in the City of Montclair, New Jersey, and own no land within the said restricted area. 40

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23. That by reason thereof the said Marguerite A. O. Mellor and John Mellor, her husband, have no interest in the said restrictions. That the rights and benefits derived under the said restrictions have since passed from the said Marguerite A. O. Mellor to the deponent.

24. That the deponent has been informed and therefore charges, that the agreement entered into between Marguerite A. O. Mellor and John Mellor, her husband, and Anna Baroff and Julius Baroff, a copy of which is attached to the bill of complaint, does not release and discharge the lands from the restrictions hereinbefore more particularly described, and that the said restrictions are still in force and effect, as upon the date that the same were created.

25. That since the creation of the said restrictions on December 2nd, 1910, the character of the neighborhood has not changed so as to necessitate an abandonment of the said land scheme, but that on the contrary, the area has been developed into a residential section containing no other property excepting one-family dwellings.

26. That if the said Anna Baroff and Julius Baroff are permitted to erect the apartment house which they are now in the course of erection, the land scheme will fail, and the property owned by the deponent and that of the other persons within the said area will depreciate in value and greatly suffer as a private residential section.

27. That the deponent has applied to the said Anna Baroff and Julius Baroff in a friendly manner to refrain from erecting the said apartment house in violation of the said building and land scheme.

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28. That the said Anna Baroff and Julius Baroff have refused and still refuse so to do and are proceeding in the erection of the said apartment house.

29. That the actions of the said Anna Baroff and Julius Baroff are contrary to the covenants contained in the agreements and conveyances hereinbefore described and contrary to equity and good conscience.

GEORGE F. BUELL.

Sworn and subscribed to before me }
this 23rd day of March, 1925. }

CHARLES DEMBE,
Master in Chancery
of New Jersey.

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

AGNES D. GERMOND, being duly sworn on her oath, according to law, deposes and says: by warranty deed dated January 2nd, 1919, and recorded in the Register's Office of Hudson County in book 1300 of deeds for Hudson County, page 103, I became the owner of premises commonly known as #64 Avenue B, in the City of Bayonne, County of Hudson and State of New Jersey; that the said premises are part of the tract of land particularly described in deed from Alexander L. Oliver and wife to the Bayonne Building Company, a corporation; that there is erected upon the lands of the deponent a one-family house valued at twenty thousand dollars.

That the said one-family house was erected in compliance with the general land and building

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10 scheme to maintain the said area as a residential section for one-family houses, in compliance with a restrictive covenant in deed hereinbefore mentioned; that the action of the defendants Anna Baroff and Julius Baroff, her husband, are in violation of the said restrictive covenants and conditions and in violation of the said general land and building scheme; that the premises of the deponent will considerably depreciate in value if the said apartment house is erected by the defendants; that the deponent is willing and ready to be joined as a complainant in this suit if the court should deem it proper and necessary.

AGNES D. GERMOND.

20 Sworn and subscribed to before me }
 this 23rd day of March, 1925. }

CHARLES DEMBE,
 Master in Chancery
 of New Jersey.

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

30 HAZEL BRUDER (nee Thiele), being duly sworn on her oath, according to law, deposes and says: by warranty deed dated February , 1916, and recorded in the Register's Office of Hudson County in book of deeds for Hudson County, page , I became the owner of premises commonly known as #68 Avenue B, in the City of Bayonne, County of Hudson and State of New Jersey; that the said premises are part of the tract of land particularly described in deed from Alexander L. Oliver and wife to The Bayonne Building Company, a corporation; that there is erected upon the
 40 lands of the deponent a one-family house valued at fifteen thousand dollars.

Bill of Complaint.

That the said one-family house was erected in compliance with the general land and building scheme to maintain the said area as a residential section for one-family houses, in compliance with a restrictive covenant in deed hereinbefore mentioned; that the action of the defendants Anna Baroff and Julius Baroff, her husband, are in violation of the said restrictive covenants and conditions and in violation of the said general land and building scheme; that the premises of the deponent will considerably depreciate in value if the said apartment house is erected by the defendants; that the deponent is willing and ready to be joined as a complainant in this suit if the court should deem it proper and necessary.

HAZEL BRUDER. 20

Sworn and subscribed to before me }
 this 23rd day of March, 1925. }

CHARLES DEMBE,
 Master in Chancery
 of New Jersey.

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

30 MAUDE V. BRADY, being duly sworn on her oath, according to law, deposes and says: by warranty deed dated November , 1919, and recorded in the Register's Office of Hudson County on book of deeds for Hudson County, page , I became the owner of premises commonly known as #72 Avenue B, in the City of Bayonne, County of Hudson and State of New Jersey; that the said premises are part of the tract of land particularly described in deed from Alexander L. Oliver and wife to The Bayonne Building Company, a corporation
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Bill of Complaint.

poration; that there is erected upon the lands of the deponent a one-family house valued at thirty-five thousand dollars.

10 That the said one-family house was erected in compliance with the general land and building scheme to maintain the said area as a residential section for one-family houses, in compliance with a restrictive covenant in deed hereinbefore mentioned; that the action of the defendants Anna Baroff and Julius Baroff, her husband are in violation of the said restrictive covenants and conditions and in violation of the said general land and building scheme; that the premises of the deponent will considerably depreciate in value if the said apartment house is erected by the de-
20 fendants; that the deponent is willing and ready to be joined as a complainant in this suit if the court should deem it proper and necessary.

MAUDE V. BRADY.

Sworn and subscribed to before me }
this 23rd day of March, 1925. }

CHARLES DEMBE,
Master in Chancery
of New Jersey.

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

JOHANNA LOUGHLIN, being duly sworn on her oath, according to law, deposes and says: by warranty deed dated December 13, 1916, and recorded in the Register's Office of Hudson County in book of deeds for Hudson County, page , I became the owner of premises commonly known as #102 West 40th St., in the City of Bayonne, County of Hudson and State of New Jersey; that
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Bill of Complaint.

the said premises are part of the tract of land particularly described in deed from Alexander L. Oliver and wife to The Bayonne Building Company, a corporation; that there is erected upon the lands of the deponent a one-family house valued at twenty thousand dollars.

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That the said one family house was erected in compliance with the general land and building scheme to maintain the said area as a residential section for one-family houses, in compliance with a restrictive covenant in deed hereinbefore mentioned; that the action of the defendants Anna Baroff and Julius Baroff, her husband are in violation of the said restrictive covenants and conditions and in violation of the said general land and building scheme; that the premises of the deponent will considerably depreciate in value if the said apartment house is erected by the de-
20 fendants; that the deponent is willing and ready to be joined as a complainant in this suit if the court should deem it proper and necessary.

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JOHANNA LOUGHLIN.

Sworn and subscribed to before me }
this 23rd day of March, 1925. }

CHARLES DEMBE,
Master in Chancery
of New Jersey.

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

ISAAC ROBBINS, being duly sworn on his oath, according to law, deposes and says: by warranty deed dated May 16, 1922, and recorded in the Register's Office of Hudson County in book 1444 of deeds for Hudson County, page 10, I became the
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Bill of Complaint.

owner of premises commonly known as #91 West 39th St., in the City of Bayonne, County of Hudson and State of New Jersey; that the said premises are part of the tract of land particularly described in deed from Alexander L. Oliver and wife to The Bayonne Building Company, a corporation; that there is erected upon the lands of the deponent a one-family house valued at thirty-five thousand dollars.

That the said one-family house was erected in compliance with the general land and building scheme to maintain the said area as a residential section for one-family houses, in compliance with a restrictive covenant in deed hereinbefore mentioned; that the action of the defendants Anna Baroff and Julius Baroff, her husband are in violation of the said restrictive covenants and conditions and in violation of the said general land and building scheme; that the premises of the deponent will considerably depreciate in value if the said apartment house is erected by the defendants; that the deponent is willing and ready to be joined as a complainant in this suit if the court should deem it proper and necessary.

ISAAC ROBBINS.

Sworn and subscribed to before me }
this 23rd day of March, 1925. }

CHARLES DEMBE,
Master in Chancery
of New Jersey.

Answer.

(Filed .)

IN CHANCERY OF NEW JERSEY.

Between OLIVE C. JENNINGS and GEORGE F. BUELL, <i>Complainants,</i> and ANNA BAROFF and JULIUS BAROFF, <i>Defendants.</i>	}	On Bill, &c.	10
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Defendants, Anna Baroff and Julius Baroff, residing in the City of Bayonne, County of Hudson and State of New Jersey, answering the bill of complaint herein, say that:

1. They admit the allegations of paragraph 1 of complainants' bill.

2. They admit that the deed of conveyance to the Bayonne Building Company, set forth the provisions designated as 1st, 2nd, and 3rd, as set forth in paragraph 2 of the bill of complaint.

3. Defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3, 4, 5, 6, 7 and 8 of the bill of complaint.

4. Defendants admit the allegations of paragraph 9 of the bill of complaint.

5. As to the allegations of paragraph 10 of the bill of complaint, defendants deny that the deed of conveyance by which defendant Anna Baroff

Answer.

10 became the owner of said premises, contained a recital that the same were purchased by her subject to certain restrictions contained in the deed made by Alexander L. Oliver and wife to Bayonne Building Company, dated December 2nd, 1910, and recorded in liber 1087 of Deeds for Hudson County, page 248, but these defendants say that the said deed of conveyance contained a provision that the lands so conveyed to the said Anna Baroff were conveyed to her subject to any valid or existing restrictions against the same of record.

6. The allegations of paragraph 11 of complainants' bill are denied.

20 7. The allegations of paragraph 12 of the complainants' bill are denied.

8. The allegations of paragraphs 13, and 14 of complainants' bill admitted.

30 9. The allegations of paragraph 15 of complainants' bill are denied, but on the contrary of said allegations, these defendants insist that the said restriction was not inserted in said conveyance by said Oliver and wife to said Bayonne Building Co. for the purpose of creating any land development and land scheme, and that the said restriction was not and could not have been inserted for any such purpose or scheme for the reason that other lands of the said Oliver, immediately adjoining said lands and premises so conveyed to said Bayonne Building Company, and in the immediate vicinity thereof, were not similarly or otherwise restricted.

40 10. The allegations of paragraph 16 of complainants' bill are denied.

Answer.

11. These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 17 and 18 of complainants' bill.

10 12. The allegations of paragraph 19 of complainants' bill are admitted, but these defendants aver the fact to be that when they purchased and acquired title to the lands and premises described in paragraph 9 of the complainants' bill, they were advised and assured that if they secured from Marguerite A. O. Mellor and John Mellor, her husband, the agreement referred to in paragraph 13 of complainants' bill, that the lands and premises so acquired by them would be free and discharged of any right, covenant or restriction.

20 13. The allegations of paragraph 20 of complainants' bill are denied.

14. These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 of complainants' bill.

30 15. The allegations of paragraph 22 of complainants' bill are denied and these defendants aver the fact to be that the lands of the said complainants are not subject to the restrictions mentioned in the bill of complaint, and that the said complainants have no right or title to enforce the same against these defendants or the lands and premises owned by the said defendant Anna Bayroff.

16. The allegations of paragraph 23 are denied.

40 17. These defendants have no knowledge or information sufficient to form a belief as to the truth

Answer.

of the allegations of paragraphs 24 and 25 of complainants' bill.

10 18. As to the allegations of paragraph 26 of complainants' bill, these defendants have no knowledge or information as to how the complainants have been informed with respect to the matters in said paragraph alleged, but these defendants do insist that the lands and premises owned by the defendant Anna Baroff is not subject to the restrictions mentioned in complainants' bill, and these defendants do further insist that the said supposed restrictions are merely personal agreements which do not run with the land, and that the same are released and discharged by the agreement between said Marguerite A. O. Mellor and John Mellor, her husband, and these defendants mentioned in paragraph 26 of the bill of complaint.

20 19. These defendants have no knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph 27 of complainants' bill.

30 20. The allegations of paragraph 28 and 29 and 30 of complainants' bill, are denied, but defendants admit that they were, at the time of the filing of bill of complaint herein, proceeding in the erection of said apartment house.

21. The allegations of paragraph 31 are denied.

FURTHER ANSWERING COMPLAINANTS' BILL, THESE DEFENDANTS SAY THAT:

40 At the time of the making of said deed of conveyance by the said Oliver and wife with the said Bayonne Building Co., the said Oliver was the

Answer.

owner of a considerable tract of land in the immediate vicinity of the lands and premises so conveyed to the said Bayonne Building Co. and similarly situated, which said land and premises were on the same side of the street and in the same block as the lands and premises so conveyed to the said Bayonne Building Company, and of lands directly opposite the same, which said lands were thereafter conveyed by the said Oliver, or by the said Mellor, his devisee, without restrictions, and that no general plan or scheme developed or was intended to develop by the insertion of the said restrictions in the deed from the said Oliver to the said Bayonne Building Co., and that if such plan or scheme was ever contemplated, the same was abandoned and disregarded by the said Oliver and said Bayonne Building Co. mutually and both the said Oliver and his successor in title and said Bayonne Building Co. conveyed the lands so owned by them without restriction, and defendants are informed and verily believe that the lands owned by the said complainants, was conveyed by the said Bayonne Building Co. without restriction, as likewise did it, said Bayonne Building Co. convey other parts of said lands so conveyed to it by the said Oliver and wife without restriction, and that therefore the operation and effect of said alleged restrictions if ever valid or enforceable, were waived, abandoned and disregarded before the alleged rights of complainants accrued, and the same are of no force and effect.

GROSS & GROSS,
Solicitors of Defendants.

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Reply.

(Filed .)

IN CHANCERY OF NEW JERSEY.

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Between
 OLIVE C. JENNINGS and GEORGE F.
 BUELL,
Complainants,
 and
 ANNA BAROFF and JULIUS BAROFF,
Defendants.

On Bill, &c.

20 Complainants replying to the Answer of the defendants, say that:

1. They join issue with the defendants in each and every allegation of the defendants' answer, wherein the defendants deny the allegations of the complainants' complaint.
2. They join issue with the defendants in each and every allegation contained in Paragraph 9, 12, 15 and 18 of the defendants' answer.
- 30 3. They deny each and every allegation of the defendants' answer, wherein the defendants allege new matters and join issue.

FEINBERG AND FEINBERG,
Solicitors of Complainants.

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Agreed State of Facts.

IN CHANCERY OF NEW JERSEY.

Between
 OLIVE C. JENNINGS and GEORGE F.
 BUELL,
Complainants,
 and
 ANNA BAROFF and JULIUS BAROFF,
Defendants.

On Bill for Injunction.

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The several parties, Complainants and the Defendants, by their respective Solicitors do hereby agree and stipulate that the facts in the above entitled cause to be submitted to the Court of Chancery of New Jersey for its determination on the issues involved in the said cause, are as follows, to wit:

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1. By deed dated December 2, 1910, and recorded in the Register's Office of Hudson County on January 31st, 1911, in Book 1087 of Deeds, page 248, Alexander L. Oliver and Marguerite A. Oliver, his wife, conveyed to The Bayonne Building Company two certain tracts of land, the first of which is more particularly described as follows:

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ALL certain tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of Bayonne, County of Hudson and State of New Jersey.

FIRST TRACT: Beginning at a corner formed by the intersection of the southwest-

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Agreed State of Facts.

erly side of West 40th Street and the southeasterly side of Avenue B, thence running (1) southwesterly along said side of Avenue B 200 feet to the southeasterly side of 39th Street; thence (2) southeasterly along said side of West 39th Street 285 feet; thence (3) northeasterly parallel with Avenue B, 100 feet; thence (4) northwesterly parallel with West 39th Street 150 feet; thence (5) northwesterly parallel with Avenue B, 100 feet to the said side of West 40th Street; thence (6) northwesterly 135 feet to the point or place of beginning.

SECOND TRACT: Beginning at a point on the southwesterly side of West 38th Street distant thereon 242.3 feet northwesterly from the corner formed by the intersection of said side of West 38th Street and the northwesterly side of Avenue C; thence (1) southwesterly parallel with Avenue C 89.82 feet; thence returning to the place of beginning; and from thence running (2) northwesterly along said side of West 38th Street 212.51 feet; thence (3) southeasterly along the division line between lots 20 and 21 on the tax maps of the City of Bayonne, in use at the present time 221.57 feet; thence (4) southerly 30.61 feet to the end of the course first run.

Being lot 20 in block 150 on the tax maps of the City of Bayonne. Being two plots being the first and second tract of the Bayonne property mentioned in the deed of conveyance of Seldon P. Spencer, Harry F. Knight and David R. Williams, executors of

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the last will and testament of Susan O. Brooks, late of St. Louis, Missouri (deceased), to Alexander L. Oliver.

The mentioning or referring to the tax maps of the City of Bayonne, in the foregoing description is intended for the purpose of locating the tract intended to be conveyed and not for the purpose of dedicating or acknowledging the dedication of any street or avenues whatsoever.

The parcel so conveyed, and which includes the premises in question, is described as the first parcel in the said deed and fronts 200 feet on the easterly side of Avenue B, extending 135 feet easterly on the southerly side of West Fortieth Street, and 285 feet easterly on the northerly side of West Thirty-ninth Street.

2. The said deed of conveyance from said Alexander L. Oliver and wife to Bayonne Building Company contained the following:

It is understood and agreed by the party of the second part, its successors and assigns, that this conveyance is made subject to the following descriptions and conditions.

1st. That no building or buildings hereafter erected on said lands shall be used or occupied for any purpose other than a one-family residence, dwelling or church.

2nd. That the front line of said residence, dwelling or church (not including bay windows or porches) shall not be any point less than 20 feet off the line of the street or avenue.

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3rd. That each of said residences, dwellings or churches shall not cost less than Twenty-five hundred (\$2,500.00) Dollars.

10 3. The second tract in the deed above mentioned conveyed lands on the southwesterly side of West Thirty-eighth Street beginning 243.3 feet northwesterly from Avenue C, and was a plot with a frontage of 212.51 feet on West Thirty-eighth Street. Avenue C is the next street easterly from Avenue B, and running parallel therewith, and distant approximately 685 feet therefrom; and West Thirty-eighth Street is the next street southerly from West Thirty-ninth Street, upon which the premises in question belonging to the defendant front, and parallel therewith and distant therefrom about 260 feet.

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30 4. That Complainants Olive C. Jennings and George F. Buell, and the affiants whose affidavits are annexed to Complainants' bill, to wit; Agnes D. Germond, Hazel Bruder, nee Thiele, Maude V. Brady, Johanna Loughlin and Isaac Robbins, are owners of parts of said lands conveyed by said Alexander L. Oliver and wife to Bayonne Building Company, by deed dated December 2nd, 1910, aforementioned, and have erected, upon the lands so acquired by them respectively, or there was already erected thereon at the time of their respective acquisitions thereof, houses for occupancy for one family each in compliance with the restrictions contained in the said deed from the said Oliver to the Bayonne Building Company; and that the houses so erected upon the plots owned respectively by the Complainants are of the approximate value as stated in the respective affidavits of the said Complainants.

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5. That the Defendant, Anna Baroff, by warranty deed dated January 7th, 1925, which said deed is recorded in the Register's Office of Hudson County, in book 1546 of deeds for said County, page 564, became the owner of the tract of land in the City of Bayonne, County of Hudson and State of New Jersey, more particularly described as follows:

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BEGINNING at a point in the southeasterly line of Avenue B where the same is intersected by the northeasterly line of West 39th Street; and from thence running (1) northeasterly along the southeasterly line of Avenue B, 37.50 feet; thence running (2) southeasterly and parallel with West 39th Street, 100 feet; thence running (3) southwesterly parallel with Avenue B, 37.50 feet to the northeasterly line of West 39th Street; and thence running (4) northwesterly along the northeasterly line of West 39th Street, 100 feet to the point or place of beginning.

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6. That the deed of conveyance by which the defendant, Anna Baroff, became the owner of the said premises, contained a recital that the said premises were purchased by the said Anna Baroff subject to the restrictions contained in said deed from Oliver to Bayonne Building Co.

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7. The restrictions referred to in said deed are the same restrictions as particularly set forth in paragraph two hereof.

8. The premises owned by the defendant Anna Baroff, are a part of the lands and premises described in paragraph one hereof, and are a part of the premises restricted, as particularly set forth in paragraph two hereof.

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9. That on January 10, 1925, Marguerite A. O. Mellor and John Mellor her husband (the said Marguerite A. O. Mellor being a devisee of Alexander L. Oliver) entered into an Agreement, copy of which is annexed to the Bill of Complaint, whereby the said Marguerite A. O. Mellor and John Mellor her husband, released the defendant Anna Baroff from the operation of the said restrictions.

10. That the defendants have secured a building permit from the authorities of the City of Bayonne to erect an apartment house for the use of fourteen families, four stories in height described in the Bill of Complaint, and intended to proceed with the erection of the same, having actually commenced excavating a cellar upon the said lands for the purposes aforesaid, but have been enjoined from proceeding therewith by an order of this Court made in the above stated cause upon the filing of the Bill of Complaint herein.

11. That the Bayonne Hudson County Park extends from West Thirty-seventh Street to West Forty-eighth Street between the Hudson County Boulevard and Newark Bay; from West Thirty-ninth Street to West Forty-second Street between the Hudson County Boulevard and Avenue B, and from West Fortieth Street to West Forty-first Street between Avenue B and Avenue C, so that the plot conveyed by the said Oliver to the Bayonne Building Company fronting on Avenue B and West Fortieth Street faces the said Bayonne Hudson County Park.

12. That when the defendant, Anna Baroff, purchased the lands described in her deed, subject to the said restrictions, there remained no vacant ground in the said tract described in deed from

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Alexander L. Oliver to Bayonne Building Company, a corporation, with the exception of the tract purchased by the defendant, Anna Baroff.

13. That the said apartment house is intended for use for dwelling purposes exclusively for fourteen families, and that the complainants claim and insist that the same is therefore in violation of the restrictions contained in the deed from Alexander L. Oliver to the Bayonne Building Company, described in paragraph 2 thereof.

14. That the Complainants will testify that they purchased their respective premises with knowledge of the restrictions contained in paragraph two hereof and did rely upon the fact that the said restrictions made in the deed from Alexander L. Oliver to the Bayonne Building Company would be performed.

15. That at the time the defendants purchased the plot they now own and described in paragraph five hereof, they knew of the restrictions contained in the said deed of Alexander L. Oliver to the Bayonne Building Company as described in paragraph two hereof.

16. That Marguerite A. O. Mellor and John Mellor, her husband, reside in the City of Montclair, New Jersey, and own no land within the said restricted area.

17. That if the defendants are permitted to erect the apartment house which they contemplate erecting upon the said plot of ground described in paragraph five hereof, the value of the property owned by the Complainants will depreciate since the houses erected upon their respective plots are set back twenty feet from the line of

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Avenue B, while the apartment house is intended to be erected along the line of Avenue B.

10 18. At the time of the conveyance by Alexander L. Oliver and wife to Bayonne Building Company, as aforesaid, the said Oliver owned lands situated on the same block, which he subsequently conveyed as follows:

20 A. Deed by Alexander L. Oliver and wife to Alva W. Forman, dated May 1, 1911, and recorded in the Register's Office of Hudson County in Book 1090 of Deeds page 222, which conveys a tract of land being a plot situated on the northwesterly corner of West Thirty-ninth Street and Avenue C, with a frontage of 100 feet on the westerly side of Avenue C and 150 feet on the northerly side of West Thirty-ninth Street. This conveyance contains restrictive covenants substantially similar to those contained in the deed from said Oliver and wife to said Bayonne Building Company, but it is expressly in said conveyance, provided that said restrictions shall expire after thirty years from the date of said deed.

30 B. By deed containing full covenants and warranty including covenant against incumbrances, Alexander L. Oliver and wife, dated February 3, 1912, recorded in Book 1115 of Deeds page 129, there was conveyed to Sarah E. Young, an aunt of the said Oliver, a plot adjoining the lands lastly above described, extending along the northerly line of West Thirty-ninth Street 150 feet, and running through to West Fortieth Street, with a frontage of 100 feet on the last men-

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tioned street. This deed contained no covenants or restrictions or any character whatever.

10 19. Alexander L. Oliver died after the making of the last mentioned deed of conveyance, leaving a last will and testament, and by which he devised all of his estate, both real and personal, unto his widow, Marguerite A. Oliver, who subsequently remarried one John Mellor, as reference being had to the records in the Office of the Surrogate of Hudson County, in Book 86 of Wills for said County on page 232, will more particularly appear.

20 20. That said Marguerite Mellor and John Mellor, her husband, thereafter conveyed to Frank Cash, by deed containing full covenant and warranty including covenant against encumbrances, dated May 5, 1916, and recorded in the Register's Office of Hudson County in Book 1234 of Deeds page 3, a plot of land fronting on the southerly side of West Fortieth Street and distant thereon easterly 135 feet from Avenue B, with a width of 25 feet and a depth of 100 feet, and immediately adjoining the lands so conveyed by said Oliver and wife to Bayonne Building Company on the east, which said deed of conveyance so made by said Marguerite Mellor and John Mellor, her husband, to the said Cash, contained no restrictions, or covenants in the nature of restrictions, whatever, nor any reference to any in any other deed, but upon which said plot has been erected a one-family dwelling house which complies with the restrictions contained in the deed from the said Alexander L. Oliver to Bayonne Building Company.

30 40 21. By deed dated June 5th, 1919, recorded in

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10 the Hudson County Register's Office in Book 1313 of Deeds for said County, on page 125, the said Marguerite A. O. Mellor and husband conveyed to Harold Levy a lot with a width of 25 feet by a depth of 100 feet, situated on the westerly side of Avenue C, distant 100 feet northerly from the northerly line of West Thirty-ninth Street, and immediately adjoining on the north the premises conveyed by Alexander L. Oliver and wife to Alva W. Forman, hereinbefore mentioned. The said deed to Harold Levy contained restrictions and restrictive covenants similar to those contained in the deed to the Bayonne Building Company as aforesaid.

20 22. By deed dated May 1, 1920, and recorded in the Register's Office of Hudson County in Book 1370 of Deeds, page 91, the said Marguerite Mellor and husband conveyed to I. W. Wood, Jr., Inc. a plot of land situated on the northerly side of West Thirty-ninth Street, and distant thereon westerly 350 feet from the westerly line of Avenue C, which said plot of land is 50 feet in width on West Thirty-ninth Street by 100 feet in depth. This deed of conveyance contained restrictions, or restrictive covenants similar to those contained in the deed from Alexander L. Oliver and wife to Bayonne Building Company aforementioned, but expressly provides that said restriction shall expire in ten years from the date of said deed.

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40 23. That out of the frontage on West Fortieth Street in the block in which the premises in question are located, owned by Alexander L. Oliver, or his successor in title Marguerite A. O. Mellor, there was conveyed a frontage of 210 feet with restrictions and a frontage of 125 feet without re-

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10 strictions. The plot fronting on the southerly side of West Fortieth Street from Avenue B to Avenue C is entirely built up and all of the buildings erected upon the lands fronting on the said side of West Fortieth Street are one-family dwellings in compliance with the restrictions contained in the deed from the said Oliver to the Bayonne Building Company. That out of the lands of the said Oliver or his successor in title, Mrs. Mellor, fronting on West Thirty-ninth Street between Avenue B and Avenue C, was conveyed a frontage of 485 feet with restrictions, and a frontage of 150 feet without restrictions, but all of the buildings erected upon the said plot of land fronting on the northerly side of West Thirty-ninth Street between Avenue B and Avenue C excepting the one hereinafter referred to are one-family dwelling houses which conform with the restrictions contained in the deed from the said Oliver to the said Bayonne Building Company.

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30 24. That the said Marguerite A. Oliver, widow of said Alexander L. Oliver, and sole devisee under his last will and testament, as aforesaid, did likewise acquire as part of the estate of her said deceased husband, certain lands fronting on the southerly side of West Thirty-ninth Street, directly opposite the lands and premises so conveyed by said Oliver and his wife to said Bayonne Building Company and being all of the lands fronting on the said southerly side of West Thirty-ninth Street between said Avenue B and Avenue C, excepting a plot fronting 125 feet on West Thirty-ninth Street at the corner of Avenue C, a portion of which said lands the said Marguerite Oliver, before her marriage to said Mellor, conveyed to William Kammann by deed containing full cove-

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10 nants and warrants including covenant against incumbrances, dated March 6, 1913, and recorded in the Register's Office of Hudson County in Book 1148 of Deeds page 515. The lands so conveyed by the said Marguerite Oliver to said Kammann comprise a plot the beginning point of which is distant easterly 85 feet from the easterly side of Avenue B, and extends easterly along the southerly line of West Thirty-ninth Street a distance of 475 feet. This deed contained no covenants in the nature of restrictions, nor restrictions of any kind whatsoever, nor reference to any in any other deed.

20 25. By full covenant and warranty deed, including covenant against incumbrances, dated July 15, 1919, and recorded in the Register's Office of Hudson County in Book 1314 of Deeds page 444, the said Marguerite Mellor and John Mellor, her husband, conveyed to John Muller a plot of land extending easterly 85 feet along the southerly line of West Thirty-ninth Street, and fronting 25 feet on Avenue B, which said lands are situated directly opposite the lands of the defendant in this suit. The said deed from Marguerite Mellor and husband to John Muller contained no restrictions, nor covenants in the nature of restrictive covenants, whatsoever, nor reference to any in any other deed.

30 26. The Bayonne Building Company to which Alexander L. Oliver and wife had conveyed the plot bounded on the north by West Fortieth Street, on the south by West Thirty-ninth Street, and on the west by Avenue B, and of which the premises of the defendant formed a part, subdivided the said plot and conveyed it as hereinafter stated.

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27. By agreement entered into on October 1, 1913, and recorded in the Register's office of Hudson County in Book 1206 of deeds, page 593, said Bayonne Building Company agreed to sell to Henry S. Germond and Agnes Dana Germond, his wife, a plot on the easterly side of Avenue B, beginning 10 88 feet south from West 40th Street, and being 46½ feet in width front and rear by 100 feet in depth throughout, and to convey the same by full covenant and warranty deed, free and clear of all encumbrances; and by deed containing full covenants and warranty, as well as covenant against encumbrances dated October 1, 1913, and recorded in Book 1206 of Deeds for Hudson County, on page 593; and again by similar deed dated January 20 2nd, 1919, recorded in Book 1300 of deeds for said County, on page 103, said Bayonne Building Company conveyed said plot so described in said contract to Agnes Dana Germond. Neither said contract nor either of these deeds contain any restriction, nor refer to any restrictions nor covenants in the nature thereof in any other conveyances, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the 30 restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

28. By full covenant and warranty deed containing covenant against encumbrances, dated October 14th, 1915, and recorded in Book 1215 of Deeds for Hudson County, page 320, said Bayonne Building Company conveyed a plot on the easterly side of Avenue B, beginning 50 feet southerly from 40 the southerly line of West 40th Street and being a

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10 plot 33 feet in width front and rear by 100 feet in depth through, to Hazel Thiele (now Hazel Bruder, whose affidavit is annexed to Complainants' bill). This deed contains no restrictions nor any reference to any restrictions, nor to covenants in the nature thereof, in any other conveyance, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house, which complied with the restrictions contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

20 29. By full covenant and warranty deed containing also a covenant against encumbrances, dated December 6, 1916, recorded in the Hudson County Register's Office in Book 1228 of Deeds page 632; said Bayonne Building Company conveyed a plot on the easterly side of Avenue B, immediately adjoining the premises of the defendant on the northerly side thereof, and beginning 37.50 feet northerly from West 39th Street, being a plot 33 feet in width front and rear by 100 feet in depth throughout, to Henry W. Thornberry and Maude I. Thornberry, his wife, which said deed of conveyance contained no restrictions nor any reference to any restrictions nor covenants in the nature thereof in any other conveyance; but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

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40 Said Henry W. Thornberry and Maude I. Thorn-

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berry, his wife, mortgaged said lands to Pamrapo Building & Loan Association by mortgage dated March 9th, 1916, and recorded in Book 873 of Mortgages for Hudson County page 51, to secure the sum of \$5,050.00 which mortgage contains no restrictions nor reference to any restrictions or covenants in the nature thereof in any prior conveyance, although said mortgage contains the usual covenant against encumbrances and of warranty by the mortgagors therein named. Said Henry W. Thornberry and Maude I. Thornberry, his wife, conveyed said lands by full covenant and warranty deed, containing covenant against encumbrances, but subject to said mortgage of said Pamrapo Building & Loan Association to George F. Buell (one of the parties whose affidavit is annexed to complainants' bill) which said deed of conveyance contains no restrictions nor any reference to any restrictions nor covenant in the nature thereof contained in any other conveyance. By mortgage dated July 1st, 1919, and recorded in the Register's Office of Hudson County in Book 959 of Mortgages, page 272, said George F. Buell and May Buell, his wife, mortgaged said lands to Richard Rhode and May Rhode, his wife, to secure the payment of the sum of \$3,500.00; which mortgage contains the usual covenant of warranty and against incumbrances, but contains no restrictions nor reference to any restrictions nor covenants in the nature thereof in any other conveyance.

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30. By deed dated December 13th, 1916, recorded in the Register's Office of Hudson County in Book 1250 of Deeds, page 128, said Bayonne Building Company conveyed a plot on the southerly side of West 40th Street beginning 100 feet easterly

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10 from Avenue B, being a plot 35 feet in width front and rear by 100 feet in depth throughout, to Johanna Loughlin. This deed contains restrictions similar to those contained in the deed by Alexander L. Oliver and wife to the Bayonne Building Company, dated December 2nd, 1910, recorded in Book 1087 of deeds for Hudson County on page 248, as hereinabove referred to.

20 31. By full covenant and warranty deed containing a covenant against encumbrances, dated March 16, 1919, recorded in the Register's Office of Hudson County in Book 1351 of deeds page 625, said Bayonne Building Company conveyed a plot on the northerly side of West 39th Street immediately adjoining the premises of the defendant on the easterly side thereof, and beginning 100 feet easterly from the easterly line of Avenue B, being 37 feet in width front and rear by 100 feet in depth throughout, to Clifford P. Jennings, one of the complainants in this cause. This deed contains no restrictions nor reference to any restrictions or covenants in the nature thereof in any other conveyance, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction. By deed dated 30 January 5th, 1920, and recorded in the Register's Office of Hudson County on March 3, 1920, in Book 1350 of Deeds page 209, said Clifford P. Jennings and Olive C. Jennings, his wife, conveyed said lands to Madeline E. West, which deed of conveyance contained no restrictions, no reference to any 40

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restrictions or covenants in the nature thereof, in any other conveyance. By deed dated January 5, 1920, and recorded in the Register's Office of Hudson County on March 3, 1920, in Book 1350 of deeds page 209, said Madeline E. West conveyed said lands to Olive C. Jennings, one of the Complainants in this cause, which deed contained no restrictions nor any reference to restrictions or covenants in the nature thereof, in any other conveyance. 10

20 32. By full covenant and warranty deed containing covenant against encumbrances, dated April 1, 1919, recorded in Book 1305 of Deeds for Hudson County, page 636, said Bayonne Building Company conveyed a plot on the southwesterly corner of West 40th Street and Avenue B, being 50 feet in depth throughout, running along the southerly line of West 40th Street, to Albert C. Nuber and Ida Nuber, his wife. This deed contains no restrictions nor makes any reference to any restrictions nor covenants in the nature thereof, in any other conveyance, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction. The last mentioned premises were conveyed by said Albert C. Nuber and Ida Nuber, his wife, by full covenant and warranty deed containing covenant against encumbrances to Maude V. Brady, one of the parties whose affidavit is annexed to complainants' bill, in which said deed there are contained no restrictions nor any reference to restrictions or covenants in the nature thereof in any other conveyance. 30 40

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33. By full covenant and warranty deed containing covenant against encumbrances, bearing date April 1, 1919, recorded in book 1308 of Deeds for Hudson County, page 80, said Bayonne Building Company conveyed a plot on the northeasterly corner of Avenue B and West 39th Street, being 37.50 feet in width front and rear, fronting on Avenue B by 100 feet in depth throughout, running easterly along the northerly line of West 39th Street, to William Kammann. Said deed of conveyance contains no restriction nor refers to any restrictions or covenants in the nature thereof in any other conveyance. The lands so conveyed by said Bayonne Building Company to said William Kammann was thereafter by mesne conveyances vested and still remains vested in the defendants in this cause and are the same lands which are described as the lands of these defendants, upon which it is in the bill of complaint alleged that these defendants have proceeded to erect an apartment house, in the bill of complaint in this cause. The deed, however, by which the defendants acquired title contains a provision therein that the conveyance is made subject to the restrictions of record and the defendants had actual knowledge of the existence of the restrictions contained in the deed made by the said Oliver to the said Bayonne Building Company, recited in paragraphs one and two hereof, and attempted to evade the force and effect thereof by procuring an agreement from Marguerite A. O. Mellor and John Mellor, her husband, on January 10, 1925, which date is prior to the commencement of the excavation work enjoined by the order made in this cause, and copy of which agreement is annexed to the bill of complaint as Schedule A.

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34. By full covenant and warranty deed containing covenant against encumbrances dated June 25th, 1919, recorded in Book 1323 of deeds for Hudson County page 74, the Bayonne Building Company conveyed a plot on the northerly line of West 39th Street, distant 137 feet easterly from the easterly line of Avenue B, and being a plot 74 feet in width front and rear by 100 feet in depth throughout, to Matilda Rabe. This deed of conveyance contains no restrictions nor reference to any restrictions nor covenants in the nature thereof in any other conveyance, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction. Said Matilda Rabe conveyed said lands by full covenant and warranty deed, containing covenant against encumbrances, dated January 30th, 1922, and recorded in the Register's office of Hudson County in Book 1431 of deeds page 297, to Emma H. Mestres, which deed contains no restrictions nor reference to restrictions, nor covenants in the nature thereof in any other conveyance.

35. By deed dated September 29th, 1919, recorded in Book 1329 of Deeds for said County on page 315, the Bayonne Building Company conveyed a plot on the northerly line of West Thirty-ninth Street distant 211 feet easterly from Avenue B, being 37 feet in width front and rear by 100 feet in depth throughout, to Arthur Frank. This deed contains restrictions similar to the restrictions con-

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tained in the deed from Alexander L. Oliver to the Bayonne Building Company, recorded in Book 1087 of Deeds for Hudson County on page 248, as hereinbefore set forth.

10 36. By deed dated December 1, 1919, recorded in Book 1351 of Deeds for said County on page 90, the Bayonne Building Company conveyed a plot on the northerly side of West Thirty-ninth Street, distant 248 feet easterly from Avenue B, being a plot 37 feet in width front and rear by 100 feet in depth throughout, to Isaac W. Wood. This deed also *contains* restrictions similar to those contained in the deed from Alexander L. Oliver to the Bayonne Building Company aforesaid.

20 37. The Bayonne Building Company became seized of other plots in said block 136, in which block the lands of the Defendant are situated, being a portion of the lands conveyed by said Alexander L. Oliver and wife to Sarah E. Young, by deed bearing date February 3rd, 1912, and recorded in Book 1115 of Deeds for Hudson County on page 129, as hereinbefore mentioned, which said last mentioned deed contained no restrictions nor restrictive covenants or any kind. The deed, however, from Young to the Bayonne Building Company *contained* restrictions similar to those contained in the Oliver deeds. The part so acquired by the Bayonne Building Company was situated on the northerly side of West 39th Street distant 150 feet westerly from Avenue C, with a frontage of 150 feet on West 39th Street. This plot was sold by the Bayonne Building Company in four parcels as follows:

40 A. By agreement dated June 20th, 1918, recorded in Book 1295 of deeds for Hudson

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County, on page 191, agreed to convey and by deed dated March 1st, 1919, recorded in Book 1311 of deeds for said County on page 294, said Bayonne Building Company conveyed a plot on the northerly side of West Thirty-ninth Street, beginning 187.5 feet 10 westerly from Avenue C, and being 37.5 feet in width, front and rear, by 100 feet in depth throughout to Michael Farrell. Neither of these deeds contained any restrictions nor make any reference to any restrictive covenants in any other deeds, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said 20 Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

B. By deed dated June 25th, 1919, recorded in Book 1325 of Deeds for Hudson County on page 252, said Bayonne Building Company conveyed a plot on the northerly side of West 39th Street, distant 225 feet 30 westerly from Avenue C, being 37 feet in width front and rear by 100 feet in depth throughout, to Mary Proctor. This deed contains no restrictions and makes no reference to any restrictive covenants in any other deed, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwell- 40

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ing house is still maintained in conformity with the said restriction.

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C. By deed dated July 1st, 1919, recorded in Book 1317 of Deeds for said County on page 105, said Bayonne Building Company conveyed a plot on the northerly side of West Thirty-ninth Street, beginning 150 feet westerly from Avenue C and being 37.5 feet in width front and rear by 100 feet in depth throughout to George Tinsley. This deed *contains* restrictive covenants somewhat similar to the restrictions contained in the deed from Alexander L. Oliver and wife to the Bayonne Building Company, dated December 2, 1910, and recorded in Book 1087 of Deeds for Hudson County on page 248, and which is hereinafter referred to, but said deed expressly provides that said restrictions shall expire November 21, 1922.

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D. By deed dated January 1st, 1920, recorded in Book 1338 of Deeds for Hudson County on page 641, the Bayonne Building Company conveyed a plot on the northerly side of West Thirty-ninth Street, distant 262 feet westerly from Avenue C and being 38 feet in width, front and rear, by 100 feet in depth throughout to Harriet Cadugan. This deed *contains* restrictions similar to those in the deed to said George Tinsley as hereinbefore mentioned, but said deed expressly provided that said restrictions shall expire on November 21, 1922.

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38. The Bayonne Building Company also acquired title to two plots on the southerly side of West Fortieth Street, in said block 136 by two

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deeds, on dated December 23rd, 1907, and recorded in Book 1005 of deeds for Hudson County page 307, and re-recorded in Book 1086 of Deeds for said County on page 155, and the other by deed dated April 2, 1919, and recorded in Book 1048 of deeds for said County on page 23. The deeds from the said Alexander L. Oliver and wife to the Bayonne Building Company *contained* similar restrictive covenants, but expressly provided that said restrictions shall cease in ten years from the date of said deeds, and when the Bayonne Building Company conveyed these plots, it did not insert in its deeds restrictions of any kind or reference to any restrictive covenants in any other deeds, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

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39. The lands were conveyed by the Bayonne Building Company as follows:

A. By agreement dated December 24, 1910, recorded in Book 1197 of Deeds for Hudson County on page 311, agreed to convey and again by deed dated February 1st, 1915, recorded in Book 1201 of Deeds for said County on page 93, the said company conveyed a plot on the southerly side of West Fortieth Street, distant 210 feet easterly from Avenue B, being 50 feet in width front and rear by 100 feet in depth throughout, to Robert Van Wallmenich. This deed contains no restrictions nor reference to restrictive covenants of any kind in other deeds,

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Agreed State of Facts.

10 but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

20 B. By deed containing full covenants and warranty, including covenant against encumbrances, dated April 29, 1911, recorded in Book 1090 of Deeds for said County on page 217, said company conveyed a plot on the southerly side of West 40th Street, 260 feet easterly from Avenue B, being 50 feet in width front and rear by 100 feet in depth throughout to Elizabeth Frank. This deed contains no restrictions nor reference to restrictive covenant of any kind in other deeds, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

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40 40. The Bayonne Building Company also acquired title to another plot on the southerly side of West Fortieth Street in said block 136, distant 135 feet easterly from Avenue B, which immediately adjoins on the easterly side the premises conveyed by Alexander L. Oliver and wife to the Bayonne Building Company by deed dated December 2, 1910, recorded in Book 1087 of Deeds for said

Agreed State of Facts.

County on page 248, as hereinbefore set forth. This plot was conveyed by Marguerite A. O. Mellor and husband to Frank Cash and Florence Cash, his wife, by deed of full covenant and warranty with covenant against incumbrances, dated May 8, 1916, recorded in Book 1234 of deeds for said County on page 3, and is hereinbefore referred to. The deed to the said Frank Cash contains no restrictions, nor reference to any restrictions or restrictive covenants contained in any other deed, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

10 20

41. The Bayonne Building Company acquired title to three other plots in said block 136 which were conveyed away by the following deeds:

A. By deed dated April 2nd, 1909, recorded in Book 1048 of deeds for Hudson County, page 25, the Bayonne Building Company conveyed to Sarah E. Young, a plot on the southerly side of West Fortieth Street, distant 300 feet west of Avenue C, and being 25 feet in width front and rear by 100 feet in depth throughout. This deed contains restrictions, somewhat similar to those contained in the deed to the Bayonne Building Company by Alexander L. Oliver and wife, recorded in Liber 1087 of deeds for said County on page 248, but expressly provides that said restrictions shall expire in ten years from the date of said deed.

30 40

Agreed State of Facts.

10 B. By deed of full covenant and warranty including covenant against encumbrances, dated April 29, 1911, recorded in book 1090 of deeds for Hudson County on page 219, the Bayonne Building Company conveyed to John Frank and Ella Frank, his wife, a plot on the southerly side of West Fortieth Street, immediately adjoining the premises conveyed to the said Sarah E. Young by the above mentioned deed. The plot being 50 feet in width front and rear by one hundred feet in depth, throughout. This deed contains no restrictions nor makes any reference to any restrictions or restrictive covenants in any other deed, but at the time of the said conveyance there was already erected upon the said plot a one-family dwelling house which complied with the restriction contained in the deed from the said Oliver to the Bayonne Building Company and which dwelling house is still maintained in conformity with the said restriction.

30 C. By deed dated July 19, 1915, the Bayonne Building Company conveyed to Francis Brick a plot on the southerly side of West Fortieth Street, distant 137.50 feet west from Avenue C, being a plot 37.50 feet in width, front and rear by 100 feet in depth throughout. This deed *contains* restrictions similar to those contained in the deed to Sarah E. Young, above mentioned.

40 42. That upon lands so as aforesaid conveyed by the said Bayonne Building Company to George Tinsley and hereinabove referred to in paragraph

Agreed State of Facts.

37-C, there has been erected since the making of said deed, a building for occupancy by two families, and that the same has at all times been occupied by two separate families independently of each other, and is and constitutes what is commonly known as a two-family house. 10

43. That fronting on Avenue C and distant 50 feet southerly from West 40th Street, and upon part of lands conveyed by said Marguerite Mellor and husband to Harold Levy, by deed dated March 14th, 1921, and recorded in book 1398 of deed for Hudson County, page 9, which deed *contained* restrictions similar to those contained in the said deed from Alexander L. Oliver and wife to Bayonne Building Company, recorded in Book 1087 of deeds for Hudson County, page 248. There were erected since the making of said deed to said Harold Levy, two two-family houses, each of said houses being erected for occupancy by two separate families independently of each other, but the said two-family houses are set back from the building line in conformity with the said restriction. 20

44. That upon the lands conveyed by said Marguerite Mellor and husband to John Muller, mentioned in paragraph 25 hereof, which lands are directly opposite the 39th Street side of the lands of the defendants involved in this cause, there was since the making of said deed, erected and still stands erected thereon, a two-family house, constructed for dwellings for two families independently of each other, and upon the lands fronting on Avenue B, immediately adjoining the last mentioned two-family house, there likewise stand erected two two-family houses of like construction, but the said two-family houses are set back from 30 40

Agreed State of Facts.

the building line in conformity with the said restriction.

10 45. That upon the lands conveyed by Marguerite Oliver to William Kammann, dated March 6, 1913, and recorded in Book 1148 of Deeds, page 515, fronting on West 39th Street and directly opposite the lands conveyed by Alexander L. Oliver and wife to Bayonne Building Company, firstly hereinabove described, and of which the lands of defendants form part, there was and still stands erected a two-family house of like character as the two-family houses above mentioned, at a distance of 100 feet from Avenue B, but the said two-family houses are set back from the building line in conformity with the said restriction.

20 46. That on the southwesterly corner of Avenue C, fronting for a distance of 100 feet along West 39th Street, there was erected since the making of said deed by said Alexander L. Oliver and wife to Bayonne Building Company, on December 2nd, 1910, an apartment house for the accommodation of twenty-four families, each living independently of the other, and immediately adjoining said apartment house on the southerly side of West 39th Street upon a plot of land 25 feet in width by 100 feet in depth, there was since the making of said deed by said Alexander L. Oliver and wife to Bayonne Building Company, dated December 2nd, 1910, and still stands erected and occupied thereon, a two-family house occupied as such, and constructed for the same purpose as the other two-family houses aforementioned.

40 FEINBERG AND FEINBERG,
Solicitors of the Complainants.

GROSS & GROSS,
Solicitors of the Defendants.

Stipulation.

IN CHANCERY OF NEW JERSEY.

Between OLIVE C. JENNINGS and GEORGE F. BUELL, <i>Complainants,</i> and ANNA BAROFF and JULIUS BAROFF, <i>Defendants.</i>	}	On Bill, &c.	10
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It is hereby stipulated and agreed between the solicitors of the respective parties that the deed from Alexander L. Oliver and Marguerite A. Oliver, his wife to the Bayonne Building Company, dated January 31, 1911, referred to in paragraph 1 of the Agreed State of Facts, as the same appears of record recorded in the office of the Register of the County of Hudson, contains the matter alleged to be the restrictive covenants in this case, in precisely the language in which the same is set forth in Paragraph 2 of the Agreed State of Facts; but that the original instrument, if produced, would show the said alleged matter prefaced by the following language, to wit:

"It is understood and agreed by the party of the second part, its successors and assigns, that this conveyance is made subject to the following restrictions and conditions."

And it is further stipulated and agreed that the record of said deed, as the same appears recorded in the office of the Register of Hudson County, as mentioned in paragraph 1 of the Agreed State of

Opinion.

Facts, does not mention or use the word "restrictions" in any part thereof.

DEMBE & DEMBE,
Solicitors of Complainants.

GROSS & GROSS,
Solicitors of Defendants.

10

Opinion.

August 9, 1927.

FEINBERG & FEINBERG, Esqs., Lawyers
Building, Bayonne.

GROSS & GROSS, Esqs., 15 Exchange Place,
Jersey City.

20

Gentlemen:

A careful examination of the pleadings, stipulations, briefs and authorities lead me to the belief that a perpetual injunction should issue. The sound and equitable theory of Chancellor Zabris-
kie in *Winfield v. Henning*, 21 N. J. Eq. 188, should be followed. *Sailer v. Podolski*, 82 *Id.* 459 (and, I think, all other cases with which this may appear to conflict) is distinguishable from the case at bar because in that case, the complainants' title was to some of the remaining lands of the original grant-
or, while in this case, the complainants (or some of them) are seized of parcels of the very tract upon which the restrictions were placed. I am, of course, speaking of the case of *Jennings v. Baroff*, but I have no great facility in the operation of a typewriting machine.

30

Before a decree is presented, an order of refer-
ence should be obtained.

40

Yours very truly,

JOHN BENTLEY.

Final Decree.

(Filed October 31, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
OLIVE C. JENNINGS and GEORGE F.
BUELL,
Complainants,
and
ANNA BAROFF and JULIUS BAROFF,
Defendants.

On Bill, &c.

10

This cause being opened to the Court by Fein-
berg & Feinberg, of Counsel with the Complain-
ants and the pleadings and stipulations having
been read and the arguments of Counsel for the
Complainants and Gross & Gross, Counsel with
the defendants, having been considered, and it ap-
pearing to the Court that the Complainants are
entitled to the relief prayed for by them, it is on
this 31st day of October, 1927, on motion of Fein-
berg & Feinberg, of Counsel with the Complain-
ants,

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ORDERED, that the defendants Anna Baroff and
Julius Baroff and each of them, their agents, ser-
vants or employees, be and they are hereby joint-
ly and severally restrained and enjoined from pro-
ceeding with the excavation, erection and con-
struction of the apartment house upon the said
lands and premises described in the Bill of Com-
plaint, and the said defendants Anna Baroff and
Julius Baroff, their agents, servants or employees

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Final Decree.

are hereby jointly and severally restrained and en-
 joined from erecting any building or dwelling
 upon the premises described in the Bill of Com-
 plaint in violation of the conditions and restric-
 tions contained in deed from Alexander L. Oliver
 10 and wife to the Bayonne Building Company, a
 corporation of the State of New Jersey, which said
 deed is dated December 2, 1910, and recorded in
 the Register's Office of Hudson County in Book
 1087, page 248.

And the said defendants, Anna Baroff and Julius
 Baroff, their agents, servants or employees are
 hereby jointly and severally restrained and en-
 joined from erecting any building or buildings to
 be used or occupied for any purpose other than a
 20 one-family residence, dwelling or church.

And the said defendants, Anna Baroff and Julius
 Baroff, their agents, servants or employees are
 hereby jointly and severally restrained and en-
 joined from erecting the front line of such resi-
 dence, dwelling or church (not including bay win-
 dows or porches) at any point less than twenty
 feet off the line of the Street or Avenue,

And the said defendants, Anna Baroff and Julius
 Baroff, their agents, servants or employees are
 30 hereby jointly and severally restrained and en-
 joined from erecting any building or dwelling
 upon the said premises which shall cost less than
 \$2,500.00, and it is

FURTHER ORDERED, ADJUDGED and DECREED that
 the defendants pay to the Counsel of the Com-
 plainants, a counsel fee of \$1,500.00. That the
 said counsel fee be added to the taxed bill of
 costs of the said complainants and that the said

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Final Decree.

complainants have execution therefor according to
 law and the rules and practice of this Court.

E. R. WALKER,
 C.

Respectfully advised:

JOHN BENTLEY,
 V. C.

A true copy.

THOMAS BARBER,
 Clerk.

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40

12 OCT. 1. 1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

<p>OLIVE C. JENNINGS, <i>et al.</i>, Complainants-Respondents,</p> <p style="text-align: center;"><i>and</i></p> <p>ANNA BAROFF and JULIUS BAROFF, Defendants-Appellants.</p>	<p><i>On Appeal from Court of Chancery,</i></p> <p>BENTLEY, V.-C.</p> <p><i>Bill to Enforce Restrictive Covenant.</i></p> <p><i>Decree for Complainants.</i></p> <p><i>Defendants' Appeal.</i></p>
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BRIEF FOR APPELLANTS.

(Italics ours except where otherwise noted.)

Statement of the Case.

The bill was filed March 2, 1925 (p. 5), to enjoin defendants from erecting an apartment house upon lands owned by Anna Baroff on the northeasterly corner of Avenue B and W. 39th street, Bayonne, being 37.50 feet on Avenue B by 100 feet on W. 39th street, and shown upon a diagram marked diagram 1 which accompanies this brief indicated as the property conveyed by Bayonne Building Company to Kammann, by deed dated April 1, 1919, and marked "X."

Complainant, Jennings, is the owner of the tract indicated on diagram 1 as the property conveyed by Bayonne Building Company to Clif-

ford P. Jennings, by deed dated March 6, 1919, and marked "O," located on the northerly side of W. 39th street, and adjoining defendants' property.

Complainant, Buell, is the owner of the land indicated on diagram 1 as the property conveyed by Bayonne Building Company to Henry W. Thornberry, by deed dated April 1, 1916, and marked "A" adjoining the property of defendant, Anna Baroff.

The charge of the bill is that the erection of the apartment house by defendants is in violation of the terms of restrictions contained in a deed made on December 2, 1910, by Alexander L. Oliver and Marguerite A. Oliver to the Bayonne Building Company of two plots of land, the first tract, which contained the property owned by complainants and defendant, being a part of block 136, 200 feet on Avenue B and 285 feet on W. 39th street, and 135 feet on W. 40th street, indicated on the diagram 2, accompanying this brief as the property conveyed by Alexander L. Oliver, *et ux.* to Bayonne Building Company by deed dated December 2, 1910, and marked "X"; the second tract conveyed was a part of block 150 fronting on W. 38th street 212.50 feet.

The conditions contained in that deed read as follows:

"1st. That no building or buildings hereafter erected on said lands shall be used or occupied for any purpose other than a one-family residence, dwelling or church.

2nd. That the front line of such residence, dwelling or church (not including bay windows or porches) shall not be at any point less than twenty feet off the line of the street or avenue.

3rd. That each of such residences, dwellings or churches shall not cost less than twenty-five hundred dollars (\$2,500)."

Defendants answered (p. 41). The case was submitted upon as agreed state of facts (p. 47) and amendment thereto (p. 75). The opinion of the court is contained in a letter written to counsel (p. 76), the court finding the defendants bound by the restrictions upon the authority of *Winfield v. Henning*, 21 N. J. E. 188. Thereupon, a final decree was entered (p. 77) which enjoined defendants "from erecting any building or buildings to be used or occupied for any purpose other than a one-family residence, dwelling or church" and from erecting the front line of such residence, dwelling or church (not including bay windows or porches) at any point less than twenty feet off the line of the street or avenue," and from "erecting any building or dwelling upon the said premises which shall cost less than \$2,500.00."

The decree also allowed complainants a counsel fee of \$1,500.

From this decree, and all parts of it, an appeal was taken. (Notice of appeal, p. 1, petition of appeal, p. 3.)

The Facts.

The conveyance by Oliver to Bayonne Building Company of the plot marked on diagram 2, "X," was on December 2, 1910. Oliver retained the remaining portion of Block 136. Oliver had previously conveyed to Bayonne Building Company the plot marked "A" on diagram 2 by deed dated December 23, 1907, and the plot marked "B" by deed dated April 2, 1909, both of which plots were restricted as the plot marked

"X" conveyed December 2, 1910. By deed dated May 1, 1911, Oliver conveyed the plot marked "C" to one Forman restricted, *the restrictions, however, to expire in thirty years*. By deed, dated February 3, 1912, Oliver conveyed the plot marked "D" to Sarah E. Young, *unrestricted*. Oliver then died, devising his property to Marguerite A. Oliver, who subsequently married one Mellor and she will hereafter be referred to as Mellor. By deed, dated May 5, 1916, Mellor conveyed the plot marked "E" to Cash, *unrestricted*. By deed, dated June 5, 1919, Mellor conveyed the plot marked "F" to Harold Levy restricted. By deed dated May 1, 1920, Mellor conveyed the plot marked "G" to I. W. Wood, Jr., Inc., restricted.

Oliver, and after his death Mellor, owned the lands fronting on the southerly side of West 39th street directly opposite the lands conveyed by Oliver to the Bayonne Building Company by the deed dated December 2, 1910, comprising about all the lands fronting on the southerly side of 39th street between Avenue B and Avenue C. Mellor conveyed, by full covenant and warranty deed, to Kammann, in March, 1915, the plot beginning 85 feet from Avenue B and extending on the southerly side of West 39th street, *without any covenants or restrictions whatsoever* (paragraph 24), the approximate location of which plot is marked on diagram 1 as "Z"; and in July, 1919, Mellor conveyed the remainder of the lands owned by her on the southerly side of West 39th street, directly opposite defendant's property, being 85 feet frontage on West 39th street, *without restrictions* to Muller, the location of which plot is marked on diagram 1, "Y."

The Oliver interests conveyed a great part of the land retained at the time of the conveyance

to Bayonne Company of December 2, 1910, some portions, plots "A," "B," "C" and "F" on diagram 2, restricted, although the restrictions of plot C expired by their terms in thirty years; other portions *unrestricted*, plots "D" and "E," in block 136, and the lots immediately opposite plot 136 on the southerly side of W. 39th street, one portion of which is immediately opposite the defendants' property, which plots so conveyed are marked "Y" and "Z" on diagram 1. *It is, apparent, therefore, that no neighborhood scheme of restrictions was intended by the Oliver interests or, if intended, was by them carried out.*

A history of the conveyances made by the Bayonne Building Company out of the lands conveyed to it is found in paragraphs 26 to 36 inclusive of the stipulation of facts.

By agreement, dated October 1, 1913, Bayonne Building Company, agreed to convey to complainants' affiant Germond plot marked "B" on diagram 1, by *full covenant and warranty deed* free of all encumbrances, *without reference to any restrictions*, and by the deed given to Germond the lands were thereafter conveyed *without any restrictions* (paragraph 27). A plot 33x100 feet was conveyed by warranty deed to Hazel Thiele *without restrictions* (paragraph 27) marked on diagram 1, "C." By full covenant and warranty deed a plot 33x100 feet, immediately adjoining defendants' lands, was conveyed to Thorberry, *without restrictions* (paragraph 29) marked on diagram 1, "A." The mortgage by Thorberry to Ramrapo Building & Loan Association in said paragraph mentioned, contains *no restrictions*. In the deed by Thorberry to complainant Buell *no reference is made to any restrictions*, although the deed contained full covenants. The mortgage made by complainant Buell to Rhode, con-

taining full covenants, *did not mention any restrictions* (paragraph 29). The full covenant and warranty deed by Bayonne Building Company to complainant Jennings, conveying a plot 37x100 feet immediately adjoining defendants' premises and marked on diagram 1, "O" *did not mention restrictions*; the deed by complainant Jennings, to West, conveying the same premises, and deed from West to complainant Jennings, likewise *did not mention restrictions* (paragraph 31). In deed by Bayonne Building Company to Nuber of plot marked on diagram 1, "D," *no restrictions* are contained, nor are any contained in the deed for the same plot by Nuber to complainants' affiant Brady (paragraph 32).

In the deed by Bayonne Building Company conveying the lands now owned by defendant, Anna Baroff, marked on diagram 1, "X," to Kammann, containing full covenants and warranty, as do likewise all the deeds hereinabove mentioned made by Bayonne Building Company, *no restrictions* whatever are contained. Kammann conveyed this plot to defendant, Anna Baroff. By deed of Bayonne Building Company to complainant's affiant Rabe, a plot 74x100 feet marked on diagram 1 "E" was conveyed *without any restrictions* which premises were thereafter conveyed by Rabe to Mestres by full covenant and warranty deed *without restrictions*.

The only portions of the property acquired by Bayonne Building Company from Oliver by the deed dated December 2, 1910, of which plot the lands of complainants and defendants formed a part and marked "X" on diagram 2, conveyed by Bayonne Building Company with restrictions, are the plots marked "H" conveyed by Bayonne Building Company to Loughlin (paragraph

30), September 13, 1916, plot marked "G" conveyed by Bayonne Building Company to Frank, September 20, 1919 (paragraph 35) and the plot marked "H" conveyed by Bayonne Building Company to Wood, December 1, 1919.

Bayonne Building Company acquired other property in block 136. These lands it acquired, with the exception of plots marked "A" and "B" on diagram 2 by conveyance *without restrictions of any kind*, and thereafter conveyances were made by Bayonne Building Company of portions of such land, some plots *without restrictions*, other plots with restrictions unlimited as to time, other plots *with restrictions limited to the period of ten years*. The lands so conveyed, not lying within the plot marked "X" on diagram 2, are shown on diagram 1. Those which are colored in red were conveyed with restrictions of some nature; those which are shown in yellow were conveyed *without restrictions of any kind*.

In no one of the conveyances through which complainants and complainants' affiants derived title from Bayonne Building Company does there appear any restriction.

Not only, therefore, did the Oliver interests not restrict the lands retained in the same manner as Oliver restricted the land conveyed by him to Bayonne Building Company, marked on diagram 2 "X," but Bayonne Building Company did not uniformly restrict the lands which it conveyed in that plot or any other lands owned by it in the same block. *A neighborhood plan of restrictions was not urged below nor was it found to exist by the Vice-Chancellor.*

A point was made in the court below that the deed by which defendant Anna Baroff acquired title, dated January 7, 1925, contained a recital

that the premises were purchased by defendant, Anna Baroff, subject to the restrictions contained in the deed from Oliver to Bayonne Building Company. But the deed to defendant Anna Baroff was a mesne conveyance. It contained no covenant on the part of the defendant, Anna Baroff. The provision in the deed, to the effect that it was subject to restrictions, was merely inserted to prevent any suit by defendant, Anna Baroff, upon the covenant of warranty. If the property was properly subject to restrictions, then the defendant took subject to the restrictions. On the contrary, if the property was not legally encumbered with restrictions *no restriction was created by operation of this deed.*

On January 10, 1925, Mellor, then being vested with all of the rights of Oliver in the restrictive conditions contained in the deed made by Oliver to Bayonne Building Company, of December 2, 1910, released defendant, Anna Baroff, from the operation of such restrictions.

In the view we take of this case, the physical situation of the surrounding property is unimportant for it is *only* in case a *neighborhood* plan is found to exist that it becomes important to determine whether the neighborhood plan has been so violated as that equity will no longer enforce compliance with it. *In the absence of a neighborhood plan, which gives an equitable right, it is immaterial whether the property has been built up to comply with the restrictions if, in fact, the party asserting the right to enforce the restrictions cannot show a right to enforce them.*

If there were a neighborhood plan it has not been lived up to.

On the plot conveyed by Bayonne Building Company to Tinsley, July 1, 1919, marked on

diagram 1, "I," there is erected what is commonly known as a two-family house.

On the plot conveyed by Mellor to Levy, by deed dated March 14, 1921, plot marked "F," diagram 2, and which deed *contained restrictions* similar to those contained in the deed from Oliver to Bayonne Building Company of December 2, 1910, there have been erected two two-family houses in violation of the terms of the restrictions.

On the plot conveyed by Oliver to Muller, by deed dated July 9, 1919, opposite defendants' property on W. 39th street, plot marked "Y" on diagram 1, there is erected a two-family house, and immediately adjoining this two-family house, on Avenue B, there is erected another two-family house.

On the plot conveyed by Oliver to Kammann marked "Z" on diagram 1 on W. 39th street, 100 feet from Avenue B, about opposite complainant Jennings property, marked "O" on diagram 1, there is a two-family house.

On the southwesterly corner of Avenue C at the point marked "XX" on diagram 1, fronting for a distance of 100 feet on W. 39th street, there is erected an apartment house for the accommodation of twenty-four families, and immediately adjoining that apartment house, on the southerly side of W. 39th street, there is a two-family house.

These various houses, some of which are erected upon lands which were restricted when conveyed by the Olivers, and some upon lands which should have been restricted by the Olivers when conveyed, if there were a neighborhood plan, were all erected after the deed made by

Oliver to Bayonne Building Company, dated December 2, 1910.

ARGUMENT.

I.

General Rule.

This court has laid down a general rule which is to be applied in every case involving an application to a Court of Equity to aid one man to restrict another in the use of his lands.

In *Fortesque v. Carroll*, 76 N. J. Equity, p. 583, 75 Atl. 923, this court said: "A more practical statement would be that Courts of Equity do not aid one man to restrict another in the uses to which he may put his land unless the right to such aid is clear," and, applying that rule, it reversed the Court of Chancery in granting an injunction restricting the erection of a structure whose exterior walls, foundation and roof constituted one building, but whose interior arrangements and entrances showed that it was to constitute two residences, alleged to be in violation of a covenant providing that "not more than one building shall be erected upon a single lot."

This court repeated what it had said in the Fortesque case, again reversing the Court of Chancery, in *Marsh v. Marsh*, 90 N. J. Equity, p. 244, 106 Atl. 810. It had said the same thing, again reversing the Court of Chancery, in *Howland v. Andrus*, 81 N. J. Equity, p. 175, 86 Atl. 391.

II.

The rights of complainants cannot rest upon the theory of a neighborhood plan.

This court in *Scull v. Eilenberg*, 94 N. J. Equity, p. 759, 121 Atl. 788, indicated the characteristics which must pertain to an effective and enforceable neighborhood plan. This court said p. 762:

"A neighborhood 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,' as was said by Judge White in the case of *Sanford v. Keer*, 80 N. J. Eq. 240. When there is no benefit there should be no burden. If the benefit be destroyed the burden should end. The requisite universality of the neighborhood plan was referred to by the late Vice-Chancellor Green in the case of *De-Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, in the following language: 'The law, deducible from these principles and the authorities, applicable to this case, is that where there is a *general* scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues and lots, and contemplating

a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser, and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof, and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase. * * *

Where the restrictions are not universal or after the frequent violations of the restrictions have been permitted, then the neighborhood scheme will be considered abandoned."

This court, in affirming Vice-Chancellor Fielder in *Klein v. The Sisters of Charity*, October 17, 1927, 5 N. J. Advance Reports, p. 1575, approved his opinion in which he had reiterated what this court had said in *Scull v. Eilenberg*, 94 N. J. Equity, p. 759, and in which case the Vice-Chancellor had also said page 1563:

"The deeds in which the restriction is found contain no statement that the restriction was for the protection or benefit 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.*"

No neighborhood plan of Oliver is shown, for the lands which he retained were conveyed some with, and some without, restrictions.

Sufficient is shown in the statement of facts to indicate that no grantee of Oliver or his successor in interest who purchased land, beyond the bounds of the plot conveyed by Oliver to Bayonne Building Company by deed dated December 2, 1910, and marked "X" on diagram 2, can enforce the restrictive conditions contained in that deed against those who have purchased land in the plot marked "X" on diagram 2, from Bayonne Building Company.

Who then established any neighborhood plan?

It was not Oliver, and, when we come to Bayonne Building Company, the history of their conveyances is as set forth in the statement of facts. The larger part of the lands, which were within the lines of the plot marked "X," was conveyed by it *without any restrictions whatsoever*. A neighborhood plan is not established by the fact that a plot of land purchased by a grantee subject to restrictions imposed by the grantor, has been sold by such grantee in plots, the conveyances, with few exceptions, not referring to the restrictions and containing no new restrictions, but warranting the property *free from all encumbrances*.

It was not urged in the court below that a neighborhood plan had been established, nor did the court below hold that it had been established.

III.

Complainants cannot prevail under *Winfield v. Henning*, 21 N. J. Equity 188.

The *Winfield* case which was relied upon in the court below, has never been approved by this court, nor has it ever been followed or approved in the Court of Chancery upon the point for

which it was relied on as authority by the court below.

The case came before the Chancellor on a motion to dissolve an injunction upon bill and answer. Coles, by deed to Keeney and Wheeler, conveyed a hundred foot square tract of land on Coles and South Fifth street, Jersey City, which deed contained the following provision: "It being expressly understood and agreed that the houses which may be erected on Gilbert street (South Fifth street), shall be set back ten feet from the southerly line of said street." Coles retained other lands. Keeney conveyed his interest in the tract to Wheeler, who afterwards erected on it five two-story houses ten feet from the south line of the street. After he had built these houses, he conveyed one of them and that house subsequently came into the possession of the complainant. He afterwards conveyed another of the houses of which house defendant afterwards came into possession. There were no restrictions contained in any deed aside from that to Keeney and Wheeler. Defendant then commenced the erection of an addition to the dwelling house which would violate the restriction contained in the deed from Coles to Keeney and Wheeler. The Chancellor in a short opinion said that there could be no question but that if a purchaser of the other lots retained by the Coles family at the giving of the deed, and injured by the erection, was the complainant, he would be entitled to the benefit of the stipulation, and then said:

"But in this case both parties derive title from the covenantors, and not from the covenantee, and the question is, whether they are bound to each other by the covenants which Wheeler entered into with the Coles family, for the benefit of the property which they retained."

After stating that no action at law could be maintained by the complainant on the covenant, he said p. 190:

"But in equity their position is different. Both parties are bound to the grantors in the Coles deed to keep this front free from buildings; each is subject to the easement over his lot, in favor of those subsequently deriving title from Coles, and each is equitably and justly entitled to the advantage which the observance of this *stipulation by his neighbor* may be to him."

He then said p. 190:

"It seems equitable that this court should, at his instance, compel the observance of this covenant. This view is supported by the dictum of Lord Romilly, in a case heard before him at the rolls, in 1866, *Western v. Macdermot*, 1 Eq. Cases (L. R.) 507; and by a decision of the Supreme Court of Rhode Island. *Green v. Creighton*, 7 R. I. R. 1."

The result in *Winfield v. Henning* may have been correct, but we submit that the basis of relief as indicated by the court finds support neither in reason nor authority.

The court may have found, from the allegations of the bill, a neighborhood plan established by Coles, conformed to and participated in by Wheeler, who erected on the property conveyed to Keeney and Wheeler, subject to these restrictions, five two-story houses in conformity with the restrictions and covering the entire plot acquired, and *then* conveyed the various properties to others.

Upon some such theory, equity may have been able to read into the transaction an agreement by the grantees of Wheeler to conform to a neighborhood plan. If this was the underlying reason for the decision of the court in *Winfield v. Hen-*

ning, although not expressed by the court, then the rules announced by this court in *Scull v. Eilenberg*, 94 N. J. Equity 759, would apply, and there could be no relief in this case upon such a theory for the reasons heretofore stated under Point II. In the instant case, Bayonne Building Company did *not* erect the buildings conforming to the restrictions and *then* sell them. On the contrary, it sold the *lands* some with, and some without, restrictions.

But the Chancellor seemed to feel, in *Winfield v. Henning* that, because each of the grantees took from Wheeler, and their land, although not restricted by Wheeler, was bound by the restrictions imposed in the Coles deed to Keeney and Wheeler, each was bound to comply with the restrictions as between themselves. He seemed to feel that there was an absolute right in Coles and his grantees to enforce in equity the provisions of the restriction against the grantees of Keeney and Wheeler, but this is not so.

Vice-Chancellor Stevens said in *Genung v. Harvey*, 79 N. J. Equity 57, 80 Atl. 955, at p. 59:

"His (the original grantor) right thus to sue (at law against the original covenantor) was absolute. *But in equity it was subject to this restriction.* He must have shown, not merely technical violation, but also substantial injury to the land that remained to him. * * * If grantor has no remaining lands, he has nothing that needs protection by injunction, and, consequently, the remedy at law is adequate."

The Chancellor in the *Winfield* case stated:

"If any purchaser of the other lots retained by the Coles family at the giving of this deed, and injured by the erection, was the complainant, the authorities are numerous and decided, that he would be entitled to the benefit of this stipulation."

A subsequent grantee of the lands retained by the Coles family would *not* be entitled to enforce the covenant at law unless it were especially assigned to him, *Reid v. Bickerstaff*, (1907) 2 Ch. 305, nor could he enforce it in equity unless it appeared that the covenant was made for the benefit of the land retained and then granted.

The mere fact that the restrictions are inserted in the conveyance of the lands granted does not indicate that the covenant is inserted for the benefit of the lands retained.

Vice-Chancellor Reed said, in *Hemsley v. Marlborough Hotel Company*, 62 N. J. Equity 164, 50 Atl. 14, affirmed on the opinion of the Vice-Chancellor 63 N. J. Equity 804, 52 Atl. 1132, at p. 171 of 62 N. J. Equity:

"The complainant's case rests upon the one fact that at the time Mary Disston conveyed to the academy she was the owner of land separate from the land so conveyed. In the absence of any words in the deed to that effect, or any reference to a plan showing a general scheme for improvement and that the grantee took the land with notice, express or implied, that the restriction was intended for the benefit of the remaining land, no right to sue passed to the subsequent grantee. *Skinner v. Shepard*, 130 Mass. 180."

Before the grantees of the original grantor can sue upon the covenant made by the grantor with a prior grantee, of other land, it must appear, from the facts and circumstances, or by the language in the covenant, that the covenant was inserted for the benefit of the remaining lands of the grantor, which means, in effect, that a general scheme of development must be shown.

In the case at bar *there was no covenant by Bayonne Building Company*. The restrictions are introduced by the following words:

"It is understood and agreed by the party of the second part (Bayonne Building Company) its successors and assigns, that this conveyance is made subject to the following restrictions and conditions."

There was, therefore, no covenant made by Bayonne Building Company to the original grantor, and certainly nothing in the conveyance indicating that any condition was for the benefit of lands retained by the original grantor, and nothing which would impose a burden upon the original grantor to convey his remaining lands subject to the same restriction.

Vice-Chancellor said in *Hemsley v. Marlborough Hotel Company*, 62 N. J. Equity 164, affirmed by this court 63 N. J. Equity 804, at p. 171:

"Upon inspection of the deed made by Mary Disston to the Academy of the Sacred Heart, nothing appears to indicate that the dwelling-house restriction was for the benefit of anyone other than the grantor. Nor is there any provision for the insertion of similar covenants in other deeds to be made by the grantors. When we look for any other feature of the transaction which would disclose on intention that the covenant should attach to and be for the benefit of the other land of the grantor, there is entire absence of any evidence."

In the case at bar the subsequent conduct of the grantor of Bayonne Building Company indicates that the insertion of this covenant was *not* for the benefit of the lands retained, (or at least if it was the right to enforce it in equity was lost), because Oliver and his successors in interest transferred the remaining land, some of

it with restrictions of different types, and some of it (part adjoining the property conveyed to Bayonne Building Company) without any restriction whatever.

But, assuming in the Winfield case that the purchaser of lots retained by the Coles family could enforce the terms of the covenant, we cannot see how it follows that in equity the grantees of *Wheeler* could enforce the restrictions *as between themselves*, for the theory upon which the purchasers of the lots retained by the Coles family could enforce the covenant against the grantees of *Wheeler*, is that the covenant was inserted in the deed to Keeney and *Wheeler for the benefit of the lands retained by the Coles family*.

From this fact, there arises an equity in the purchaser of any of the lots retained by the Coles family to enforce the covenant made for the benefit of the lots, which is nothing more or less than applying the rule that a contract may be enforced for the benefit of those for whom it is made.

But to bring the purchasers from Keeney and *Wheeler* within the same rule would require a finding that the covenant was imposed by the original grantor upon the lands granted *for the benefit of the lands granted*. Only in such a case could it be said that a subsequent purchaser of *those* lands granted could enforce the covenant upon the theory that it was made for *his* benefit. But there is no evidence in the case at bar that Oliver imposed this restriction upon the lands granted to Bayonne Building Company for the benefit of the lands so granted.

But even if it were so, *i. e.*, that the purpose of the imposition of the restriction was to benefit the lands *granted*, it would *not* follow that

subsequent grantees of the lands could enforce the restrictive covenants, *inter sese*, because Bayonne Building Company, while owner of the lands granted, would be within its right, if it determined *not* to take advantage of any such supposed benefit and to surrender it. Can there be any question but that, while these lands remained in the possession of Bayonne Building Company, as against any subsequent purchaser of the lands from Bayonne Building Company, Oliver and his successors in interest could release the restrictions?

But no such release of restrictions was necessary to prevent Bayonne Building Company conveying the lands granted to it in such a manner as that the purchasers would not take any supposed benefit from these restrictions. Bayonne Building Company, being the owner of the lands, might convey them with or without the benefit of such restrictions. What Bayonne Building Company actually did was to convey the lands in such a manner as to indicate that it did *not* intend to transfer the lands with any such supposed benefit, for the entire frontage on Avenue "B" and two hundred feet of the frontage on West 39th street, which property includes all of the properties of the complainants and defendants, was conveyed by it *by full covenant warranty deed without any reference to restriction*.

All of this reasoning amounts to this—that it is *only* in case a neighborhood plan be shown within the rulings of this court, that complainants in the case at bar would have any basis of relief whatever. It must be conceded that there is no privity between complainants and defendants; nor is there any privity between complainants and Oliver; nor is there any privity between complainants and defendants and any

grantees of Oliver's retained lands. There *is* privity between Bayonne Building Company and the Olivers. The rights of all parties not in privity with each other, rest in equity. We can perceive how it is that, because of the privity existing between Bayonne Building Company and Oliver, a subsequent grantee of Oliver, because of his privity with Oliver, may in equity be held to have a right against Bayonne Building Company also in privity with Oliver, if the contract was made between Bayonne Building Company and Oliver for the benefit of the lands retained by Oliver. But we cannot perceive how, because of the privity existing between complainants and Bayonne Building Company, complainants may enforce, against defendants, these restrictions not forming a part of the contract between Bayonne Building Company and the defendants, upon any theory that the grantees of Oliver might enforce such restrictions. The immediate common grantor of complainants and defendants is Bayonne Building Company. But *it* could not enforce the restrictions against defendants for it conveyed that land by full covenant warranty deed. Complainants cannot therefore enforce the restrictions in the right of Bayonne Building Company. Upon what theory can complainants go further to Oliver and derive any rights from him?

The Chancellor in *Winfield v. Henning* speaks of the restrictions as an *easement*. Vice-Chancellor Stevens in *Genung v. Harvey*, 79 N. J. Equity 57, 80 Atl. 955, dealing with the *Winfield* case, said at p. 62:

"I may add that in view of the numerous discussions which this important subject has undergone since that case was decided, it may be questionable whether the chancellor's suggestion the case was one of apparent and continuous easement can be agreed to. If an

owner has two lots, having houses on the same line and sells one of them, using nothing but the ordinary language of conveyancing, it could hardly be claimed that there has arisen, by implication from the circumstances that both houses stand on the same line, an apparent and continuous easement in favor of either. I do not see how the existence of a covenant held by a third party which would enable that third party to enjoin the owners from building beyond the line, to the detriment of his (the third party's) land, could create an easement in each of the two lots for the benefit of the other. It seems to me that if it create any easement (and it has been held that it does not)—*Brewer v. Marshall*, 19 N. J. Eq. (4 C. E. Gr.) 537; *Hayes v. Waverly and Passaic Railroad Co.*, 51 N. J. Eq. (6 Dick.) 345, 349—it would be one attaching only to the covenantee's land. And it is to be remembered that in cases of this kind the right to an injunction is not absolute even in the covenantee. He may lose his right by conveying all that he owns or by allowing or encouraging others to violate the covenant, or the character of the neighborhood may change. I shall not pursue the matter further. It is enough to say that the case cited does not apply, for the reason above assigned."

The Vice-Chancellor refused to apply the Winfield case to the facts in the Genung case. In that case complainant and defendant owned adjoining lots. Both lots had originally been conveyed to Mary J. Genung one five years after the other, but both subject to the same restriction, *i. e.*, that no house, etc., should be erected nearer the street line than fifteen feet. One of the lots was subsequently conveyed by Mrs. Genung to Frank Genung, and then to complainant. The other lot Mrs. Genung mortgaged to the Mutual Life Insurance Company, and, on foreclosure, the prop-

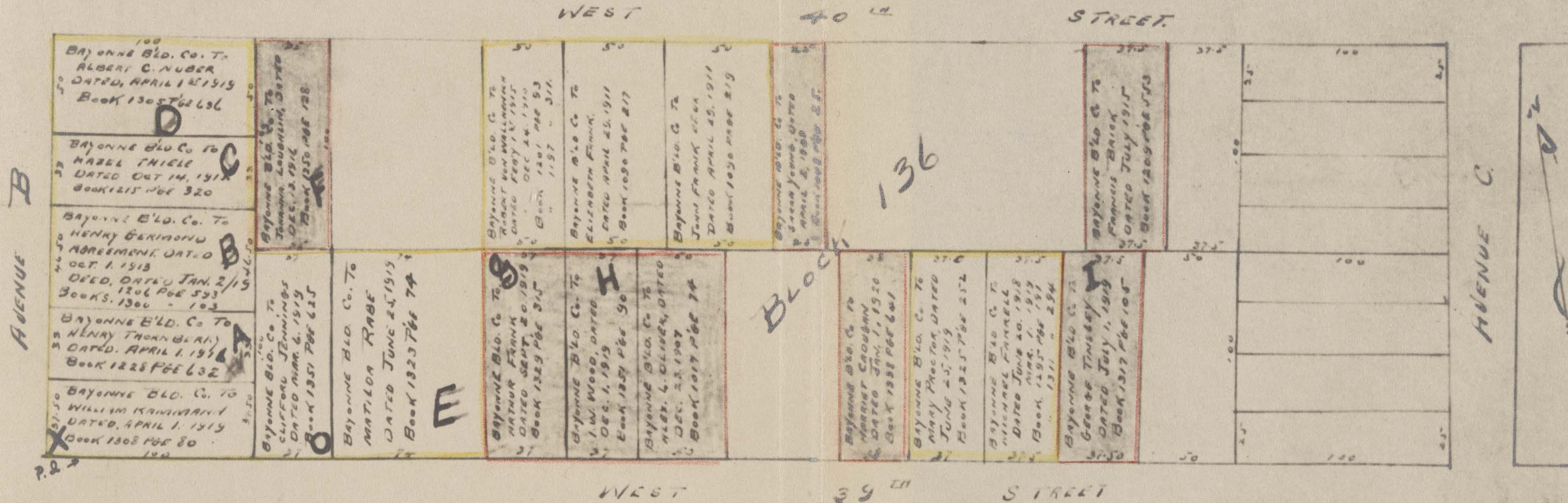
DEEDS BY BAYONNE BUILDING COMPANY
IN BLOCK 136.

YELLOW PLOTS WERE NOT RESTRICTED
RED PLOTS WERE RESTRICTED

THERE DO NOT APPEAR OF RECORD
ANY OTHER DEEDS IN THIS BLOCK BY
BAYONNE BUILDING CO.
APRIL 15 1925

NOT DRAWN TO SCALE.

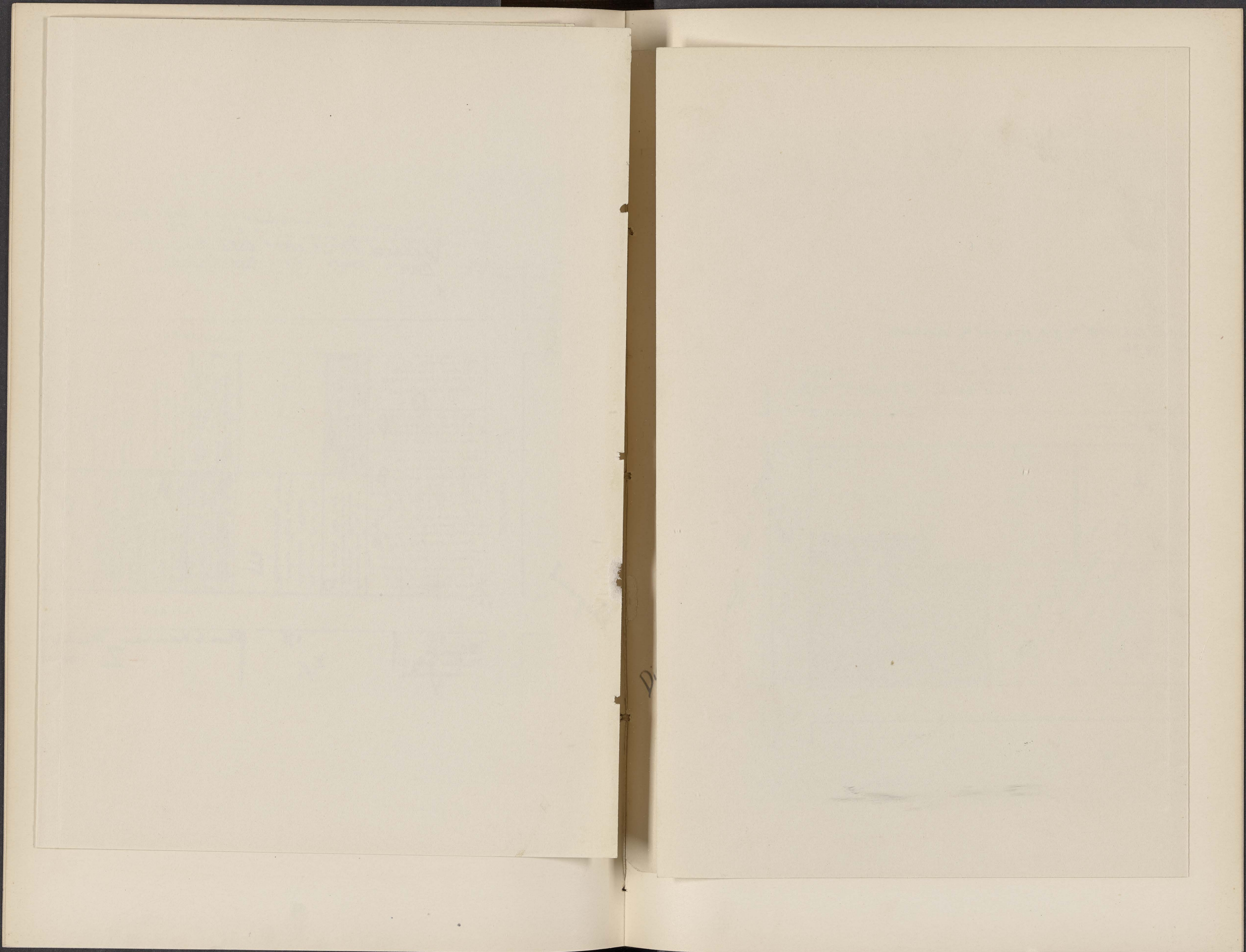
[Signature]



85
Oliver to
Muller July 1919
unrestricted
Y

475
Oliver to Kamman March 6-1913
Z unrestricted

XX



DEEDS BY ALEXANDER L. OLIVER AND HIS WIDOW AND DEVISEE
IN BLOCK 136

YELLOW PLOTS WERE NOT RESTRICTED
RED PLOTS WERE RESTRICTED

NOT DRAWN TO SCALE

WEST 40TH STREET

WEST 39TH STREET

AVE. B

AVE. C

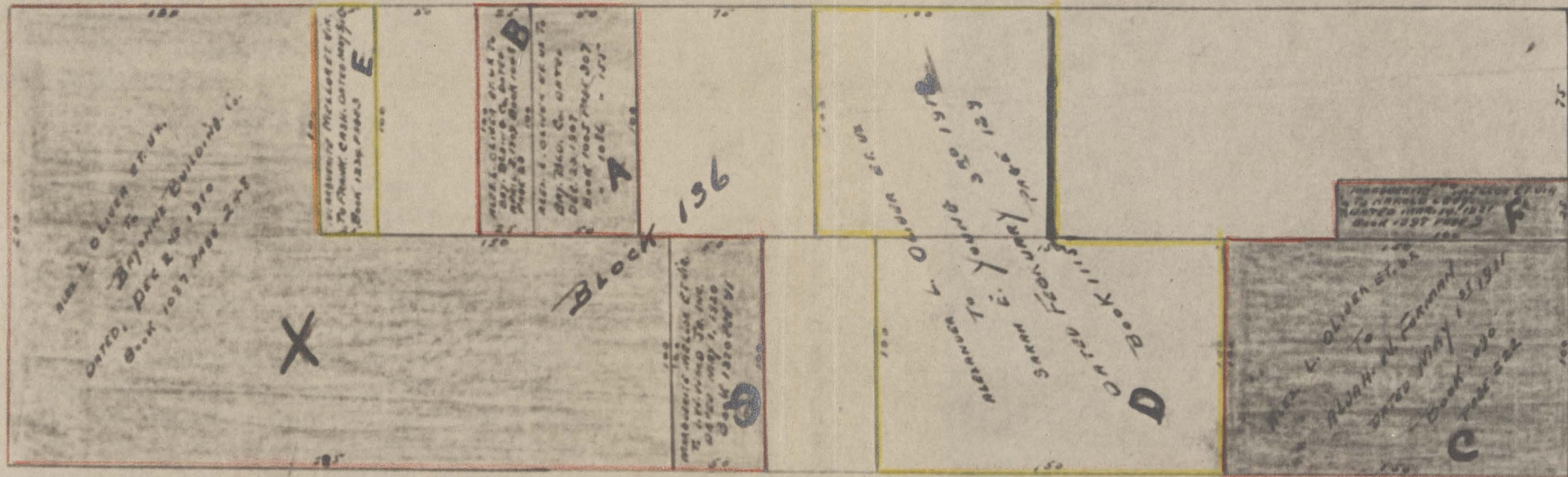


Diagram 2

erty was conveyed by the sheriff to Berry, and then by mesne conveyances to Harvey.

There was no restrictive covenant in the mortgage made by Mrs. Genung to the Insurance Company, nor in the sheriff's deed, nor in the deed from Berry to the Bank, nor in the deed to the defendant. There *was* a restrictive covenant in one of the intermediary deeds. The Vice-Chancellor held that, had Bradley conveyed the defendant's lot first, and afterwards conveyed the complainant's lot to anyone but Mrs. Genung, the complainant's right to an injunction would have been clear. The Vice-Chancellor said that when he conveyed that lot to Mrs. Genung, Bradley

"could not have come into this court and asked for relief in respect of that lot, whatever might have been his right in respect of any other property owned by him, if he then owned any."

The Vice-Chancellor then said at p. 59:

"While Bradley remained the owner of complainant's lot, Mrs. Genung could not have built beyond the line, because she would have injuriously affected it, but when, in 1882, she became its owner, she could *do as she pleased, subject to her liability at law, unless, by doing so, she injuriously affected some other property of Mr. Bradley.* There is absolutely no proof that in 1882, or afterwards, Mr. Bradley had any property that would have been injuriously affected by so building, or, for that matter, outside of common report, any proof that he was the owner of any other property on that street. I have already said that there is no proof of any general scheme. And so, in 1882, the situation was this: Mr. Bradley might have sued at law for a violation of the covenant, but had no sufficient interest to sue in equity. Mrs. Genung could have built over the line without interference from this court, *unless*

it could be said that as owner of complainant's lot she might have sued herself as owner of defendant's lot, which is absurd.

Bradley's right having ceased, and Mrs. Genung having no right to sue herself, if complainant now has any right under the covenant, it must be because it has been in some way or other revived. Now, there is absolutely no evidence of revivor. On the contrary, it appears that when Mrs. Genung mortgaged defendants' lot to the insurance company, she not only did not reimpose the covenant for the protection of the lot which became complainant's lot, but she inserted in the mortgage a covenant of warranty of peaceable possession. If, after having given the mortgage, she had attempted to derogate from her grant, she could not have succeeded, but in point of fact she never did. She made no other conveyance of defendants' lot, but permitted it to be sold in the foreclosure proceedings, and the purchaser at the sale acquired all the title and interest that Mrs. Genung had when she mortgaged."

(And see *Post v. Weil*, 5 L. R. A., p. 422 (N. Y.) New York Court of Appeals, 1889, the second head-note of which is:

"A covenant in a deed of land restricting the mode of its use, and inserted for the benefit of adjoining land of the grantor, will be extinguished by the subsequent vesting in one person of the title to both tracts of land.")

The Vice-Chancellor then held, upon these facts, that complainant was not entitled to relief. He distinguished the Winfield case upon the ground that, in the Winfield case, the complainant, the owner of one of the houses, was put in the shoes of Coles, the original grantor of his grantor, and that it appeared that Coles still had some property to protect, and either he or his grantees might have sued. In the Genung case,

it did not appear that Bradley, the original grantor of Mrs. Genung, retained any property in the right of which he might sue. The Vice-Chancellor said p. 61:

"Here it does not appear that Mr. Bradley has, or in 1893 when complainant's grantor took title had, any such right. It was not the existence merely of a covenant suable at law that gave the right, but the fact that Coles, the covenantee, as the owner of nearby property—property that was injuriously affected by the breach of the covenant—could have relief in equity for the protection of that property. The complainant was put in Coles' shoes."

This may be a distinction in the facts of the two cases, but this distinction we submit is without a legal difference, for upon what theory, in the Winfield case, could the complainant be put in the shoes of Coles with whom he had no privity? If this rule be sound, absurd results may be created. Let us suppose that a very large tract of land is conveyed by a grantor to a grantee, but that the grantor retains one lot, and inserts in the grant of the large tract restrictions for the benefit of the one lot he retains. The property conveyed is then sold off in lots. Upon the reasoning of the Winfield case, so long as the original grantor retains the one lot, which was to be benefited by the restrictions, purchasers of the lots out of the large tract conveyed may enforce, as between themselves, the covenant inserted by the original grantor for the benefit of his one retained lot, but the moment he parts with that one retained lot, the right of the purchasers of the lots out of the large tract to enforce the covenant inserted, not for their benefit, but for the benefit of the one retained lot, ceases.

In the succeeding paragraph of his opinion, the Vice-Chancellor criticizes the reasoning of the Winfield case.

But if we apply the reasoning of the Winfield case, as explained in *Genung v. Harvey*, we find that the facts in the case at bar are analogous to those in *Genung v. Harvey*, and not those in *Winfield v. Henning*, for there is *no* proof in the case at bar that either Oliver or his grantees can, in the right of any lands retained by Oliver, enforce these covenants, for as Vice-Chancellor Stevens said in the case of *Genung v. Harvey*, 79 N. J. Equity, p. 62:

“And it is to be remembered that in cases of this kind the right to an injunction is not absolute even in the covenantee. He may lose his right by conveying all that he owns or by allowing or encouraging others to violate the covenant, or the character of the neighborhood may change.”

Oliver and his successors in interest transferred the remaining lands under such conditions, and so dealt with them, as that he and his successors in interest could not enforce these restrictions as against the defendant or any owner of the lots in the plot conveyed by Oliver to the Bayonne Building Company by the deed of December 2, 1910.

The successors in interest of Oliver certainly cannot enforce these conditions because *they* have expressly released to the defendants, and had released before the filing of the bill. It was urged that this release was ineffective, and that a grantor who has conveyed lands with restrictions, which restrictions are for the benefit of lands retained by him, and then has subsequently convey the lands retained, cannot release the restrictions to the prejudice of the lands for whose benefit the restrictions were imposed.

But that is true only where the covenantee has transferred the lands retained under such conditions as that it is to be presumed that he intended to transfer to the lands sold the benefit of the covenant; but, in the case at bar, the lands retained were transferred under such conditions as that it is apparent the covenantee did *not* intend to transfer the benefit of the covenant. This left a mere naked legal right of Oliver, and those who succeeded by operation of law to his estate, to sue at law for a breach of these restrictions, and that right has been released.

In *Winfield v. Henning*, 21 N. J. E. 188, the Chancellor relies for support upon the dictum of Lord Romilly in *Western v. Macdermot*, 1 Eq. Cases (L. R.) 507, and upon the decision of the Supreme Court of Rhode Island in *Greene v. Creighton*, 7 R. I. 1.

The precise question had been determined adversely to the Chancellor's conclusion by the Supreme Judicial Court of Massachusetts in *Jewell v. Lee*, 14 Allen 145, 92 American Decisions 744. The decision is so applicable to the case at bar as that we quote fully from it.

“The main ground on which the plaintiff rests his claim to equitable relief is, that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist.”

“It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improv-

ing or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels, and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. *But in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law.* The benefit of the condition would in such cases inure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it or any part of it subject to the condition. Indeed, no restriction on the use of land, and no condition annexed to its possession and enjoyment, can be for the benefit of the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. *Inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition as such imposed on its use or enjoyment by any prior grantor.*"

There is nothing in the case before us which in any degree tends to show that there was any intent on the part of the grantor and grantee in the original deed by which the condition was annexed to that grant of the land now owned by the parties to this suit to give any other or different effect to the condition than that which would result from it at common law. It does not appear that the *original grantor* had in contemplation the division of the land into separate lots or parcels which would be held by different owners, or that the condition was inserted

in the grant for the purpose of creating a restriction on the use of the land as between subsequent grantees of different lots or parcels thereof.

* * * * *

So far as we are able to see, there is nothing to indicate that the original grantor of the premises, in annexing the condition, had any intent to regulate or control the possession or enjoyment of the premises for the benefit of subsequent owners or grantees of the estate, or any part of it, but that it was imposed by him solely for his own private and personal benefit, as the owner of other lots in the vicinity, in which the present plaintiff has no interest whatever."

The note to *Stevenson v. Spivey*, (Va.) 110 S. E. 367, 21 A. L. R. 1276, adequately summarizes, at p. 299, the decision of Vice-Chancellor Sir Lord Shaddell, in *Schreiber v. Creed*, (1839) 10 Sim. 9, 59 Eng. Reprint 515, as follows:

"Where the original vendee bought a number of lots in a tract of land, to be held subject to the restrictions mentioned in a plan of the estate contained in an earlier indenture, which plan was subject to such alterations as should be made and approved by the vendor, his heirs, etc., but the vendee never intended to bind the vendor to the observance of the restrictions which he, the vendee, had entered into, and the vendee afterwards sold two of the lots subject to the restrictions entered into between the original vendor and the original vendee, and then reconveyed the balance of the land to the original vendor without any stipulations, it was held that the purchaser of two of the lots from the original vendee could not enforce the restrictions as against the purchaser of other lots in the parcel conveyed to the original vendee."

Greene v. Creighton, 7 R. I. 1, is not an authority for the Chancellor's decision in *Winfield*

v. *Henning*. In that case two tenants in common united in a deed of property to a city and inserted in the deed the following clause: "And it is hereby expressly understood, covenanted and agreed by the said grantors, for themselves and their heir and assigns respectively forever, that no building of any description shall at any time forever hereafter be erected and placed within eight feet of said Halsey street or on either side thereof."

Construing this deed, in an action brought by a subsequent purchaser of a part of the land so restricted for a breach of a covenant against encumbrances, the court held that it was an agreement between the grantors *inter sese* which should be construed as a grant in fee to each of a negative easement in the lands of all, and as such, capable, upon a disturbance of the easement, of being enforced by the appropriate remedies at law and in equity.

The precise question arose in *Graham v. Hite*, Court of Appeals of Ky. (1892), 93 Ky. 474, 20 S. W. 506. The decision of the Kentucky Court is expressed in the head-notes:

"1. A deed of certain city property provided that buildings thereafter erected on such property 'shall be of brick, and set the same distance back from Third street as the house now erected on the southwest corner of Third and Oak streets, and shall be suitable dwellings for the neighborhood.' Held, that the provision intended that the front wall of buildings thereafter erected should be on a line with the front wall of the corner house, and did not prohibit the erection of a stoop, porch, or platform of reasonable width, along the front of such buildings."

"2. The provision was for the benefit of the corner lot, and not for the benefit of

lots into which the property conveyed might be divided."

"3. Where the conveyances under which subsequent grantees of part of such property hold contains no mention of the provision in the original deed, nor any new restriction to the same effect, one subsequent grantee cannot enforce against another the restriction of the original deed."

Winfield v. Henning was cited to the court, and the court said (p. 508):

"The only case cited by counsel that authorizes this action by appellee is *Winfield v. Henning*, 21 N. J. E. 188, and even in that case it was conceded an action at law would not lie, and upon *supposed* equitable grounds alone the owner of one lot was held for benefit of another owner to observance of a covenant to the common grantor. But the judgment of the Chancellor in that case was in *Dana v. Wentworth*, 111 Mass. 291, held to be inconsistent with the decisions of courts of Massachusetts and of England, and we may add that judgment cannot be supported by principle, because *it restricts one lot owner in the use of his property for the benefit of another with whom he never contracted, and to whom he never became bound, expressly or by implication.*"

In *Dana v. Wentworth*, 111 Mass. 291 (1873), the Supreme Judicial Court of Massachusetts held that—

"The owner of a parcel of land bounding on a street conveyed it by a deed containing a condition, that the grantee, or his heirs or assigns, should not build on the land within eight feet of the street. The grantee conveyed the land in several lots. Held, that the grantor could not maintain a bill in equity, for the benefit of the owners of some of these lots to restrain the owner of another from violating the condition, in the absence of evidence that the condition was imposed as part of a general plan for the benefit of

the land granted and of other land on the street."

And the Massachusetts court said (p. 293):

"The clause in the deed from the plaintiff to Nudd, restricting building on the land thereby conveyed is in the form of a condition; as a condition, it can only be taken advantage of by the grantor, and at common law; and this bill is not framed to enforce a forfeiture for breach of condition. * * *

"There is nothing in the case to show that the restriction in the deed from the plaintiff to Nudd was part of a general plan for the benefit of the land thereby granted and other estates on the same street, or was inserted in the plaintiff's deed for the benefit of the grantee or his assigns, or was repeated in any grant or covenant executed by him or them or either of them. Under these circumstances, a purchaser from Nudd of part of the land so granted to him has no more right in equity than at law to enforce the restriction against the purchaser of another part of the same land. *Jewell v. Lee*, 14 Allen 145; *Keates v. Lyon*, L. R. 4 Ch. 218. The judgment of the Chancellor of New Jersey in *Winfield v. Henning*, 6 C. E. Green 188, is inconsistent with the decision in this Commonwealth and in England."

Again, *Hazen v. Mathews*, Supreme Judicial Court of Massachusetts, 184 Mass. 388, 68 N. E. 838, it was held:

"A provision in a conveyance of a lot prohibiting the grantee or his heirs or assigns from building on the lot within 50 feet of its front is ineffective after the death of the grantor, where he was the owner in common with another of the adjoining land, and there was no clause in the deed that the restriction was for the benefit of other lots in the neighborhood, and is no breach of a covenant against incumbrances in a subsequent conveyance of the lot."

And the court said:

"Had Crary inserted a clause in his deed of lot 91, stating that the restrictions contained in that deed were inserted for the purpose of imposing upon lot 91 an equitable restriction for the benefit of, and as appurtenant to, the lots on the same side of Prospect avenue and the other lots in that neighborhood belonging to himself and Darling, the clause would not have been effectual. *An easement cannot be imposed by deed in favor of one who is a stranger to it.* *Edwards Hall Co. v. Dresser*, 168 Mass. 136, 46 N. E. 420. Darling, who owned one-half of the adjoining land, was a stranger to the deed of lot 91 made by Crary to Wooster, and an easement cannot be attached to land owned in common by a conveyance to one only of the tenants in common. Such a conveyance would be personal to the grantee, and would not inure to the benefit of subsequent owners of the land."

A note upon the general subject will be found in 21 A. L. R. at page 1281.

And see also the note in 33 A. L. R., page 676.

In *Chambers v. Randall* (1923), 1 Chancery (England), 149, 92 L. J. Ch. N. S. 227, 128 L. T. N. S. 507, referred to in the note in 33 A. L. R. 676, it was held that a restrictive covenant inserted in a deed to a tract of land by the grantor, who owned certain lands on the street on which the tract was situated, was not enforceable by the trustees of a settlement, to whom he conveyed certain of the lots, which trustees were also the grantor's executors—after all of the lots had been conveyed by him and after his death, and the note proceeds—

"According to the court, the restrictive covenant was inserted for the purpose of enabling the owner to protect his remaining property while he retained it, and to make

the most of it when he disposed of it. It is stated that in that state of things, it might have been competent for him to realize the benefit of the covenant by stipulating with the purchaser of any of the houses from him, that he, the purchaser, should have the benefit of the covenant assigned to him, and he might in that way have obtained a better price from the purchaser, but not having done so, the contract was not enforceable by the grantee."

In *Reid v. Bickerstaff* (1907), 2 Ch. 305, an opinion by Cozens-Hardy, *M. R.*, it was said:

"A subsequent purchaser of part of the estate does not take the benefit of the covenant unless (a) he is an express assignee of the covenant, as distinct from assignee of the land; or (b) the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser * * *."

In *Sailer v. Podolski*, 82 N. J. E. 459, 88 Atl. 967, Leaming, *V.-C.*, certain lands had been laid out into 33 building lots. The owners conveyed lands to defendants, by deed, which contained restrictive covenants and also, subsequently, a lot to complainants containing restrictive covenants. Stating the facts the court said (461):

"When this conveyance was made by the common grantors to complainant's predecessor in title seventeen of the lots had been conveyed by the common grantors by deeds containing restrictive covenants and seven without restrictive covenants. A month later the remaining eight lots were conveyed by the common grantors without restrictive covenants. It thus appears that in a tract comprising thirty-three lots eighteen lots were conveyed by deeds with restrictive covenants and fifteen without; and at the time of the purchase by complainant's predecessor in title seven lots had been conveyed free from restrictions. When complainant purchased

from her predecessor in title fifteen, or nearly one-half of all the lots comprising the tract, had been conveyed by the common grantors free from the operation of restrictive covenants. It seems clearly impossible to regard an enterprise which has been developed in the manner stated as one embracing the necessary elements of a general scheme or plan to subject the several lots of the tract to the operation of uniform restrictions. The elements necessary to render a general scheme operative to bestow upon each lot owner the right to enforce the restrictions against all other lot owners are clearly defined in *De Gray v. Monmouth Beach*, 50 N. J. E. 329, 340."

The court then said:

"As complainant's right to enforce defendant's covenants cannot be sustained as a right emanating from a general scheme of development, it follows that it can only be sustained upon the claim that defendant's covenant was entered into for the benefit of subsequent owners of the lot subsequently conveyed by the common grantors to complainant's predecessor in title and thereafter conveyed to complainant. The deed from the common grantors to defendant's predecessor in title was dated December 16th, 1901; the deed from the common grantors to complainant's predecessor in title was dated May 19th, 1902. In *Hemsley v. Marlborough Hotel Co.*, 62 N. J. E. 164, 170, affirmed in 63 N. J. E. 804, it is held that in a case of the nature stated *the burden rests upon complainant to establish that the covenant was made by the prior grantee of the common grantor for the benefit of the subsequent purchasers of the lot owned by complainant.* In *McNichol v. Townsend*, 73 N. J. E. 276, *Hemsley v. Marlborough Hotel Co.*, supra, was followed, and it is there also pointed out *that no presumption arises from such a covenant that it is for the benefit of subsequent purchasers of the remaining land*

of the common grantor, and that in the affirmation of *Renals v. Cowlshaw*, reported in 11 Ch. Div. 866, 868, it is stated that to enable the subsequent purchaser to take the benefit of restrictive covenants of a prior purchase, *there must be something in the deed containing the covenants to define the property for the benefit of which the covenants were entered into.* 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 necessary 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 from *Coudert v. Sayre*, 46 N. J. E. 386, and *De Gray v. Monmouth Beach*, 50 N. J. E. 329, to the present time."

It will be observed that in this case, which was one in which the grantors of the parties complainant and defendant imposed the restrictions,

the court held that the circumstances were *not* such as to show that these restrictions were imposed for their mutual benefit. In the case at bar, the court below went a step further than it would have been necessary to go in the *Sailer* case to grant relief and held that, where there were *no* restrictive covenants imposed by either complainants' or defendants' grantors, restrictions imposed by the grantor of the grantor of complainants and defendants might be enforced by complainants against defendants, although there were no proof whatever that the restrictions were imposed for the benefit of the land of the grantor of complainants and defendants and no proof that it was intended that the grantees of that land should have a right, as between themselves, to enforce the restrictive covenants, with which they had nothing to do, and there was no proof of any general scheme.

It is submitted that the theory upon which relief was granted to the complainant below is opposed to what Vice-Chancellor Leaming said in *McNichol v. Townsend*, 273 N. J. E. 276, 67 Atl. 938, at page 278:

"It may therefore be said that the *controlling* question now presented is whether the restrictive stipulation above quoted was inserted in the Graham deed for the benefit of the land now owned by complainant. *The burden is necessarily upon complainant to establish this fact.* The Graham deed, so far as the record discloses, contains no statement that the restrictive clause now in question was for the protection of any part of Brown's unsold property and contains no engagement upon the part of Brown, and the adjudicated cases do not appear to have recognized that a stipulation or covenant of this nature will be presumed to have been made for the benefit of the remaining land of the grantor in the absence of some evi-

dence of the fact. In *Master v. Hansford*, 4 Ch. Div. 718, 724, and again in *Renals v. Cowlshaw*, 9 Ch. Div. 125, 129, it is recognized that such restrictive covenants may be intended for the benefit of remaining land of grantor or may be intended only to enable the grantor more advantageously to deal with his property. In the affirmance of the latter case on appeal it is also suggested that there should be something in the deed containing the restrictive covenant to define the property for the benefit of which it was entered into. 11 Ch. Div. 866, 868. Should it be assumed that the restrictive stipulation contained in the Graham deed was for the benefit of remaining land of the grantor it would be difficult to indulge the assumption that it was for the benefit of that part of his remaining land which complainant now owns, as other land nearer to the land conveyed appears to have been owned by Brown at the date of the Graham deed. In *Hemsley v. Marlborough Hotel Co.*, 62 N. J. E. 164, 170, Vice-Chancellor Reed clearly defines the necessity of evidence to establish the fact that the restriction which is sought to be enforced by a subsequent grantee of a common grantor was intended for the benefit of the remaining land. Where a general building scheme exists the intent of the parties is sometimes easily ascertained by the application of the words of the deed to the surrounding circumstances, but the evidence in this case fails to disclose the existence of such general scheme. Brown had at one time been the owner of all the land on either side of States avenue, extending from Pacific avenue to the ocean. At the date of the Graham deed nearly all of the land had been sold by him. In many deeds of lots so sold by him covenants or stipulations had been inserted substantially the same as the one now in question, but *four* of the conveyances so made by him *contained no restrictions whatever*. In view of that fact it cannot be said that any general scheme existed for

the improvement of the avenue according to a defined plan to be accomplished by the exaction of uniform building covenants from the several purchasers of lots. *Mulligan v. Jordan*, 50 N. J. E. 363, 364, 365; *Leaver v. Gorman*, ante page 129."

On final hearing *McNichol v. Townsend*, 74 N. J. E. 618, 70 Atl. 965.

The decree is also opposed to the cases of *Scull v. Eilenberg*, Court of Errors and Appeals, 94 N. J. E. 759.

De Gray v. Monmouth Beach, 50 N. J. E. 329, 24 Atl. 388, Vice-Chancellor Green.

Klein v. Sisters of Charity, 5 N. J. A. R. 1575 (Ct. Er. & Ap. on opinion Fielder, *V.-C.*).

IV.

The building of an apartment house is not a violation of the restrictions.

Those restrictions, so far as pertinent here, provide:

"That no building or buildings hereafter erected on said lands shall be used or occupied for any purpose other than a one-family residence, dwelling or church."

The second and third restrictions are also of importance as they show the same punctuation, that is a comma after the word "residence."

The provisions were not, we submit, intended to limit the property to the erection of a one-family residence, and also to a *one-family* dwelling or church. It cannot be contended that the prohibition applies to a *one-family* church.

The word "dwelling" has a much broader significance than the word "residence." An examination of the definitions given to that word

(dwelling) will indicate that it includes almost any sort of structure in which man may be sheltered or in which he may lodge.

An examination of the definition of "dwelling" in Corpus Juris would indicate that it is a term much broader than a private residence.

In *Crane v. Hathaway*, 132 Atl. Rep. 748 (not officially reported), the construction of a covenant somewhat similar to the provisions involved here was found to be so doubtful as that Vice-Chancellor Buchanan refused to enforce it.

The restrictions do not presume to limit the erection of one one-family residence on a lot, or any other particular area. They certainly did not intend to limit the use of the entire tract to the erection thereon of a one one-family residence, for in the third provision there is reference to "each of said residence, dwellings or churches."

See *Walker v. Renner*, 60 N. J. E. 493, 46 Atl. 626 (Court of Errors and Appeals).

Can it be said that Bayonne Building Co. or its grantees might not have erected any number of one-family residences on any particular city lot? Suppose that it had erected on a lot 25x100 feet, five or ten single family residences, and even connected them by a continuous roof, it certainly could not have been held that such was in violation of this restriction. If that be so, the erection of what is known as an apartment house, which merely gives the occupants a common entrance to their separate private residences, cannot be a violation of this restriction. In such apartment house the single private residences are different only in that they may be arranged one beside or above the other. Each apartment is a "one-family residence," and there is no limitation of the number of them that may be

erected on any lot or other area. Furthermore, the alleged provisions do not purpose to prohibit the erection of any building but its use only.

The strictness with which restrictive covenants must be construed is illustrated by *Marsh v. Marsh*, 90 N. J. E. 244, 106 Atl. 810, reversing the Court of Chancery in which case it was held, where there was a covenant that no building should be erected on the lot unless the front foundation wall of the building be a certain distance from the front line of the lot, that the addition to a house, which originally had a porch, the front line of which porch came within the prohibited distance, of a second story on the porch to be used for sleeping quarters, was not such a clear violation of the covenant and that the front foundation wall of the porch with the second story added was not so clearly the front foundation wall of the building within the meaning of the covenant as that equity would enjoin.

And Vice-Chancellor Berry in *Hilsinger v. Schwartz* 99 N. J. E. 288, 133 Atl. 184, applying the rule of *Fortesque v. Carroll*, 76 N. J. E. 583, held that the building of a garage was not in violation of a covenant against the building of a stable although, at the time of the imposition of the covenant, garages were unknown and a garage has been defined as a stable for automobiles, and the automobile and its garage is a substitute for the horse and his stable.

V.

The provisions contained in the deed from Oliver to the Bayonne Building Company are not covenants or restrictions but conditions.

The provisions here sought to be enforced are introduced into the deed by the following language:

"It is understood and agreed by the party of the second part, its successors and assigns, that this conveyance is made subject to the following restrictions and conditions."

The language above quoted from the deed is clearly that of a condition; the conveyance is made "subject to the following * * * conditions."

There is no case in New Jersey dealing with the exact question here raised and therefore the cases in other jurisdictions are important.

Thus *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10, holds that a provision in a deed conveying lands

"Upon the conditions, however, that the premises shall be used solely for the purpose of erecting, furnishing, keeping and maintaining thereon an academic or collegiate school"

created a condition subsequent, and not a covenant.

In *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692, a provision that the conveyance was made upon the express condition that the grantee, his heirs and assigns should never erect any building nearer the street than a building then standing thereon, was held a condition subsequent, and not a covenant.

In *Brown v. Chicago & N. W. R. Co.* (Iowa, 1900) 92 N. W. 1003, a clause in a deed that the

same is made upon the express condition that the depot shall remain permanently within certain limits, and that a bridge shall be built over the railway was held to be a condition subsequent, and not a covenant.

In *Gray v. Blanchard*, 8 Pick. 283, 25 Mass. 283, the provision in the deed "Provided, however, this conveyance is upon the condition that no windows shall be placed in the north wall of any house then on the premises or thereafter to be erected thereon, and that no building shall be erected at the east end of the house for the space of thirty years," was a condition subsequent and not a covenant.

So, also in *Langley v. Chapin*, 134 Mass. 82, the clause in the conveyance—"This is made upon the condition that (the grantee) will erect upon said premises a cotton factory within (2) years from the date hereof"—was a condition subsequent, and not a covenant.

To the same effect is also *Marshalltown v. Forney*, 61 Iowa 578, 16 N. W. 740.

Also *Blanchard v. Detroit R. Co.*, 31 Mich. 43.

See also *Rose v. Hawley*, 118 N. Y. 502.

A case more nearly resembling the one at bar is *Adams v. Valentine*, 33 Fed. Rep. 1. In that case the provision in the deed was—"provided, and this deed is upon condition, that no building shall ever be erected upon such premises nearer Olive street than the house of H. G. Otis now stands." The court, reviewing the authorities, held this to be a condition subsequent and not a covenant.

We are not citing authorities involving the situation where the deed containing the condition contains express language giving the grantor the

right of re-entry upon breach of condition, or providing for a forfeiture upon breach thereof. We are merely citing cases dealing with the construction of language similar to that here involved, keeping in mind the fact that the sole devisee of the original grantor, has, by a proper instrument in writing, fully and completely released to the defendants, any rights in the land owned by them and to the enforcement so far as they might be so enforced by her, the provisions here in question.

It is respectfully submitted that the decree should be reversed and the bill dismissed.

ISAAC GROSS,
MERRITT LANE,
Of Counsel Appellants.

New Jersey Court of Errors and Appeals

OLIVE C. JENNINGS, *et al.*,
Complainants-Respondents,

vs.

ANNA BAROFF and JULIUS BAR-
OFF,
Defendants-Appellants.

SUPPLEMENTAL AND REPLY BRIEF OF APPELLANTS.

(Italics ours except where otherwise noted.)

SUPPLEMENTAL.

Since the preparation of the original brief of appellants the case of *Puddington v. Vielbig*, 142 Atl. 171, 6 N. J. Advance Reports 1089, was decided in the Court of Chancery, Backes, V.-C. The case in its facts is analogous to that at bar. The parties were owners of adjoining lots, with dwellings, parts of a seven-acre tract once owned by Lathrop, who restricted the tract to two dwellings, and later released the restriction as to number. The defendant was using her dwelling as an inn, and the complainant claimed that defendant was bound by the covenant restricting the lands to dwellings and sought to restrain the violation. The restrictive covenant arose in 1866 at the time Lathrop conveyed the tract when his grantee covenanted that "no buildings excepting dwelling houses and the necessary outbuildings shall be erected thereon."

Lathrop owned additional lands adjoining or in the vicinity at the time of the making of the restrictive covenant by his grantee. The seven-

acre tract upon which the restriction rested eventually came to Young in 1897, some of the intervening conveyances containing the restrictive covenant and others not. Young split up the tract and one of the lots came to the complainant. All of the conveyances in complainant's chain of title from Young were made subject to the restrictive covenant. Defendants' lot was conveyed by Young with no mention of the covenant, and subsequently conveyed to defendant, all the conveyances being made subject to the restriction. Other portions of the seven-acre tract, Young conveyed without any mention in the conveyances of the restriction. The Vice-Chancellor said:

"Every one who took title to the seven acres, or to lots after it was split up, was amply charged with notice of the rights that sprung from the covenant and are bound to respect it. But bound to whom? At law, not to any one but the covenantee, Mr. Lathrop, 'and his assigns, being owners of adjoining property,' and to those upon whom their title devolved, if the covenant ran with their lands or was assigned with the grant; and, in equity, not to the complainant, unless it appears that the covenant was taken for the benefit of the owner of the seven acres; and that can hardly be asserted. The covenant is a burden on the owner of the land, not a benefit, and was obviously imposed for the protection of the remaining lands of the grantor, to preserve the then rurality of the surroundings."

The Court further said:

"There is nothing from which the inference may be drawn that the restriction to dwellings was thence to be for the benefit of the owners of the parcels. There is nothing that resembles, in the least, a general building scheme, as in *Scull v. Eilenberg*, 94 N. J. Eq. 759, 121 A. 788, from which

it is sometimes implied that restrictive covenants are for the common benefit of the parties to the scheme, and nothing to indicate that the burden was imposed other than to enable the grantee to more advantageously enjoy his remaining possessions."

The Vice-Chancellor then cites with approval and quotes from the opinion of the Massachusetts Supreme Judicial Court in *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744, referred to on page 27 of our original brief. He then passes to *Winfield v. Henning*, 21 N. J. Eq. 188, and considers with care the dictum of Lord Romilly in *Western v. MacDermot*, 1 Eq. Cas. (L. R.) 507, and *Greene v. Creighton*, 7 R. I. 1, relied upon by the Chancellor in the Henning case, and indicates that those cases do not support what the Chancellor said in the Henning case. He considers the later English cases and states that they treat *Western v. MacDermot* as a building scheme case. He refers to *Greene v. Creighton* and states that its analogy to *Winfield v. Henning* is remote for the same reasons as stated on page 29 of our original brief. He concludes:

"The doctrine of *Winfield v. Henning* cannot be followed to sustain an injunction in this case. The covenant may be enforceable by the covenantee, but as among owners of the several subdivisions of the 7-acre plot they owe no duty one to the other to observe it, * * *."

The statement of the facts in the instant case, p. 3 of our original brief, indicates how like the instant case is to *Puddington v. Vielbig*. Since our original brief in this case was prepared, the Court of Chancery has also decided *Enderle v. Leslie Construction Company*, 141 Atl. 758, 6 N. J. Adv. Rep. 926, Backes, V.-C., bearing upon what must be established before restrictions will be sustained upon the theory of a neighborhood

plan. He held, upon the authority of *Sanford v. Keer*, 80 N. J. Eq. 240, 83 Atl. 225, 40 L. R. A. (N. S.) 1090; *Scull v. Eilenberg*, 94 N. J. Eq. 759, 121 Atl. 788, that a neighborhood scheme is not established where the restrictions imposed are not uniform and are not imposed alike on all lots within the area intended to be included in the scheme, and he also held that, in the absence of such a general scheme; "the complainants have no equities against the defendants, and it is immaterial whether the defendants took title free or encumbered by restrictive covenants; they being subsequent purchasers."

Respondents attempt on p. 10 of their brief to distinguish this case from *Puddington v. Vielbig*, 6 N. J. Advance Reports, p. 1089. We submit that the case cannot be distinguished. Either this case was incorrectly decided or the *Puddington* case was incorrectly decided.

Respondents on p. 7 of their brief direct attention to the fact that all of the houses erected on West 40th street between Avenue B and Avenue C facing the Bayonne Hudson County Park and all the houses on the northerly side of West 39th street with the exception of one, had been erected in strict conformity with the restrictions requiring, etc.

If it be the fact that all of the houses on West 40th street comply with the terms of the restrictions it is not because they were built in compliance with the terms of any such restrictions, for reference to diagrams 1 and 2, will indicate that, after the making of the deed to the Bayonne Building Company, which contains the restrictions under discussion, the Olivers, the grantors, conveyed lands both on West 40th street and West 39th street without restriction as well as lands immediately opposite the tract in ques-

tion, and the property of appellants, on West 39th street.

The cases cited on p. 8 of respondents' brief *Coudert v. Sayre*, 46 N. J. E. 386; *Wootton v. Seltzer*, 83 N. J. E. 163, were cases in which it was held that restrictive covenants imposed upon land by a grantor run with the land retained by the grantor if the restrictions were imposed for the benefit of the land retained. To apply those cases to the case at bar some owner of the lands retained by the Olivers would have to be involved.

Clough v. Mesnick, 96 N. J. E. 482, referred to on p. 8 of respondents' brief, has no application whatever.

Before it is important to consider as to whether the release binds the respondents, it is necessary to determine that respondents have some rights. The difficulty is that, under the circumstances of this case, respondents have no rights whatever.

Respondents say on p. 15 that "without the release procured by the defendants-appellants from Mellor, they would not be permitted to violate the restriction by erecting an apartment house, etc."

Respondents are mistaken we submit. So far as respondents are concerned, they could not object because they have no rights under the restrictions. So far as Oliver is concerned he could not object because after the making of the restrictions he transferred his remaining land without restriction, or some parts of it, and destroyed the neighborhood plan, if there ever was one. He might have a cause of action at law for damages, in which event his damages would be nominal, but a court of equity would not prevent complainants from erecting their proposed building. So far as the grantees of Oliver of the

lands retained by Oliver are concerned, they could not object because their rights can rise no higher than those of Oliver.

The release was wholly unnecessary.

Respondents, under their Point III, p. 13, assert that their rights rest upon the theory of a neighborhood plan. But the court below did not find that there was a neighborhood plan and the statement of the facts which appears on p. 3 of our original brief, indicates, we submit, that the rights of complainants can not rest upon any theory of a neighborhood plan. (See p. 11 of our original brief.)

Respectfully submitted,

ISAAC GROSS,
MERRITT LANE,
Of Counsel with Appellants.

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18 OCT. 1928

New Jersey Court of Errors and Appeals

OLIVE C. JENNINGS and GEORGE
F. BUELL,
Complainants-Respondents,

against

ANNA BAROFF and JULIUS BAROFF,
Defendants-Appellants.

On Bill for
Injunction.

BRIEF FOR COMPLAINANTS- RESPONDENTS.

Statement of the Case.

By deed dated December 2nd, 1910, Alexander L. Oliver and wife conveyed to the Bayonne Building Company two certain tracts of land in the City of Bayonne, subject to restrictions and conditions hereinafter set forth, and the first of which said tracts of land is marked as "X" on Diagram 2 attached to the brief for the appellants. The tract in question includes all the land on the easterly side of Avenue B between the northerly side of West 39th Street and the southerly side of West 40th Street for a distance of one hundred thirty-five feet in depth along the said southerly side of 40th Street, and two hundred eighty-five feet in depth along the northerly side of West 39th Street.

The Bayonne Hudson County Park extends from West 37th Street to West 48th Street between the

Hudson County Boulevard and Newark Bay; from West 39th Street to West 42nd Street between the Hudson County Boulevard and Avenue B; and from West 40th Street to West 41st Street between Avenue B and Avenue C (State of Case, p. 52, line 25), so that the plot conveyed by the above deed fronting on Avenue B and West 40th Street faces the said Bayonne Hudson County Park, as does also the entire side of West 40th Street of Block 136 shown on Diagram 1.

The language of the deed as to the restrictions and conditions is as follows:

"It is understood and agreed by the party of the second part, its successors and assigns, that this conveyance is made subject to the following restrictions and conditions:

"1st. That no building or buildings hereafter erected on said lands shall be used or occupied for any purpose other than a one family residence dwelling or church.

"2nd. That the front line of said residence, dwelling or church (not including bay windows or porches) shall not be any point less than 20 feet off the line of the street or avenue.

"3rd. That each of said residences, dwellings or churches shall not cost less than Twenty-five Hundred (\$2,500.00) Dollars."

The Bayonne Building Company subdivided the said plot which is shown on Diagram 2 as "X," and made conveyance of the said subdivisions as shown by the deeds indicated on Diagram 1.

The agreed state of facts contained in the state of case admits that while parts of the remaining property owned by the said Oliver in said Block 136 were conveyed with restrictions and parts without restrictions, that all of the houses erected along Avenue B between 39th and 40th Streets and all of the houses erected on West 40th Street between

Avenue C and Avenue B are in conformity with the restrictions contained in the said deed from Oliver to the Bayonne Building Company; that all of the houses facing on the northerly side of West 39th Street between Avenue B and Avenue C, excepting one, are likewise in conformity with the restrictions contained in the said deed from Oliver to the Bayonne Building Company.

By deed dated January 7th, 1925, the defendants-appellants, through a subsequent grantee of the Bayonne Building Company became seized of the lot marked "X" on Diagram 1 running thirty-seven and a half feet along Avenue B and one hundred feet in depth on West 39th Street. The deed of conveyance by which the defendants-appellants became the owners of the said lot contained a recital that the said lot was purchased subject to the restrictions contained in the said deed from Oliver to the Bayonne Building Company (State of Case, p. 51, Paragraph 6). The defendants-appellants purchased the said lot with knowledge of the said restrictions contained in the said deed from Oliver to the Bayonne Building Company (State of Case, p. 53, Paragraph 15), and at the time of the purchase, the lot was the only vacant ground which remained of the tract conveyed by the said Oliver to the Bayonne Building Company (State of Case, p. 52, Paragraph 12).

On January 10th, 1925, three days after the defendants-appellants acquired title to the lot in question, Margaret A. O. Mellor, she being the devisee of the said Alexander L. Oliver, entered into an agreement with the defendants-appellants (State of Case, p. 16), by which it was sought to free and release the said lot purchased by the defendants-appellants from the force and effect of the restrictions contained in the deed from Oliver to the Bayonne Building Company and subject to

which the said defendants-appellants acquired title from a subsequent grantee of the Bayonne Building Company.

The defendants-appellants obtained a building permit from the City of Bayonne to erect an apartment house four stories in height and to be used by fourteen families, the said apartment house to cover practically the entire of the lot marked as "X" on Diagram 1, and actually commenced excavating the cellar when the bill of complaint in this cause was filed (State of Case, p. 52, Paragraph 10). If the defendants-appellants were permitted to carry through their plans of erecting the said apartment house it would be in direct violation of the restrictions and conditions contained in the said deed from Oliver to the Bayonne Building Company, since it contemplates a building other than a one-family residence, dwelling or church, and furthermore contemplates that the front line of the apartment house be directly along the line of Avenue B, while all of the other dwelling houses on Avenue B, between 39th Street and 40th Street, or 40th Street between Avenue B and Avenue C, and on West 39th Street between Avenue B and Avenue C, with the exception of one house, conformed with the restrictions contained in the deed of Oliver to the Bayonne Building Company, and stand back a distance of twenty feet from the building line.

Paragraphs 14 and 15 of the agreed state of facts (State of Case, p. 53) concedes that if the defendants-appellants are permitted to erect an apartment house as contemplated, that the property owned by the complainants-respondents will depreciate in value, and that the one-family houses which have been erected on the said block are approximately of the value of from \$15,000.00 to \$35,000.00 each (State of Case, p. 32, Paragraph 15, and p. 50, Paragraph 4).

The bill of complaint was filed to restrain and enjoin the defendants-appellants from erecting the said apartment house on lot shown as "X" on Diagram 1. The matter was submitted upon the agreed state of facts (State of Case, pp. 47 to 74) to Vice-Chancellor JOHN BENTLEY, who, without considering the other questions involved, advised a final decree restraining the defendants-appellants from violating the said restrictive covenants contained in the deed of Oliver to the Bayonne Building Company on the precedent established by the case of *Winfield v. Henning*, 21 N. J. Equity (State of Case, p. 76). The defendants-appellants appeal from the final decree and all parts of it.

ARGUMENT.

POINT I.

Winfield v. Henning, 21 N. J. Equity, page 188, is still a controlling authority under which the complainants-respondents are entitled to the relief procured by the final decree.

The complainants-respondents still contend that the equitable doctrine laid down in the case of *Winfield v. Henning*, 21 N. J. Equity, page 188, is a direct and controlling authority for the case at bar, and that the instances in which the equitable doctrines thereof have not been followed by our courts are readily distinguishable by a difference in the facts.

The facts in the case under consideration and those before the Court in *Winfield v. Henning* are identical. In the *Winfield* case, John B. Coles was the owner of a large tract of land. His devisees conveyed a plot on the corner of South

5th Street and Coles Street, Jersey City, one hundred feet by one hundred feet to Keeney and Wheeler with a provision "it being expressly understood and agreed that the houses which may be erected on Gilbert Street (known as South 5th Street) shall be set back ten feet from the southerly line of the said street." Keeney conveyed his interest to Wheeler, and the latter erected five two-story houses, each of twenty foot front on South 5th Street, set back ten feet from the southerly line of the said street. After they were built, Wheeler conveyed one of the said houses to a grantee through whom the complainant, Winfield, derived his title, and a year later Wheeler conveyed another of the said houses to a grantee through whom the defendant, Henning, claimed title. The stipulation as to the placing of houses ten feet from the street is not contained in any deed after that which was made to Keeney and Wheeler. The defendant, Henning, sought to erect an addition to the dwelling house on his lot, which would occupy the ten feet between the street and the house, and by which the westerly view from the complainant's house would be cut off.

It is thus apparent at a glance that the facts under consideration in the case of *Winfield v. Henning* are in every way similar to the facts in the case at bar, with the exception that the defendants-appellants seek to erect an apartment house rather than a mere addition as was contemplated by Henning, and perhaps the further exception that the plot from Oliver to the Bayonne Building Company was larger than that which was conveyed by the devisees of Coles to Keeney and Wheeler.

The Chancellor in considering the case of *Winfield v. Henning* said that there were two questions raised and to be determined. One was as

to whether the defendant, Henning, was bound by the stipulation, and the other, if he was, as to whether the complainant had any right to compel its performance. Both of these questions were answered in the affirmative and the motion to remove the restraint was denied. The covenant contained in the deed to Keeney and Wheeler was regarded as one running with the land and binding not only upon those who derived title from the covenantors, but also their grantees.

In the case at bar the equities in favor of the complainants-respondents are even stronger than in that of *Winfield v. Henning*. Here the defendants-appellants purchased their lot, not alone with knowledge of the restriction contained in the deed of Oliver to the Bayonne Building Company, but with the further knowledge of the existing conditions that all of the houses erected on Avenue B and on West 40th Street, between Avenue B and Avenue C, facing the Bayonne Hudson County Park, and all of the houses on the northerly side of West 39th Street, with the exception of one, had been erected in strict conformity with the restrictions requiring one-family dwelling houses set back at least twenty feet from the building line, at a cost varying from \$15,000.00 to \$35,000.00 each, and then sought to circumvent the force of the restriction by procuring a release of the same from Mellor at a time when Mellor owned no other property in the neighborhood (State of Case, p. 53, Paragraph 16).

Defendants-appellants in their brief take the position that the restrictive covenant contained in the deed from Oliver to the Bayonne Building Company was made for the benefit of the grantor and that, therefore, there is no privity between the complainants-respondents and the defendants-appellants. This contention, however, is not sup-

ported by the facts nor by the language used in the deed creating the restriction, which is:

"It is understood and agreed by the party of the second part, its successors and assigns, that this conveyance is made subject to the following restrictions and conditions."

The above seems to indicate very clearly that the conveyance was accepted by the Bayonne Building Company for itself and its successors and assigns with the understanding and agreement that no building hereafter erected on the said lands shall be used or occupied for any purpose other than a one-family residence, dwelling or church, the front line of which should not be less than twenty feet off the street or avenue at any point, and the cost of each of which should not be less than \$2,500.00. The scheme subsequently carried out of having all excepting one of the buildings which were erected facing on West 39th Street, West 40th Street and Avenue B conform with the restrictions, the cost of each of which varied from \$15,000.00 to \$35,000.00, shows conclusively that the restriction was intended to benefit the land, and that a violation of the restriction would tend to greatly depreciate the value of the land.

Covenants of this kind which either add to the value or desirability of the land retained or conveyed are generally held to confer a benefit upon the land and consequently run with it.

A restrictive covenant that confers an immediate, permanent and beneficial effect upon the use to which the real estate is designed to be applied will run with the title.

Coudert v. Sayre, 46 N. J. Eq. 386;

Wootton v. Seltzer, 83 N. J. Eq. 163;

Clough v. Mesnick, 96 N. J. Eq. 482.

The fact that one of the houses facing on West 39th Street violates the restriction in that it is a two-family house does not in any wise change this situation, since to begin with, the two-family house is erected upon a lot distant over three hundred feet from the tract conveyed by Oliver to the Bayonne Building Company, and then again, the case of *Morrow v. Hasselman*, 69 N. J. Equity, page 612, 61 Atl. Reporter, page 369, deals with this question directly and determines that the violation of a restriction as to the building line on a certain street is no defense to a suit seeking the enforcement of a restriction on another street. It, therefore, follows that the one two-family house erected on West 39th Street is no defense to enforcement of the restriction along the line of Avenue B as is sought in the case at bar, since it is well settled that the single violation of a restriction in a building scheme does not relieve the remainder of the property involved.

In the case of *Kirkpatrick v. Peshine*, 24 N. J. Equity, page 206, the question was raised and determined that a vendee with whom a restrictive agreement was made is entitled to the benefit of a covenant contained in a deed against the grantee of another lot from the common grantor, notwithstanding the absence of any privity between them.

"Reason and justice," said Lord Justice KNIGHT BRUCE, in *Demattos v. Gibson*, 4 DeG. & J. 282, "seem to prescribe, that at least, as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully, and for a valuable consideration, made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently

with it, use the property in a manner not allowable to the giver or seller." Cited in *Kirkpatrick v. Peshine*.

It may be argued that the opinion of Vice-Chancellor BACKES in the case of *Puddington v. Vielbig*, decided May 25th, 1928, and reported in New Jersey Advance Reports, Vol. 6, page 1089, and in which, after considering the facts, the case of *Winfield v. Henning* was not followed, is in favor of the defendants-appellants' contention. An examination of that case, however, shows that the facts existing therein vary from those in the case at bar, in that the deed creating the restriction expressly provided "that the covenant ran to the grantor, his heirs, executors and administrators and * * * his assigns, being owners of adjoining property." We respectfully urge that the restriction contained in the Oliver deed was intended for the benefit of the land conveyed thereby, and that the subsequent grantees of the Bayonne Building Company, who purchased or built dwellings in conformity therewith are entitled to be protected in their investments by the injunction granted in the Court below.

POINT II.

The release of the restriction by the assigns of the original grantor, after the rights of the respondents had intervened is not binding upon them.

Taking the premise that the defendants-appellants upon acquiring their lot subject to the restrictions contained in the deed of Oliver to the Bayonne Building Company could not have built the apartment house in contemplation without procuring the release from the heirs of Oliver (Mellors), how can we escape the conclusion that

the release places them in no better position for the following reasons:

First: Because at the time of executing the release of the restriction, Mellors, the heirs of Oliver, had no interest whatsoever in the tract originally conveyed by Oliver to the Bayonne Building Company, and no interest whatsoever in any other property in the neighborhood.

Second: Because of the fact that the complainants-respondents and the other persons who are now the owners of the separate parcels into which Plot "X" on Diagram 2 had been divided, acquired their respective interests either subject to the restrictions or with buildings already erected in compliance therewith.

To hold that the release executed by the Mellors unto the defendants-appellants is valid, is to destroy, or at least greatly depreciate the investments made in conformity with and in reliance upon the restriction contained in the deed from Oliver to the Bayonne Building Company, and the equity of refusing to follow such a course hardly requires precedent.

One of the leading cases in this state is *Coudert v. Sayre*, 46 N. J. Equity, page 386. While the facts differ somewhat from those under consideration in this case, the Court nevertheless was called upon to consider the validity of a release given as in the case at bar.

"This brings us to the point where it becomes necessary to examine the grounds on which the complainant rests his right to relief. He says first that his grantor has released or cancelled the covenant in question. But this modification, it will be observed, was made more than a year after the land now held by the defendant had been conveyed. It certainly

requires no argument to show that the complainant's grantor was without the least shred of authority or right to release or modify the covenant so far as it operated to confer a benefit on land which he had previously conveyed. One person is without the least power or capacity, in the absence of a delegation of power, to release or change the rights of another in land. For a principle so elementary no authority need be cited."

This same defense was also urged in the case of *Waters v. Collins*, 70 Atl. Rep. page 984, which was one wherein both the complainant and the defendant derived title to lands by separate deeds from the Chelsea Beach Company, each, however, containing a covenant amongst other things, that no building shall at any time be erected within twenty feet of the front property line of any street or avenue, the defendant contending his right to ignore the restriction by reason of having received a release from the Chelsea Beach Company. Vice-Chancellor REED, in considering this defense says:

"Now, as appears by the above statement, this resolution was passed after both the deeds from the Chelsea Beach Company for the two lots in question were executed. Nothing, therefore, can be clearer than that such resolution was entirely efficacious to affect in any respect the contractual rights to the parties to those deeds. The company could not sell lots, holding out to the grantees a restrictive scheme intended to advance the value of the property sold, at the expense of property to be yet sold, and afterwards receive an enhanced price for subsequent lots, by a removal in whole or in part of the restriction bargained for."

In the case of *DeRossett v. Bianchi*, 100 N. J. Equity, 439, Vice-Chancellor CHURCH was also called upon to consider the effect of a release given by the original grantor to avoid the operation of a restriction.

"It is further contended that the land company released the restrictions in defendant's deed. The release reads: "To the extent to which the party of the first part has the right to so release the same." This language plainly expresses a doubt as to the authority to make such a release. In my opinion the company had no authority whatever to make such a release. The rights of the complainants were fixed under the map of 1915 and the surrounding circumstances and under the cases above quoted."

The cases referred to in the above quotation from Vice-Chancellor CHURCH's opinion are *Polhemus v. DeLisle*, 98 N. J. Equity, 256, wherein Vice-Chancellor BERRY quoting from the case of *Coudert v. Sayre* held to the same effect, and from *Laverack v. Allen*, 130 Atl. Rep. 615, wherein Vice-Chancellor FIELDER followed the same rule that:

"In the usual case where the grantor has conveyed a lot subject to restrictions imposed for the benefit of an adjoining lot, he has no right to modify the restrictions so far as they operate to confer a benefit on such adjoining lot after he has conveyed it."

POINT III.

The rights of the complainants-respondents rest upon the theory of a neighborhood plan for the tract conveyed by the Oliver deed.

The defendants-appellants in their brief take the position that the complainants-respondents are not entitled to relief upon the theory of a neighborhood plan, citing *Scull v. Eilenberg*, 94 N. J. Equity, p. 759, and other cases as authority. While we agree with the general principle of law that a neighborhood scheme of restrictions must be uni-

versal and apply to all lots of like character brought within the scheme in order to be effective and enforceable, we, at the same time, respectfully urge that a neighborhood scheme is not required to include any stipulated number of lots or any particular sized area.

The case at bar is also to be distinguished from those in which relief is sought against the violation of a covenant upon lands other than that which was included in the instrument creating the restriction which binds the claimants. The complainants-respondents are not claiming any rights in this action through Oliver, but, on the contrary, are claiming a right against Oliver and his assigns in preventing them from destroying the benefits conferred upon the plot conveyed to the Bayonne Building Company by freeing one of the lots included under the original deed from the restriction. We respectfully contend that the restriction in the deed of Oliver to the Bayonne Building Company affected the entire of the plot marked as "X" on Diagram 2, since the entire of the said plot was restricted in the same way and by the same deed. To release the defendants-appellants from the obligation of the restrictions on the one vacant lot remaining on the corner of Avenue B and 39th Street, after all the other lots in the block had been built upon in compliance with the terms and conditions of the restriction, is to give the defendants-appellants a benefit at the expense of the complainants-respondents, without their authorization or consent, but upon the authorization of persons who have no further interest whatsoever in the plot or in any of the lands in the neighborhood.

The doctrine that the grantee of a particular deed containing a restriction without a covenant on the part of the grantor to restrict the remainder

of his lands in a similar way cannot enforce the covenant against a subsequent grantee of the original grantor is well established. Our position, however, is that this doctrine has no application to the case at bar.

POINT IV.

Respondents are entitled to the relief procured under the general powers of the Court of Equity.

It would seem, and we respectfully urge, that the general rules of equity dealing with matters where there is no adequate remedy at law should not permit a grantor to place a benefit upon a tract of land (as was done in this case in the deed from Oliver to the Bayonne Building Company by restricting the plot to residences for not more than one family, set back a distance of not less than twenty feet from the line of the street) and then permit him to release a small subdivision of the plot after all persons who acquired the other subdivisions of the plot, with due notice of the restrictions, have acquired vested rights. The erection of the apartment house directly on the line by the defendants-appellants will cut off the view from the front of the other buildings, leaving their owners not alone with a big depreciation in value, but still bound by the restrictive covenant. The release given by Mellors to the defendants-appellants runs to them only. It is hardly possible to conceive that the conclusions reached by the courts in other cases were intended to assist a grantor creating restrictive covenants in perpetrating a fraud upon his grantees. Without the release procured by the defendants-appellants from Mellor, they would not be permitted to violate the restriction by erecting an apartment house, since

the deed under which they acquired title expressly provides that the conveyance is made subject to the restrictions and conditions contained in the deed from Oliver to the Bayonne Building Company. It should, therefore, necessarily follow that if the defendants-appellants could not violate the restriction without the release from Mellor, that they should not be permitted to do it with the release.

POINT V.

The building of an apartment house along the line of the street is a violation of the restrictions.

The defendants-appellants under Point IV of their brief urge that the building of an apartment house is not a violation of the restriction. It can hardly be said that there is any vagueness or uncertainty in the language used in the deed, to-wit: "That no building or buildings hereafter erected on the said lands are to be used or occupied for any purpose other than a one-family residence, dwelling or church, and that the front line of said residence, dwelling or church, shall not be any point less than twenty feet off the street or avenue." Just how the house contemplated by the defendants-appellants with apartments for fourteen families and built along the line of Avenue B is not in violation of the restriction, we are unable to understand. The defendants-appellants admit that the apartment house was to be built on a line with Avenue B. This is, therefore, in violation of the covenant that the front line of such residence, dwelling or church, shall not be any point less than twenty feet off the street or avenue. The erection of a fourteen-family apartment house would certainly be contrary to the

covenant that no building or buildings hereafter erected on said lands shall be used or occupied for any purpose other than a one-family residence, dwelling or church.

POINT VI.

Whether the provisions contained in deed from Oliver to the Bayonne Building Company are conditions or covenants and restrictions is immaterial.

Under Point V of the brief of the defendants-appellants, counsel undertakes to distinguish between a condition and a covenant or restriction. This question would only arise if the word "restriction" were not included in the phraseology used in the deed.

We respectfully submit, therefore, that the final decree advised by the learned Vice-Chancellor below be affirmed by this Court, and that the appeal of the defendants-appellants be dismissed.

JACOB J. FEINBERG,
H. B. DEMBE,
Of counsel with
Complainants-Respondents.

