INDEX

NOTICE OF APPEAL.

(Filed Dec. 9, 1927.)

IN CHANCERY OF NEW JERSEY.

No. 66/165

Between
WILLIAM K. PAFF,
Complainant,
and
HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants.
} On Bill, Etc.

The complainant hereby appeals from the final decree made in this Court in the above stated cause and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

MINTON & ROGERS,
Solicitors for and of Counsel with Complainant.

Dated: December 9, 1927.

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

NORMAN T. ROGERS,
Of Counsel with Complainant.

AMENDED NOTICE OF APPEAL.

(Filed Dec. 12, 1927.)

IN CHANCERY OF NEW JERSEY.

No. 66/165

Between

WILLIAM K. PAFF,
Complainant,

and

HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants.

} On Bill, Etc.

The complainant hereby appeals from the final decree made by the Chancellor on the advice of Vice Chancellor Malcolm G. Buchanan, in the above stated cause, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

MINTON & ROGERS,
Solicitors for and of Counsel with Complainant.

Dated: December 12, 1927.

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

NORMAN T. ROGERS,
Of Counsel with Complainant.

PETITION OF APPEAL.

(Filed Dec. 28, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM K. PAFF,
Complainant-Appellant,

vs.

HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants-Appellees.

} On Appeal from the Court of Chancery.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of William K. Paff, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the twenty-third day of November, in the year one thousand nine hundred and twenty-seven, in a certain cause in said Court of Chancery wherein the said William K. Paff was complainant and the said Herbert P. Margerum and Ardmore Realty Company, a corporation, were defendants, in this respect, to wit, that the said decree adjudges . . .

"that the said order to show cause made on the 14th day of November, 1927, be and the same is hereby discharged,"

And "that the restraint imposed upon the defendants, Herbert P. Margerum and Ardmore Realty Company by said order of this Court made on the 14th day of November, 1927, be and the same is hereby dissolved,"

And "that the bill of complaint filed herein be and the same is hereby dismissed,"

And "that the Complainant, William K. Paff, pay to the Solicitors of the Defendants the costs of this suit, to be taxed within ten days after the service upon him of true but uncertified copies of this decree and such taxed costs. . . ."

2. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, in that,

(a) The prayer contained in the Bill of Complaint should have been granted, for the reasons set up in said Bill.

(b) The restraint imposed upon defendants should not have been dissolved, nor complainant's bill been dismissed.

(c) The restrictions pleaded by complainant should have been enforced against defendants, and defendants should have thereby been enjoined against erecting or causing to be erected on their lands any apartment house, or any dwelling houses other than single dwellings in accordance with the provisions of said restrictions.

(d) The said restrictions are clear, definite, certain and sufficiently free of doubt to entitle complainant to a permanent injunction against defendants in accordance with the prayer of his bill, and are not vague and uncertain,

nor indefinite and doubtful so as to entitle a court of equity to deny complainant his right to the relief prayed for.

(e) The decree is erroneous in so construing the effect of the said restrictions thereby permitting defendants to erect an apartment house upon their lands, for the plain and reasonable meaning of the said restrictions from their context is that only single dwellings may be constructed upon said lands, and not apartment houses.

Your petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall deem proper.

MINTON & ROGERS,
Solicitors for and of Counsel with Appellant.

BILL OF COMPLAINT AND AFFIDAVITS.

(Filed November 14, 1927.)

IN CHANCERY OF NEW JERSEY.

No. 66/165

Between

WILLIAM K. PAFF,
Complainant,

and

HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants.

} On Bill, Etc.

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

The complainant, William K. Paff, of the City of Trenton, County of Mercer and State of New Jersey, respectfully shows—

1. He is the owner in fee of a certain tract or parcel of land, with a dwelling house thereon erected, situate, lying and being in the City of Trenton, County of Mercer and State of New Jersey, known as the southerly twelve feet (12') of lot No. 16, and all of lot No. 17, on the plan of lots of the "Dean Estate," surveyed and drawn by E. G. Weir, C.E., June 1st, 1895, and filed in the Mercer County Clerk's Office on November 20th,

1900, and re-surveyed by Abram Swan, Jr., C.E., January 1st, 1905, bounded and described as follows, to wit:

Beginning at a point in the westerly line of Lenape Avenue, formerly Parkline Avenue, distant southwardly (measured along said line of said avenue) four hundred and twenty-eight feet (428') from the point of intersection of the line of said Avenue with the southerly line of West State Street, and runs thence (1), southwardly along said line of said Avenue thirty-seven feet (37') to a point; thence (2) westwardly at right angles to the first course, and along the northerly line of lot No. 18 on said plan of lots one hundred and fifty feet (150') to a point in the easterly line of lot No. 33 on said plan of lots; thence (3), northwardly and parallel with the first course along the easterly line of lots Nos. 33 and 32 on said plan of lots, thirty-seven feet (37') to a point; thence (4), eastwardly and parallel with the second course one hundred and fifty feet (150') to the point of *Beginning*.

2. Lot No. 17 on the above described premises, with others, representing a frontage on Lenape Avenue of twenty-five feet (25') and a depth in a westerly direction therefrom of one hundred fifty feet (150') was conveyed by James D. Tantum, (single), to James C. Tattersall, dated May 16, 1901, and recorded in the Mercer County Clerk's Office in Book 244 of Deeds, pages 559, etc. The said conveyance from James D. Tantum to James C. Tattersall contains the following covenant:

> "This conveyance is made under and subject nevertheless to the following restrictions, covenants and conditions which are hereby made a part of the consideration for this conveyance and are hereby severally accepted and agreed to by the party of the second part hereto:
>
> (1) That no building or any part thereof erected or to be erected upon any part of the land hereby conveyed shall be used as a hotel, tavern, drinking saloon, blacksmith shop, slaughter house,

bone-boiling establishment, tannery, skin-dressing establishment, glue, soap, candle or starch manufactory, or for other offensive purposes or occupations;

(2) That no dwelling or other building shall be erected upon the said described lots of land or premises within twenty feet (20') of the street line, provided that this prohibition shall not be construed to extend to bay windows, open porches, steps or cellar doors.

(3) That no wine, spirituous or malt liquors or intoxicants of any kinds shall be sold as a beverage upon the premises hereby conveyed.

(4) Any violation of the above restrictions and conditions by the party of the second part, his heirs or assigns or any of them, shall work a forfeiture of the premises hereby conveyed unto the party of the first part, his heirs or assigns, and who upon such violation may forthwith enter upon and take possession of said premises and all improvements thereupon."

3. Said lot No. 17, with others, was conveyed on June 5th, 1903, by James C. Tattersall to Franz Milton Company, a corporation, by deed recorded on June 19th, 1903, in Mercer County Clerk's Office in Book 265 of Deeds, pages 176-179, subject to the aforesaid restrictions, and thence by the said Franz Milton Company, a corporation, conveyed to Oliver M. Schafer by deed dated August 3, 1910, and recorded on August 4th, 1910, in Mercer County Clerk's Office in Book 327 of Deeds, pages 597-599, also subject to the aforesaid restrictions.

4. Lot No. 16 of said premises, fronting twenty-five feet (25') on said Lenape Avenue, and extending back a depth of one hundred and fifty feet (150') was conveyed by Eva C. Dean, (single), to Oliver M. Schafer

by deed dated August 3d, 1910, and recorded on August 4th, 1910, in Mercer County Clerk's Office in Book 327 of Deeds, pages 595-597, subject to the same restrictions set forth in Paragraph 3 hereof, and the southerly fifteen feet (15') of said lot No. 16, together with the northerly twenty feet (20') of lot No. 17 on said plan were thence conveyed by Oliver M. Schafer and Alicia C. Schafer, his wife, to Anna M. Fell by deed dated April 23d, 1915, and recorded April 29, 1915, in Mercer County Clerk's Office in Book 379 of Deeds, pages 403-405, subject to the same restrictions.

5. Lot No. 19 of said tract of land, fronting twenty-five feet (25') on the westerly side of Lenape Avenue, and extending back therefrom a depth of one hundred and fifty feet (150') was conveyed to Oliver M. Schafer by Cora M. Krewson and husband, by deed dated August 3d, 1910, and recorded August 4th, 1910, in Mercer County Clerk's Office in Book 331 of Deeds, pages 1-3, subject to the same restrictions set forth in Paragraph 3 hereof.

6. Lot No. 20 on said plan, of the same dimensions as Lot No. 19 aforesaid, fronting on the said Lenape Avenue, was conveyed to the said Oliver M. Schafer by Eva C. Dean, (single), by deed dated August 3d, 1910, and recorded August 4, 1910, in Mercer County Clerk's Office in Book 327 of Deeds, pages 595-597, subject to the same restrictions as set forth in Paragraph 3 hereof.

7. Lots Nos. 21 and 22 on said plan, fronting on said Lenape Avenue, and each of the same dimensions as the aforementioned lots, were conveyed by James D. Tantum, (single), to Walter B. Pycraft, by deed dated May 1, 1901, and recorded May 2d, 1901, in Mercer County Clerk's Office in Book 246 of Deeds, pages 160-162, subject to the same restrictions as set forth in Paragraph 3 hereof; and was thence by the said Pycraft conveyed to Oliver M. Schafer by deed dated August 2d, 1910,

and recorded August 3d, 1910, in Mercer County Clerk's Office in Book 327 of Deeds, pages 585-587, subject to the aforementioned restrictions.

8. Lots Nos. 18, 19, 20, 21 and 22 on the aforesaid plan, and the southerly five feet (5') of said lot No. 17, were conveyed by Oliver M. Schafer and Alicia C. Schafer, his wife, to the said defendant, Herbert P. Margerum, by deed dated April 30th, 1920, and recorded May 1st, 1920, in Mercer County Clerk's Office in Book 450 of Deeds, pages 103-105, subject to the aforesaid restrictions, and the said defendant, Herbert P. Margerum, is at this time the owner on record of said premises, excepting as to the southerly five feet (5') of said lot No. 17, which the said defendant with his wife, Norma H., conveyed to complainant by deed dated June 25, 1920, and recorded July 7th, 1920, in Mercer County Clerk's Office in Book 448 of Deeds, pages 372-374, subject to the aforesaid restrictions.

9. Anna M. Fell, (single), conveyed to complainant the southerly fifteen feet (15') of said lot No. 16, and the northerly twenty feet (20') of lot No. 17 on said plan, by deed dated November 10th, 1919, and recorded on November 13th, 1919, in Mercer County Clerk's Office in Book 436 of Deeds, pages 597, etc., subject to the restrictions aforementioned.

10. By agreement, dated April 10th, 1911, expressed to have been made by and between said Oliver M. Schafer and Alicia C. Schafer, as owners of lots Nos. 15, 16, 17, 18, 19, 20, 21 and 22 on said plan, fronting on Lenape Avenue as aforementioned, each twenty-five feet (25') thereon by one hundred and fifty feet (150') in depth, excepting lot No. 22, which is at the corner of Riverside Avenue and said Lenape Avenue, and fronts on the latter street thirty-five feet (35') and extends along the said Riverside Avenue about one hundred and

fifty-seven feet (157'), and James E. Glenn and Mabel Glenn, his wife, as owners of lots Nos. 7, 8, 9 and 10 on said plan, fronting on said Lenape Avenue, and Alfred F. Robertshaw and Elizabeth A. Robertshaw, his wife, owners of lots Nos. 11, 12, 13 and 14 on said plan, fronting on said Avenue, agreed that they would adopt the following restrictions and regulations, in addition to those hereinbefore mentioned, and which should be binding upon and enforceable against the respective owners of the said lots of land, their heirs and assigns, a copy of which agreement is hereunto annexed, and which agreement was recorded on April 22d, 1911, in Mercer County Clerk's Office in Book "S" of Special Deeds, at pages 447, etc.:

"*First*:—That no dwellings shall be erected in pairs or rows but that they must all be single dwellings.

Second:—That no dwelling shall be erected to cost less than Four Thousand Dollars.

Third:—That no dwelling shall be erected on a twenty-five foot lot but the ground for each dwelling shall have a frontage of not less than thirty-three and one-third feet.

Fourth:—That no dwelling shall be erected on the premises within thirty feet of the front property line, providing that this prohibition shall not be constructed to extend to bay-windows, open porches or steps.

Fifth:—That no out buildings shall be erected on the premises within one hundred feet of the front property line.

Sixth:—It is agreed that in the event of the owner of lots numbered 17, 18, 19, 20, 21 and 22 desiring to front these lots and the dwellings to be erected on them on Riverside Ave., instead

of Parkline Ave., the dwelling and out building nearest Parkline Ave., may be erected not less than twenty feet from the property line of Parkline Ave., and the foregoing restrictions and regulations are not to apply to these lots when they front on Riverside Ave., but lots numbered 15, 16 are to be covered by the foregoing restrictions and regulations.

Seventh:—Any violation of the foregoing restrictions and regulations by any of the parties to this agreement, their heirs or assigns shall work a forfeiture of damages to the other party or parties to this agreement, their heirs or assigns."

11. The said lots Nos. 18, 19, 20, 21 and 22 now owned in fee of record by the defendant, Herbert P. Margerum, are adjacent to and adjoin lot No. 17 and the southerly part of lot No. 16, owned by the complainant. The said lots are a part of a large tract of land, which was the subject of partition in a deed dated November 19th, 1900, expressed to have been made by and between Cora M. Krewson and Elmer E., her husband, Eva C. Dean, (single), and James D. Tantum, (single), to Cora M. Krewson, and James D. Tantum and Eva C. Dean, which deed was recorded in the Mercer County Clerk's Office on November 20, 1900, in Book 240 of Deeds, pages 565-588, whereby all of the remaining part of the said "Dean Estate" was conveyed, and from thence owned by the said several grantees, not as tenants in common, but separately as to the particular lots mentioned in said deed. Thence the several lots of the said estate, including those hereinbefore mentioned, were conveyed by the several grantees, subject to the restrictions as mentioned in Paragraph 3 hereof, and it was the intention of the several grantees upon the said partition to preserve all the said premises as a residential section, with a view

of beautifying and harmonizing the entire locality as a resdential district.

12. The aforesaid premises are situated on the westerly side of Lenape Avenue, and extend in a southerly direction to the corner of that Avenue and Riverside Avenue and comprise an exclusive residential section of the City of Trenton.

13. Defendant, Herbert P. Margerum, has executed a written option to sell said lots Nos. 18, 19, 20, 21 and 22 to the defendant, Ardmore Realty Company, a corporation, which written option complainant has been informed of by both of the said defendants through their agents and representatives. The said option to buy was given by the said Herbert P. Margerum to the said Ardmore Realty Company, with the full and complete knowledge that the defendant, Ardmore Realty Company, intended to begin the construction and erection of an apartment house, designed to be five stories in height and accommodating twenty-one families, to be erected on the premises owned by Herbert P. Margerum, as aforesaid, and to face on Riverside Avenue.

14. The complainant and other owners of land on the said tract on the westerly side of Lenape Avenue have constructed their dwelling in a manner which conforms with the building restrictions set forth in the aforementioned deeds and agreement, and until the acts of the defendants, Herbert P. Margerum and Ardmore Realty Company, herein complained of, the complainant and the other residents owning lots including Nos. 7 to 22, inclusive, of the said "Dean Estate," have received the benefits of the said restrictions, and the uniformity of the architectural design and symmetry of construction and location of the dwellings on the said tract has not been in any wise destroyed, and they have erected upon said premises only single dwellings and out-buildings in conformity with the said restrictions.

15. Complainant has for some time past, and still is occupying the premises owned by him as his residence.

16. On November 7th, 1927, the defendant, Ardmore Realty Company, by its servants, agents or contractors began to dig a foundation on lots Nos. 18, 19, 20, 21 and 22 on said tract owned by the defendant, Herbert P. Margerum, and subject to the option to buy from him in favor of the said Ardmore Realty Company, for the erection of the apartment house hereinbefore referred to, the exact nature of which construction was made known to complainant by the defendants herein, their servants, agents or contractors upon his making inquiry thereof.

17. On November 10th, 1927, complainant caused a notice to be served upon Ardmore Realty Company, addressed to it, and the defendant, Herbert P. Margerum, demanding that it cease digging for the foundation of such an apartment, to be erected on said lots of land, and although service of said notice could not be made upon the defendant, Herbert P. Margerum, for the reason that he could not be found, the defendant, Ardmore Realty Company, continues to proceed with the construction as aforesaid, and thence plans to erect an apartment house thereon, and refuses to discontinue the same.

18. Complainant shows that the erection of an apartment house upon the said premises will be contrary to the restrictive covenants as aforesaid, to which complainant and defendants are bound, and that the contemplated erection thereof will obstruct and destroy the view from complainant's premises to the south, and will thereby cause him great inconvenience by being deprived of light, air and view, will render his dwelling house less comfortable for those who now, or who may hereafter occupy his said house as a dwelling; and that it will totally destroy the uniformity of architectural design and symmetry of construction of the buildings upon said tract, which, to a considerable extent, makes up the value of complainant's

premises for residential purposes, and complainant's premises from an æsthetic stand will be completely destroyed by such a building.

19. The restrictions contained in the deeds from Krewson, Dean and Tantum, covering the premises owned by defendants and complainant, as well as those other lots of land of the "Dean Estate" on Lenape Avenue, created in the mind of complainant and the several purchasers of those lots the understanding that the said lands would be used for the erection of single dwellings and appropriate outbuildings, and that thus a strictly residential district with uniformity of construction and symmetry of design was permanently assured for the owners of these lots and the subsequent purchasers thereof, and they did not contemplate the erection of apartment houses upon said lands as part of the design and purpose of said covenants and restrictions, and the construction of apartment houses upon said tract is absolutely contrary to the provisions of said covenants and restrictions, and not harmonious with the intendment thereof.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That the defendants, Herbert P. Margerum and Ardmore Realty Company, a corporation, may answer the Bill of Complaint, without oath, and each statement therein made.

2. That an injunction or restraining order, pendente lite, as well as permanently may be issued restraining and enjoining the said defendants, their agents and servants from erecting or building, or causing to be erected or built any structure on their said premises in said Bill of Complaint described, excepting a single dwelling house, with appropriate outbuildings pursuant to the restrictive covenants against said premises, as stated in said Bill of Complaint, and that it may be declared and decreed that the premises of the complainant, and of the defendants are

mutually restricted and bound by the several restrictions contained in their deeds of conveyance, previously mentioned, and the articles of agreement hereinbefore described, and that the said covenants run with the land and are obligatory upon the respective owners thereof.

3. That such further relief may be granted as may be agreeable to equity, neighborliness and good conscience.

4. That a writ of subpœna may issue commanding the said defendants to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

MINTON & ROGERS,
Solicitors for and of Counsel with Complainant.
NORMAN T. ROGERS.
Of Counsel with Complainant.

EXHIBIT "A."

Articles of Agreement made and entered into this tenth day of April, 1911, by and between James E. Glenn and Mabel Glenn his wife, Alfred F. Robertshaw and Elizabeth A. Robertshaw his wife, and Oliver M. Schafer and Alicia C. Schafer his wife, all of the City of Trenton, New Jersey.

Witnesseth, that the parties to this agreement being owners of the building lots fronting on the west side of Parkline Avenue, south of West State St., in consideration of One Dollar each to the others paid and other mutual benefits and considerations agree to adopt the following restrictions and regulations, in addition to those already in existence, which shall be binding upon and enforceable against the respective owners of the lots of

land hereby effected, their heirs and assigns forever, viz.: James E. Glenn and Mabel Glenn lots numbered 7, 8, 9 and 10, Alfred F. Robertshaw and Elizabeth A. Robertshaw lots numbered 11, 12, 13 and 14. Oliver M. Schafer and Alacia C. Schafer lots numbered 15, 16, 17, 18, 19, 20, 21 and 22. These restrictions and regulations to be incorporated in all future deeds given by the parties.

FIRST:—That no dwellings shall be erected in pairs or rows but that they must all be single dwellings.

SECOND:—That no dwelling shall be erected to cost less than Four Thousand Dollars.

THIRD:—That no dwelling shall be erected on a twenty-five foot lot but the ground for each dwelling shall have a frontage of not less than thirty-three and one-third feet.

FOURTH:—That no dwelling shall be erected on the premises within thirty feet of the front property line, providing that this prohibition shall not be constructed to extend to bay-windows, open porches or steps.

FIFTH:—That no out-buildings shall be erected on the premises within one hundred feet of the front property line.

SIXTH:—It is agreed that in the event of the owner of lots numbered 17, 18, 19, 20, 21, and 22 desiring to front these lots and the dwellings to be erected on them on Riverside Ave., instead of Parkline Ave., the dwelling and out building nearest Parkline Ave., may be erected not less than twenty feet from the property line of Parkline Ave., and the foregoing restrictions and regulations are not to apply to these lots when they front on Riverside Ave., but lots numbered 15, 16, are to be covered by the foregoing restrictions and regulations.

SEVENTH:—Any violation of the foregoing restrictions and regulations by any of the parties to this agreement, their heirs or assigns shall work a forfeiture of

damages to the other party or parties to this agreement, their heirs or assigns.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Alfred F. Robertshaw (X)
Elizabeth Robertshaw (X)
Oliver M. Schafer (X)
Alicia C. Schafer (X)
James E. Glenn (X)
Mabel Glenn (X)

Signed, sealed and delivered in the presence of
Charles H. English

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.*:

Be It Remembered, That on this thirteenth day of April, in the year of our Lord One Thousand Nine Hundred and Eleven, before me an Attorney at Law of New Jersey, personally appeared James E. Glenn and Mabel Glenn, his wife, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed:

And the said Mabel Glenn being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

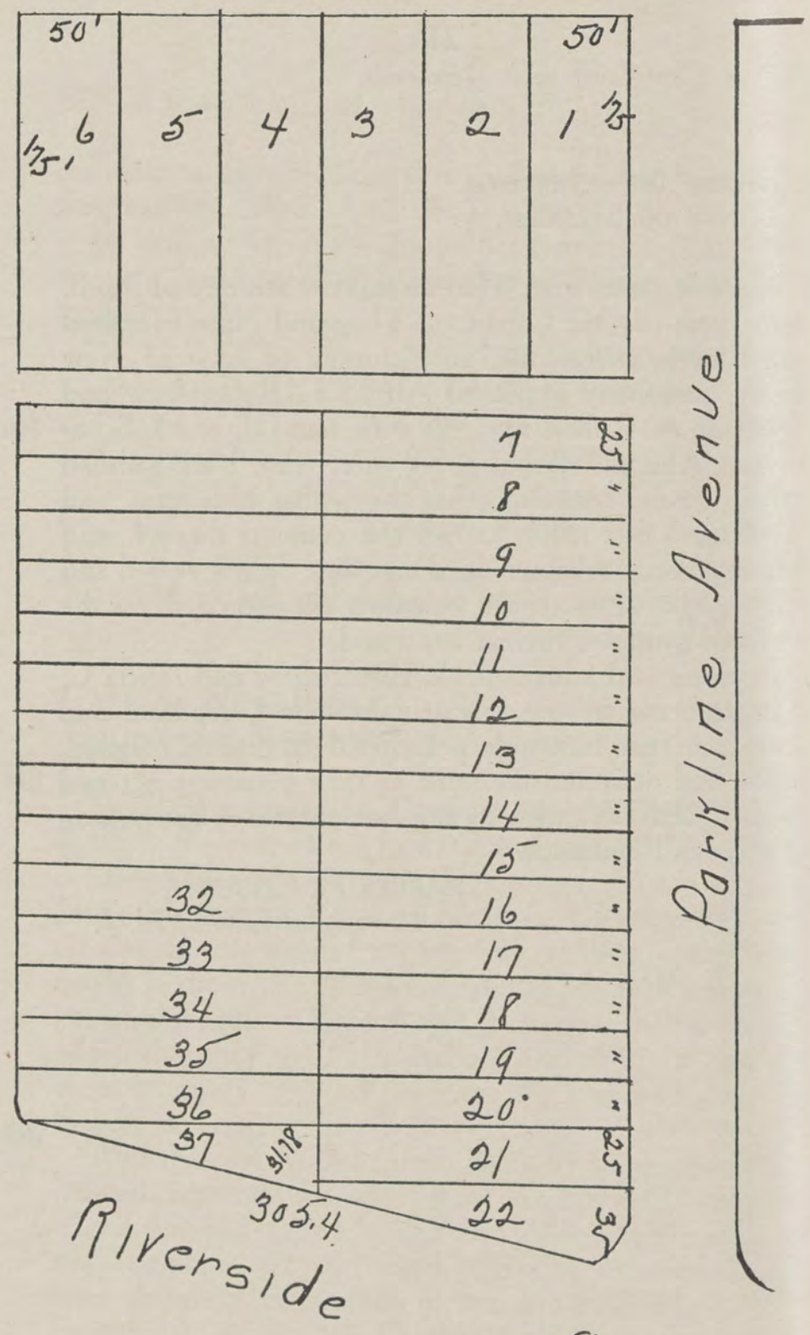
CHARLES H. ENGLISH,
Attorney at Law.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.*:

Be It Remembered, That on this twelfth day of April, in the year of Our Lord One Thousand Nine Hundred and Eleven, before me, an Attorney at Law of New Jersey, personally appeared Alfred F. Robertshaw and Elizabeth A. Robertshaw, his wife, and Oliver M. Schafer and Alicia C. Schafer, his wife, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed:

And the said Elizabeth A. Robertshaw and Alicia C. Schafer being by me privately examined, separate and apart from their husbands, acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, FREELY, without any fair, threats or compulsion of their said husbands.

CHARLES H. ENGLISH,
Attorney at Law of N. J.



SCALE 100 FT.—1 IN.

PLAN OF LOTS, DEAN ESTATE

TRENTON, N. J.

June 1, 1895.
Filed 11/20/00.

B. GUMMERE,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM K. PAFF,
Complainant,
and
HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants.
} On Bill, Etc. 10

AFFIDAVITS.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.:* 20

I, Edith A. Haley, of full age, being duly sworn according to law, upon my oath depose and say:

1. On November 10, 1927, at about 11:30 A. M., I served upon Sol Phillips Perlman, a notice of which the annexed is a true copy. Mr. Perlman represented himself to be the President of the Ardmore Realty Company, a corporation, one of the defendants in the above-entitled cause. I served Mr. Perlman with said notice at his office 30
on the eighth floor of the American Mechanics Building at 145 East State Street in the City of Trenton, said County and State, and I informed him of the contents of said notice at that time. He stated to me that he was expecting the service of such notice in behalf of the said defendant, Ardmore Realty Company, and that the Ardmore Realty Company intended to proceed with the construction of an apartment house upon the premises at

the northwesterly corner of Riverside Avenue and Lenape Avenue in said City in all events. He stated to me that the defendant, Herbert P. Margerum, had given to the defendant, Ardmore Realty Company, a written option to buy the said premises, and that Mr. Margerum knew of the intention of the Ardmore Realty Company to construct an apartment house upon said premises. He told me to see Mr. Joseph J. Thomas at the said address in order to secure service of another copy of said notice upon Herbert P. Margerum.

2. I went to the office of Joseph J. Thomas at the same address and met Mr. Thomas. I inquired of Joseph J. Thomas for the whereabouts of Herbert P. Margerum, one of the defendants, and he told me that Mr. Margerum was out of town considerably but that he thought he might be found at the office of Golding Sons' Company in the Trenton Trust Building in said City. He called that office on the telephone while I waited and received the reply that Mr. Margerum was out of town, and in all probability could not be located before November 14th.

EDITH A. HALEY.

Sworn to and subscribed before me this 14th day of November, 1927.

JOSEPH FISHBERG,
Notary Public of N. J.

To Herbert P. Margerum and Ardmore Realty Company, a Corporation:

PLEASE TAKE NOTICE that the undersigned is the owner of lands facing on Lenape Avenue (formerly known as Parkline Avenue) adjoining premises owned by you or either of you extending on Lenape Avenue south from the undersigned's premises to Riverside Avenue, known as part of lot No. 17 and all of lots Nos. 18, 19, 20, 21 and 22 on a map of the Dean Estate on file in the Mercer County Clerk's Office; and

That the undersigned has been advised by certain agents or representatives of each of you that the Ardmore Realty Company now holds an option to purchase the aforesaid premises from Herbert P. Margerum, and has planned and intends to erect upon the said premises an apartment house, four stories in height, to contain living apartments for twenty-one families; and

The undersigned has observed that that the agent or contractor of Ardmore Realty Company is at this time actually excavating upon said premises for the construction of such an apartment house; and

This is to give you, Herbert P. Margerum and you, Ardmore Realty Company, a corporation, notice that the title to the said premises owned by you, Herbert P. Margerum, and presently subject to an option to buy by you, Ardmore Realty Company, and the said premises adjoining thereto owned by the undersigned is subject to certain building and occupancy restrictions, fully contained in the title deeds to the said premises and that certain agreement made by and between James E. Glenn et als, dated April 10, 1911, and recorded in the Mercer County Clerk's Office on April 22, 1911, in book S of special deeds on page 447 etc., which restrictions provide for the erection on said premises of only single dwellings and appropriate outbuildings; and further provide that no buildings on any part of the said lands shall be used as a hotel, tavern, or for other offensive purposes or occupations; and further provide that no building shall be erected nearer the property line on Lenape Avenue than thirty feet excepting for bay windows, open porches or steps unless lots Nos. 17, 18, 19, 20, 21 and 22 as aforesaid shall be faced on Riverside Avenue, in which latter case the said dwelling or outbuilding to be erected upon said lots may be erected not nearer than twenty feet to the property line on Lenape Avenue.

Please Be Advised Therefore that any violation of the restrictions as to buildings and occupancy contained

in the title deeds to your premises and those of the undersigned will cause irreparable damages to the premises owned by the undersigned, and *Take Notice* that the undersigned hereby demands of you, Herbert P. Margerum, and you, Ardmore Realty Company, your agents and servants, that you discontinue any construction whatsoever contemplated in violation of the said restrictions.

WILLIAM K. PAFF,
By MINTON & ROGERS.

Dated Nov. 9, 1927.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM K. PAFF,
Complainant,
and
HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants.

} On Bill, Etc.

AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.:*

I, WILLIAM K. PAFF, of full age, being duly sworn according to law, upon my oath depose and say:

1. I am the complainant in the foregoing complaint made. I have read the bill of complaint, and the facts

therein stated are true so far as I am informed and believe.

2. I am the owner in fee simple of a dwelling house and lot, known as No. 29 South Lenape Avenue, in the City of Trenton, said tract being known as the southerly twelve feet (12') of lot No. 16 and all of lot No. 17 on plan of lots of the "Dean Estate," filed November 20th, 1900, in the Office of the Clerk of Mercer County.

3. Adjoining my premises are those of Herbert P. Margerum, comprising lots Nos. 18 to 22, inclusive, on said plan of lots, extending southerly to the corner of Riverside Avenue. The said tract is presently not built upon, excepting for a stone garage.

4. On or about October 28th, last, Joseph J. Thomas, a real estate agent, residing in the City of Trenton, called me on the telephone and stated that he thought he could sell the tract belonging to Herbert P. Margerum, adjoining my land as aforesaid, for the building of an apartment house thereon, to be five stories in height, with a court in the rear, and of pleasing appearance and design. He asked me whether, as an adjoining land owner, I would have any objection thereto, and I told him that I would object to the building of an apartment house on the adjoining lots, owned by Herbert P. Margerum, for the reason that, in my opinion, it would affect the value of my property. We talked further about the matter, and he agreed to call me on October 31st.

5. Late in the afternoon on October 31st, last, Mr. Thomas called me by telephone again, and asked if I thought more favorably of the building of an apartment house on the Margerum tract. I replied that I did not, and asked him if he had a bona fide sale arranged for those lots for that purpose. He stated that he was not certain about it, but believed that the sale would go through, if permission could be gotten for the erection of an apartment house on the land.

6. I heard nothing further concerning this matter until

prohibition shall not be construed to extend to bay windows, open porches, steps or cellar doors.

(3) That no wine, spirituous or malt liquors or intoxicants of any kinds shall be sold as a beverage upon the premises hereby conveyed.

(4) Any violation of the above restrictions and conditions by the party of the second part, his heirs or assigns or any of them, shall work a forfeiture of the premises hereby conveyed unto the party of the first part, his heirs or assigns, and who upon such violation may forthwith enter upon and take possession of said premises and all improvements thereupon.

DEED

James D. Tantum, (single), to James C. Tattersall.

Dated May 16, 1901. Recorded May 21, 1901, Book 244 of Deeds, pages 559-562.

Premises:
Lots Nos. 17 and 18 on said tract.

Restrictions:
Same as above.

DEED

James C. Tattersall, et ux, to Franz-Milton Co., a corporation.

Dated June 5, 1903. Recorded June 19, 1903, Book 265 of Deeds, pages 176-179.

Premises:
Lots Nos. 17 and 18 on said plan.

Restrictions:
Subject to Liquor and Building restrictions.

DEED

Franz-Milton Company, to Oliver M. Schafer.

Dated August 3, 1910. Recorded August 4, 1910, Book 327 of Deeds, pages 597-599.

Premises:
Lots Nos. 17 and 18 on said plan.

Restrictions:
Subject to Liquor and Building restrictions contained in Deed book 244, page 559, etc.

DEED

Oliver M. Schafer and Alicia C., his wife, to Anna M. Fell.

Dated April 23, 1915. Recorded April 29, 1915, Book 379 of Deeds, pages 403-405.

Premises:
Southerly fifteen (15) feet of lot No. 16 and northerly twenty (20) feet of lot No. 17 on said plan.

Restrictions:
Subject, however, to all restrictions, covenants and conditions comprised in previous conveyances or other instru-

ments of record affecting the premises hereinbefore expressed to be conveyed.

DEED

Anna M. Fell, (single), to William K. Paff.

Dated November 10, 1919. Recorded November 13, 1919, Book 436 of Deeds, pages 497, etc.

Premises:
Southerly fifteen (15) feet of lot No. 16 and northerly twenty (20) feet of lot No. 17 on said plan.

Restrictions:
Subject, however, to all restrictions, covenants and conditions comprised in prior conveyances or other instruments of record affecting the premises hereinbefore expressed to be hereby conveyed.

DEED

Oliver M. Schafer and Alicia C., his wife, to Herbert P. Margerum.

Dated April 30, 1920. Recorded May 1, 1920, Book 450 of Deeds, pages 103-105.

Premises:
Southerly five (5) feet of lot No. 17 and lots Nos. 18 to 22 inclusive, on said plan.

Restrictions:
Subject to Liquor and Building restrictions as above.

DEED

Herbert P. Margerum and Norma H., his wife, to William K. Paff.

Dated June 25, 1920. Recorded July 7, 1920, Book 448 of Deeds, pages 372-374.

Premises:
Southerly five (5) feet of lot No. 17 on said plan.

Restrictions:
Subject to Liquor and Building restrictions as above.

DEED

William K. Paff and Olive W., his wife, to Edna T. Bickett.

Dated April 20, 1923. Recorded April 24, 1923, Book 504 of Deeds, pages 563-564.

Premises:
Three (3) feet of lot No. 16 on said plan, being the northerly three (3) feet of that part of lot No. 16 conveyed to the said William K. Paff by Anna M. Fell, and which three (3) feet joins lands of the said Edna T. Bickett.

AGREEMENT

Between James E. Glenn and wife, Alfred F. Robertshaw and wife, and Oliver M. Schafer and wife.

Dated April 10, 1911. Recorded April 22, 1911, In Book S of Special Deeds, pages 447, etc.

Recites:
James E. Glenn owner of lots Nos. 7 to 10 inclusive, on said plan, Alfred F. Robertshaw owner of lots Nos. 11 to 14 inclusive, on said plan, Oliver M. Schafer owner of lots Nos. 15 to 22 inclusive on said plan.

Restrictions:
For restrictions see exhibit "A" annexed hereto.

(4) I have searched the records of the Office of the Clerk of the County of Mercer for the title of the defendant, Herbert P. Margerum, in and to lots Nos. 18 to 22 inclusive on said plan:

For DEEDS from James D. Tantum to James C. Tattersall, James C. Tattersall to Franz-Milton Company, and Franz-Milton Company to Oliver M. Schafer covering lot No. 18 see abstracts in previous paragraph.

DEED

Cora N. Krewson and husband, to Oliver M. Schafer.

Dated August 3, 1910. Recorded August 4, 1910, in Book 331 of Deeds, pages 1-3.

Premises:
Lot No. 19 on said plan.

Restrictions:
Same as contained in Deed in previous paragraph, Eva C. Dean to Oliver M. Schafer.

DEED

Eva C. Dean, (single), to Oliver M. Schafer.

Dated August 3, 1910. Recorded August 4, 1910, in Book 327 of Deeds, pages 595-597.

Premises:
Lot No. 20 on said plan.

Restrictions:
Same as contained in Deed in previous paragraph, Eva C. Dean to Oliver M. Schafer.

DEED

James D. Tantum, (single), to Walter B. Pycraft.

Dated May 1, 1901. Recorded May 2, 1901, in Book 246 of Deeds, pages 160-162.

Premises:
Lot No. 21 and 22 on said plan.

Restrictions:
Set forth in full as in previouus deed.

DEED

Walter B. Pycraft to Oliver M. Schaffer.

Dated August 2, 1910. Recorded August 3, 1910, in Book 327 of Deeds, pages 585-587.

Bill of Complaint and Affidavits.

Premises:
Lots No. 21 and 22 on said plan.

Restrictions:
Subject to Building and Liquor restrictions.

DEED

Oliver M. Schafer and Alicia C., his wife, to Herbert P. Margerum.

Dated April 30, 1920. Recorded May 1, 1920, in Book 450 of Deeds, pages 103-105.

Premises:
Southerly five (5) feet of lot No. 17 and lots Nos. 18 to 22, inclusive: Being one hundred forty (140) feet frontage on the westerly side of Lenape Avenue at the northwesterly corner of that Avenue with Riverside Ave. and extending back one hundred fifty (150) feet in depth to the rear line of lots Nos. 33, 34, 35, 36 and 37 on said tract.

Restrictions:
Subject to Liquor and Building restrictions.

DEED

Herbert P. Margerum and Norma H., his wife, to William K. Paff.

Dated June 25, 1920. Recorded July 7, 1920, in Book 448 of Deeds, pages 372-374.

Bill of Complaint and Affidavits.

Premises:
Southerly five (5) feet of lot No. 17 on said plan.

Restrictions:
Subject to Liquor and Building restrictions.

AGREEMENT

Between James E. Glenn and wife, Alfred F. Robertshaw and wife, and Oliver M. Schafer and wife.

Dated April 10, 1911. Recorded April 22, 1911, In Book S of Special Deeds, pages 447, etc.

Recites:
James E. Glenn owner of lots Nos. 7 to 10 inclusive, on said plan, Alfred F. Robertshaw owner of lots Nos. 11 to 14 inclusive, on said plan, Oliver M. Schafer owner of lots Nos. 15 to 22 inclusive on said plan.

Restrictions:
For restrictions see exhibit "A" annexed hereto.

(5) In searching the said records I find that the tract known as the Dean Estate was the subject of a partition, and that a deed appears therein from Cora M. Krewson and husband, Eva C. Dean, (single), and James D. Tantum, (single), to Cora M. Krewson, Eva C. Dean and James D. Tantum which is dated November 19, 1900, and recorded November 20, 1900, in Book 240 of Deeds, pages 565-588, wherein the said tract was conveyed by several parcels to the said grantees severally, and that as to lots Nos. 16 and 20, they were conveyed to Eva C. Dean, and as to lot No. 19, it was conveyed to Cora M. Krewson, and as to lots Nos. 17, 18, 21 and 22 they

were conveyed to James D. Tantum, and there is in the deeds covering these premises and the remaining lots in the tract known as the Dean Estate from these three individuals actually inserted at length the restrictions covering the premises in question. In addition to those restrictions covering the premises in question, as well as lots 7 to 15 on said tract facing on Lenape Avenue, there are the restrictions contained in the agreement hereinbefore recited between Messrs. Glenn, Robertshaw and Schafer.

(6) I have also ascertained that Parkline Avenue as it appears upon the map of the Dean Estate filed in the Office of the Clerk of Mercer County was changed to Lenape Avenue by ordinance of the City of Trenton duly made and entered.

(7) Hereunto annexed is a true copy of the map of the Dean Estate filed November 20, 1900, in the Mercer County Clerk's Office, dated June 1, 1895, showing the location of the lands owned by the complainant, William K. Paff, and the defendant, Herbert P. Margerum, which latter lands are subject to the option given by Margerum to the defendant, Ardmore Realty Company.

(8) I first consulted with the complainant, William K. Paff, in regard to the matter of the Ardmore Realty Company erecting an apartment upon lots Nos. 18, 19, 20, 21 and 22 on the tract known as the Dean Estate, on November 8th, last, and was that day referred to and consulted with Joseph J. Thomas, of the City of Trenton, who represented himself to be the real estate agent for Herbert P. Margerum, in the sale of those lots to Ardmore Realty Company. Mr. Thomas told me that Mr. Margerum had given an option to purchase the said lots to Ardmore Realty Company, and that the Ardmore Realty Company was planning to erect an apartment house upon the said lots to be faced upon Riverside Avenue, and to extend back along the westerly side of Lenape Avenue. He stated that certain operations toward con-

structing the foundations thereof were already under way on the said lots. I pointed out to him that the complainant believed that the construction of an apartment house upon these lots was contrary to the building restrictions which covered them and his lots adjoining, as well as lots Nos. 7 to 15 inclusive on said tract. Mr. Thomas referred me to Sol Phillips Perlman of this city, whom I interviewed later in the day, and Mr. Perlman stated that he was President of that Corporation, and counsel therefor. He confirmed Mr. Thomas' statement that the corporation held an option to buy the said lots from Herbert P. Margerum, and that he intended to build an apartment house upon the said tract on Riverside Avenue to be five stories in height and to house twenty-one families. I stated to Mr. Perlman the complaint which William K. Paff had made to me about that construction, and its conflict with building restrictions covering said lands and Mr. Perlman stated that the operations for the construction of said apartment house had been instituted and would continue.

(9) After the service of the Notice from William K. Paff upon Mr. Perlman, as President of Ardmore Realty Company, to desist the building of said apartment house on November 10, 1927, Mr. Perlman stated in behalf of Ardmore Realty Company, defendant herein, that the operations would continue despite the notice.

NORMAN T. ROGERS.

Sworn to and subscribed before me this 14th day of November, 1927.

JOSEPH FISHBERG,
Notary Public of N. J.

Order to Show Cause, with Temporary Constraint.

ORDER TO SHOW CAUSE, WITH TEMPORARY RESTRAINT.

(Filed Nov. 14, 1927.)

IN CHANCERY OF NEW JERSEY.

No. 66/165.

Between
WILLIAM K. PAFF,
Complainant,
and
HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants.
} On Bill, Etc.

Upon reading the bill of complaint filed in this cause and the affidavits thereunto annexed,

It Is on motion of Minton & Rogers, of counsel with complainant, *Ordered* on this fourteenth day of November, 1927, that the defendants, Herbert P. Margerum and Ardmore Realty Company, show cause before the Chancellor at the State House in Trenton on the twenty-second day of November, instant, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order or injunction should not be made, pendente lite, according to the prayer of the bill of complaint;

And It Is Further Ordered, that the said defendants, their agents and servants in the meantime, and until the

Order to Show Cause, with Temporary Constraint.

further order of this Court, desist and refrain from erecting or building, or causing to be erected or built an apartment house on the pemises known as lots Nos. 18, 19, 20, 21 and 22 of the Dean Estate" in the City of Trenton, situate on the westerly side of Lenape Avenue, at the northwesterly corner of Riverside Avenue.

And It Is Further Ordered, that a copy of this bill and affidavits and of this order, which need not be certified, be served upon each of said defendants at least five days before the return day of this order.

E. R. WALKER,
C.

Respectfully advised,
MALCOLM G. BUCHANAN,
V. C.

ANSWERING AFFIDAVITS.

(Filed Nov. 26, 1927.)

IN CHANCERY OF NEW JERSEY.

No. 66/165.

Between
WILLIAM K. PAFF,
Complainant,
and
HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants.
} On Bill, Etc.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.:*

Joseph Plumeri, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am the Secretary of the Ardmore Realty Company, a corporation of the State of New Jersey. I am and have been in the real estate business as a broker in the City of Trenton for the past ten years. I read the bill of complaint and I am familiar with the contents thereof.

2. I believe it to be true that William K. Paff is the owner in fee of the tract or parcel of land with a dwelling house thereon and described in the first paragraph of the bill of complaint.

3. I believe it to be true that lot No. 17 on the above

mentioned premises with others was conveyed to James C. Tattersall as stated in paragraph two of the bill of complaint, and it is true that the said conveyance to James C. Tattersall contains the covenant mentioned in the second paragraph of said bill of complaint.

4. It is also true that said lot No. 17, with others, was conveyed to the Franz Milton Company, a corporation, subject to the aforesaid restrictions and covenants and thence by the said corporation to Oliver M. Schafer as stated in paragraph 3 of the bill of complaint.

5. I believe it to be true also that lot No. 16 of said premises was conveyed to Oliver M. Schafer subject to the same restrictions and that the southerly fifteen feet of lot No. 16, together with the northerly twenty feet of lot No. 17, were thence conveyed to Anna M. Fell subject to the same restrictions as stated in paragraph 4 of the bill of complaint.

6. It is also true that lot No. 19 was conveyed to Oliver M. Schafer as stated in paragraph 5 of the bill of complaint.

7. It is also true that lot No. 20 was conveyed to Oliver M. Schafer subject to the same restrictions as stated in paragraph 6 of the bill of complaint.

8. It is also true that lots 21 and 22 were conveyed to Walter B. Pycraft subject to the same restrictions as stated in paragraph 7 and were thence conveyed to Oliver M. Schafer subject to the aforesaid restrictions as stated in said paragraph.

9. It is also true that lots Nos. 18, 19, 20, 21 and 22 and the southerly five feet of lot No. 17 were conveyed by said Oliver M. Schafer to Herbert P. Margerum subject to the aforesaid restrictions as mentioned in paragraph 8 of the bill of complaint and that the said Herbert P. Margerum is the owner of record of said premises, excepting as to the southerly five feet of lot No. 17 which said Herbert P. Margerum conveyed to the complainant.

10. I believe it to be true that Anna M. Fell conveyed to the complainant the southerly fifteen feet of lot No. 16 and the northerly twenty feet of lot No. 17 as stated in paragraph 9 of the bill of complaint.

11. It is also true that an agreement was entered into dated April 10th, 1911, as stated in paragraph 10 of the bill of complaint and containing the restrictions mentioned in said paragraph.

12. It is also true that lots Nos. 18, 19, 20, 21 and 22 are adjacent to and adjoin lot No. 17 and the southerly part of lot No. 16. I believe it to be true that said lots are a part of a large tract of land which was the subject of a partition in a deed dated November 19th, 1900, as stated in paragraph 11 of the bill of complaint. I know of no intention of the several grantees upon said partition to preserve the premises as a residential section with a view of beautifying and harmonizing the entire locality as a residential district.

13. It is true that the aforesaid premises are situated on the westerly side of Lenape Avenue and extend in a westerly direction to the corner of that Avenue and Riverside Avenue and that said section is a residential section of the City of Trenton. It is not true, however, that said section is an exclusive residential section as directly across the street on Lenape Avenue from the premises in question is located the Junior High School No. 3, a public school accommodating hundreds of pupils.

14. It is true that Herbert P. Margerum executed a written option to sell lots Nos. 18, 19, 20, 21 and 22 to the Ardmore Realty Company. It is also true that said option was given to the said company with the full and complete knowledge that the defendant company intended to begin the construction and erection of an apartment house designed to be five stories in height and accommodating twenty-one families, to be erected on the

premises owned by Herbert P. Margerum and to face on Riverside Avenue.

15. I am unaware of any violations of the aforesaid building restrictions by the complainant and other owners of the land on the westerly side of Lenape Avenue; in my opinion, however, there is no uniformity of architectural design nor symmetry of construction of buildings on said land; some of the houses on said land are built of stucco, some of frame, some of brick, some of the houses are of Colonial design and others of various other designs. There is, however, so far as I am aware, uniformity of location of the dwellings on said tract. It is true also that there have been erected on said premises only single dwellings and outbuildings in conformity with said restrictions.

16. It is true that the complainant has for some time past and still is occupying the premises owned by him as his residence.

17. It is true that the defendant, Ardmore Realty Company, began to dig a foundation on November 7, 1927, on lots Nos. 18, 19, 20, 21 and 22 owned by said Herbert P. Margerum and subject to the option to buy from him for the erection of an apartment house. The apartment house which the said Ardmore Realty Company intended to erect upon said lots Nos. 18, 19, 20, 21 and 22 will face on Riverside Avenue, and will consist of one building; it will have one foundation, one roof, and its exterior walls will be continuous: it will accommodate four families on each floor and a family in the basement, be five stories in height, have one entrance for all families, with an elevator, will be most modern in all respects, of beautiful and dignified appearance, constructed of brick and steel, will have a marble lobby; no ashes will be disposed of from said apartment house, an oil-burning heating system supplying heat; there will be no refuse or garbage deposited on the outside of the building, there being an incinerator in the building, and in all other re-

spects will conform to the highest type of modern apartment house.

18. It is true that on November 10th, 1927, the complainant caused a notice to be served upon the Ardmore Realty Company demanding that it cease digging the foundation, but it is not true that the defendant, Ardmore Realty Company, continues to proceed with the construction; the fact is that the day the notice was received construction was stopped by the said Ardmore Realty Company and has not been continued at all since that time.

19. It is not true that the erection of an apartment house on the said premises will be contrary to the restrictive covenants as aforesaid inasmuch as the said apartment house and the lots on which the same will be erected will front on Riverside Avenue and it is not intended to violate any building line restriction. It is intended to construct the said building at least twenty feet from the line of Lenape Avenue and at least thirty feet from the line of Riverside Avenue; I am not aware of any rights which the complainant has to a view, light or air over the land of the said Herbert P. Margerum, but in any event the view of the complainant to the south will not be obstructed because, as has just been stated, it is intended to erect said building within twenty feet of the building line of Lenape Avenue; said building will be in size eighty (80') feet wide by seventy-eight feet ten inches (78'10") in length, and at its nearest point it is calculated will not be less than fifteen or eighteen feet from complainant's house. It is not true, in my opinion, that the said apartment house will totally destroy the uniformity of architectural design and symmetry of construction of the buildings upon said tract because, as has been stated, there is no uniformity of architectural design and symmetry of construction of the buildings; there is across the street on Lenape Avenue from complainant's house Junior High School No. 3, which is an extremely large

building occupying several acres; connected therewith are portable frame one-story schools. On Riverside Avenue immediately adjoining lots Nos. 18, 19, 20, 21 and 22 aforesaid are houses in pairs, of various types of construction; said houses are plainly visible from Lenape Avenue from the front of the complainant's dwelling. At the southwest corner of West State Street and Lenape Avenue there is also a pair of houses. It is intended to use said apartment house only for residential purposes and in my opinion the same will enhance the value of the homes in the neighborhood rather than injure the value. Said apartment house will have a court in front, and it is my opinion that the building will add to the beauty of the locality as a residential district and will not detract from whatever harmony it may be said the buildings in said locality possess. It is also my opinion that complainant's premises from an æsthetic standpoint will not be affected adversely by such apartment house. The zoning ordinance of the City of Trenton permits the erection of apartment houses for strictly residential purposes in any part of the City of Trenton, and from an investigation which I have made of zoning ordinances in other cities I know of no zoning ordinance of any City which prohibits the erection of apartment houses for residential purposes in the finest and most exclusive residential sections.

20. I am not aware of what the owners of the premises now owned by the defendants and the complainant as well as those other lots on Lenape Avenue of the "Dean Estate" had in mind as to the type of building to be erected on said land other than what was expressed in the various deeds and the aforesaid agreement; there is in existence at the present time on the southeast corner of West State Street and Eastfield Avenue an apartment house housing several families known as the "Glencoe Apartments." This apartment house was erected in the year 1907 by Isaac Glenn, who is a brother of James

to desist and I did not state to anyone that the operations would continue despite the notice. I feel certain that if anyone thinks I said that there must have been some misunderstanding. Mr. Rogers desired and I was particularly anxious that the matter should be brought into court for determination by the court at the earliest possible moment, and both of us had agreed that that was the best thing to have done. Mr. Rogers may have intended to state to me that he would serve a notice upon me, but I feel certain that he did not say so. In any event, no work has been done on the apartment house since the service of the notice as has already been stated.

SOL PHILLIPS PERLMAN.

Sworn and subscribed to before me this 21st day of November, 1927.

HAZEL FRIEDMAN,
Atty. at Law of N. J.

STATE OF NEW JERSEY,
COUNTY OF MERCER, } *ss.:*

Joseph J. Thomas, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am and have been in the real estate business as a broker in the City of Trenton for the past 12 years. I read the bill of complaint and I am familiar with the contents thereof. I have been acting as broker for Herbert P. Margerum for the sale of the premises mentioned in the bill of complaint.

2. I believe it to be true that William K. Paff is the owner in fee of the tract or parcel of land with a dwelling house thereon and described in the first paragraph of the bill of complaint.

3. I believe it to be true that lot No. 17 on the above

mentioned premises with others was conveyed to James C. Tattersall as stated in paragraph two of the bill of complaint, and it is true that the said conveyance to James C. Tattersall contains the covenant mentioned in the second paragraph of said bill of complaint.

4. It is also true that said lot No. 17, with others, was conveyed to the Franz Milton Company, a corporation, subject to the aforesaid restrictions and covenants and thence by the said corporation to Oliver M. Schafer, as stated in paragraph 3 of the bill of complaint.

5. I believe it to be true also that lot No. 16 of said premises was conveyed to Oliver M. Schafer subject to the same restrictions and that the southerly fifteen feet of lot No. 16, together with the northerly twenty feet of lot No. 17, were thence conveyed to Anna M. Fell subject to the same restrictions as stated in paragraph 4 of the bill of complaint.

6. It is also true that lot No. 19 was conveyed to Oliver M. Schafer as stated in paragraph 5 of the bill of complaint.

7. It is also true that lot No. 20 was conveyed to Oliver M. Schafer subject to the same restrictions as stated in paragraph 6 of the bill of complaint.

8. It is also true that lots 21 and 22 were conveyed to Walter B. Pycraft subject to the same restrictions as stated in paragraph 7 and were thence conveyed to Oliver M. Schafer subject to the aforesaid restrictions as stated in said paragraph.

9. It is also true that lots Nos. 18, 19, 20, 21 and 22 and the southerly five feet of lot No. 17 were conveyed by said Oliver M. Schafer to Herbert P. Margerum subject to the aforesaid restrictions as mentioned in paragraph 8 of the bill of complaint and that the said Herbert P. Margerum is the owner of record of said premises, excepting as to the southerly five feet of lot No. 17 which said Herbert P. Margerum conveyed to the complainant.

10. I believe it to be true that Anna M. Fell conveyed to the complainant the southerly fifteen feet of lot No. 16 and the northerly twenty feet of lot No. 17 as stated in paragraph 9 of the bill of complaint.

11. It is also true that an agreement was entered into dated April 10th, 1911, as stated in paragraph 10 of the bill of complaint and containing the restrictions mentioned in said paragraph.

12. It is also true that lots Nos. 18, 19, 20, 21 and 22 are adjacent to and adjoin lot No. 17 and the southerly part of lot No. 16. I believe it to be true that said lots are a part of a large tract of land which was the subject of a partitition in a deed dated November 19th, 1900, as stated in paragraph 11 of the bill of complaint. I know of no intention of the several grantees upon said partition to preserve the premises as a residential section with a view of beautifying and harmonizing the entire locality as a residential district.

13. It is true that the aforesaid premises are situated on the westerly side of Lenape Avenue and extend in a westerly direction to the corner of that avenue and Riverside Avenue and that said section is a residential section of the City of Trenton. It is not true, however, that said section is an exclusive residential section, as directly across the street on Lenape Avenue from the premises in question is located the Junior High School No. 3, a public school accommodating hundreds of pupils.

14. It is true that Herbert P. Margerum executed a written option to sell lots Nos. 18, 19, 20, 21 and 22 to the Ardmore Realty Company. It is also true that said option was given to the said company with the full and complete knowledge that the defendant company intended to begin the construction and erection of an apartment house designed to be five stories in height and accommodating twenty-one families, to be erected on the premises owned by Herbert P. Margerum and to face on Riverside Avenue.

15. I am unaware of any violations of the aforesaid building restrictions by the complainant and other owners of the land on the westerly side of Lenape Avenue; in my opinion, however, there is no uniformity of architectural design nor symmetry of construction of buildings on said land; some of the houses on said land are built of stucco, some of frame, some of brick, some of the houses are of Colonial design and others of various other designs. There is, however, so far as I am aware, uniformity of location of the dwellings on said tract. It is true also that there have been erected on said premises only single dwellings and outbuildings in conformity with said restrictions.

16. It is true that the complainant has for some time past and still is occupying the premises owned by him as his residence.

17. It is true that the defendant, Ardmore Realty Company, began to dig a foundation on November 7, 1927, on lots Nos. 18, 19, 20, 21 and 22 owned by said Herbert P. Margerum and subject to the option to buy from him for the erection of an apartment house. I have seen the plans and specifications of the apartment house which the said Ardmore Realty Company intended to erect upon said lots Nos. 18, 19, 20, 21 and 22. The same will face on Riverside Avenue and will consist of one building; it will have one foundation, one roof and its exterior walls will be continuous; it will accommodate four families on each floor and a family in the basement, be five stories in height, have one entrance for all families, with an elevator, will be most modern in all respects, of beautiful and dignified appearance, constructed of brick and steel, will have a marble lobby; no ashes will be disposed of from said apartment house, an oil-burning heating system supplying heat; there will be no refuse or garbage deposited on the outside of the building, there being an incinerator in the building, and in all other respects

Lenape Avenue. There is also in existence in the neighborhood the "Wilmet Apartments" which is a similar type building. This is at 636 West State Street and is about four blocks from Lenape Avenue and West State Street. This building was erected in 1909. There is at present also in existence at the northeast corner of West State Street and Westfield Avenue the Westfield Apartment house, a similar type of building which was erected in the year 1914. Westfield Avenue is three blocks west of Lenape Avenue. One of the persons who executed the agreement dated April 10th, 1911, containing the restrictions on said land was Alfred F. Robertshaw; said Alfred F. Robertshaw was at said time a contractor and builder who was familiar with various types of buildings, including apartment houses. I deny that the construction of apartment houses on said land is contrary to the provisions of the said covenants and restrictions, but is entirely in conformity therewith.

JOSEPH J. THOMAS.

Sworn and subscribed to before me this 21st day of November, 1927.

IRVING H. LEWIS,
Attorney at Law of N. J.

CONCLUSIONS.

(Filed January 19, 1928.)

IN CHANCERY OF NEW JERSEY.

No. 66/165.

Between
WILLIAM K. PAFF,
Complainant,
and
HERBERT P. MARGERUM,
ET ALS.,
Defendants.
} On Final Hearing.

(Not to be printed at all.)

MESSRS. MINTON & ROGERS, for Complainant.
MESSRS. PERLMAN & LERNER, for Defendants.

BUCHANAN, *V. C.*

Under the plan of lots as drawn for the "Dean Estate" there were sixteen lots each twenty-five feet wide and one hundred and fifty feet deep, numbered from seven to twenty-two inclusive, fronting on Parkline (now Lenape) Avenue. Lot twenty-two was the corner lot, and was bounded on its righthand side by Riverside Avenue. In 1911, James E. Glenn, owning lots seven to ten, inclusive, Alfred Robertshaw, owning lots eleven to fourteen, inclusive, and Oliver M. Schafer, owning lots fifteen to twenty-two, inclusive, entered into a restrictive contract with respect to the said lots, containing the following provisions:

Conclusions.

"*First*:—That no dwellings shall be erected in pairs or rows but that they must all be single dwellings.

Second:—That no dwelling shall be erected to cost less than Four Thousand Dollars.

Third:—That no dwelling shall be erected on a twenty-five foot lot but the ground for each dwelling shall have a frontage of not less than thirty-three and one-third feet.

Fourth:—That no dwelling shall be erected on the premises within thirty feet of the front property line, providing that this prohibition shall not be constructed to extend to bay-windows, open porches or steps.

Fifth:—That no out buildings shall be erected on the premises within one hundred feet of the front property line.

Sixth:—It is agreed that in the event of the owner of lots numbered 17, 18, 19, 20, 21, and 22 desiring to front these lots and the dwellings to be erected on them on Riverside Ave., instead of Parkline Ave., the dwelling and out building nearest Parkline Ave., may be erected not less than twenty feet from the property line of Parkline Ave., and the foregoing restrictions and regulations are not to apply to these lots when they front on Riverside Ave., but lots numbered 15, 16, are to be covered by the foregoing restrictions and regulations."

Complainant is now the owner of lot 17 and half of lot 16. Lots 18 to 22 are owned by defendants, who are about to erect a five-story apartment house thereon, to face on Riverside Avenue. Complainant by his bill seeks to enjoin the erection of such apartment house, on the ground that it violates the restrictions; contending that nothing but single dwelling houses can lawfully be erected on these lots.

Conclusions.

The matter came on to be heard on affidavits on the return of an order to show cause for restraint *pendente lite;* but both sides agreed that the matter should be deemed to be before the Court as on final hearing.

It seems to me that the injunction must be denied upon the ground that the right of complainant under the restrictive agreement is not clear. It has been repeatedly laid down that restrictions upon real estate are not looked upon with favor, and restrictive agreements are enforced only when and so far as they are clear with respect to the restrictions which they purport to impose.

Restrictions upon the use of lands are always to be construed strictly, and ambiguities and uncertainties are to be resolved in favor of the owner's unrestricted use of the land. *Marsh* v. *Marsh*, 90 N. J. Eq. 244; *Underwood* v. *Herman*, 82 N. J. Eq. 353; *Howland* v. *Andrus*, 81 N. J. Eq. 175. Equity does not aid one to restrict another in the use to which he may put his land unless the right to such aid is clear, and when there is doubt as to the right, equitable relief will be denied. *Fortescue* v. *Carroll*, 76 N. J. Eq. 583; *Howland* v. *Andrus*, supra; *Underwood* v. *Underwood*, supra.

In the present instance I think it is at least doubtful that it was intended by these restrictions to prevent the owner of lots 18 and 22, inclusive, from fronting those lots on Riverside Avenue, and erecting an apartment house thereon.

It is clear that defendants would have the right to do just that, if they owned lot 17 as well as the other five lots, for in the event that such lots are fronted on Riverside Avenue *none* of the prior restrictions are to apply to them.

Complainant contends that under the restrictive agreement such lots can be fronted on Riverside Avenue only if all six are so fronted. As I have said, it does not seem to me that such is the necessary, or clear intent and meaning of the agreement; and it is upon that ground that I

deny the restraint. Some of the other grounds advanced by defendant might lead to the same result; but under the view I have taken it is unnecessary to consider them.

Costs, but no counsel fee, will be allowed defendants.

ORDER.

(Filed November 26, 1927.)

IN CHANCERY OF NEW JERSEY.

No. 66/165.

Between
WILLIAM K. PAFF,
Complainant,
and
HERBERT P. MARGERUM, and
ARDMORE REALTY COMPANY,
a Corporation,
Defendants.
} On Bill, Etc.

This matter coming on to be heard in the presence of Norman Rogers, of Minton & Rogers, Solicitors of the Complainant, and Sol Phillips Perlman, of Perlman & Lerner, Solicitors of the Defendants, on bill, affidavits, order to show cause and answering affidavits and the Court having considered the same and having heard and considered the arguments of counsel and having duly considered the matter and being of the opinion that the restrictions upon which the Complainant based his right to

relief are vague and uncertain and not sufficiently clear and definite, that the restraint imposed upon the defendants, Herbert P. Margerum and Ardmore Realty Company, by said order made in this cause on the fourteenth day of November, 1927, should be dissolved and the aforesaid Solicitors having each in open court agreed and consented that this hearing be deemed and taken to be a final hearing inasmuch as there were no further facts to present,

It is on this twenty-third day of November, 1927, *Ordered* that the said order to show cause made on the 14th day of November, 1927, be and the same is hereby discharged, and

It is further *Ordered* that the restraint imposed upon the defendants, Herbert P. Margerum and Ardmore Realty Company by said order of this Court made on the 14th day of November, 1927, be and the same is hereby dissolved, and

It is further *Ordered* that the bill of complaint filed herein be and the same is hereby dismissed, and

It is further *Ordered* that the Complainant, William K. Paff, pay to the Solicitors of the Defendants the costs of this suit, to be taxed within ten days after the service upon him of true but uncertified copies of this decree and such taxed costs, and that in default of such payment execution issue therefor according to the practice of this Court against the goods and chattels, lands, tenements and hereditaments and real estate of the said William K. Paff.

E. R. WALKER,
C.

Respectfully advised,
MALCOLM G. BUCHANAN,
V. C.

Trent Press, Printing, 14 North Warren Street, Trenton, N. J.

New Jersey Court of Errors and Appeals

WILLIAM K. PAFF,
Complainant-Appellant,

vs.

HERBERT P. MARGERUM and ARDMORE REALTY COMPANY, a Corporation,
Defendants-Appellees.

} *On Appeal from Chancery Court.*

BRIEF OF APPELLANT.

Statement of Facts.

This appeal presents for review a final decree of the Court of Chancery dismissing appellant's bill of complaint for an injunction against appellees, enjoining them from erecting an apartment house upon lands of appellees adjoining those of appellant.

Appellant is the owner of lot No. 17 and the southerly twelve feet of lot No. 16, as delineated on a map or plan of lots of the "Dean Estate," filed in the Clerk's Office of Mercer County (see page 22, for plan, and pages 32 and 33, for title deeds, State of the Case), which represent a total frontage of thirty-seven feet on the westerly side of Lenape Avenue, in the City of Trenton, said County, by a depth in the westerly direction from the line of said street of 150 feet. This land con-

tains the 2½ story, single residence of appellant and a garage on the rear of the lot (page 15, line 37), State of the Case). Appellee, Herbert P. Margerum, is the owner of record of lots Nos. 18, 19, 20, 21 and 22 on said plan of lots adjoining appellant's land on the south. (See page 22, for plan, and page 36, for title deeds, State of the Case), which premises front on the westerly side of Lenape Avenue, about 135 feet, and extend back westerly a depth of 150 feet therefrom. These premises extend from the southerly line of lot No. 17 to the northwesterly corner of Riverside and Lenape Avenues.

Appellee, Ardmore Realty Company, has a written option for the purchase from appellee, Herbert P. Margerum, of lots Nos. 18 to 22, inclusive, and on or about November 7th, 1927, actually entered into possession of the said premises and began the construction of a five-story apartment house thereon, with the knowledge and permission of the said Margerum (see page 44, line 30, page 45, line 21, State of the Case). This apartment house is to provide living accommodations for twenty-one families, and is to be built so that it fronts on Riverside Avenue and extends back along the westerly line of Lenape Avenue, at a distance of 20 feet therefrom (see page 45, line 25-35, State of the Case).

Appellant's and appellees' lands (part of lot No. 16 and all of lots Nos. 17 to 22, inclusive), are part of the "Dean Estate," as well as the remainder of the lands on the westerly side of Lenape Avenue, (lots Nos. 7 to 16) in the block bounded on the north by lots facing on West State Street and on the south by the northerly line of Riverside Avenue. These lands were owned formerly by Eva C. Dean, Cora M. Krewson and James D. Tantum, who by their deed, dated November 19, 1900 (page 37, line 28, State of the Case), actually partitioned all of the remaining part of the "Dean Estate" owned by them, including these lands, and thereby the said James D. Tantum became the sole owner of lots Nos. 17, 18,

21 and 22, and Eva C. Dean Nos. 16 and 20 and Cora M. Krewson No. 19. Thereupon those grantees severally sold these lots, and in each instance inserted in the deeds certain restrictive covenants (see page 29, line 11; page 30, line 19; page 34, line 28; page 35, lines 7 and 19, State of the Case).

On April 10, 1911, James E. Glenn and wife, Alfred F. Robertshaw and wife and Oliver M. Schafer and wife, entered into a certain written agreement (see pages 18, 19, 20 and 21, State of the Case), which agreement was duly recorded in Mercer County Clerk's Office on April 22, 1911, in Book S of Special Deeds, pages 447, etc. Therein it appears that those three persons are respectively the owners of lots Nos. 7 to 10, inclusive, lots Nos. 11 to 14, inclusive, and lots Nos. 15 to 22, inclusive, on the said plan of the "Dean Estate," which face on the westerly side of South Parkline Avenue (changed to Lenape Avenue, page 38, line 12, State of the Case), which lots include the entire frontage on that side of that Avenue from the rear line of the lots on said plan facing on West State Street on the north, to the northerly line of Riverside Avenue on the south. By virtue of this agreement certain building restrictions were imposed on the said premises in addition to those which were imposed thereon under the deeds from the said Eva C. Dean, James D. Tantum and Cora M. Krewson.

The premises on the westerly side of Lenape Avenue at the time of the filing of appellant's bill, was built up with single residences and appropriate outbuildings in accordance with the restrictive covenants running with the said lands, as set forth particularly in the agreement of April 10, 1911, as well as the restrictions set forth in the various deeds from Dean, Tantum and Krewson, subsequent to November 19, 1900, excepting for appellees' lands, lots Nos. 18 to 22, upon which only a stone garage had been built.

Immediately that appellant observed appellees com-

mencing the construction of the said five-story apartment house upon lots Nos. 18 to 22, inclusive, he notified appellees in writing to cease work on such a building (see pages 23, 24, 25 and 26, State of the Case), alleging that such was in violation of the restrictive covenants set up in the agreement of April 10, 1911, which were imposed thereby upon appellees' lands for the benefit of lots Nos. 7 to 22, inclusive, of said "Dean Estate." Appellees wholly failed and refused to desist from the construction of such an apartment house upon the said premises, and accordingly on November 14th, 1927, appellant filed his bill in the Court of Chancery, setting up the acts of appellees as being in violation of the restrictive covenants contained in the said agreement of April 10, 1911, and secured from Vice-Chancellor Buchanan an Order to Show Cause, returnable November 22d, 1927, which restrained the appellees from proceeding with the construction of the apartment house complained of.

At the hearing on the return day of that order, it was stipulated by appellees and appellant that the affidavits accompanying the bill and the answering affidavits of appellees constituted all of the proofs in the matter, and that that hearing should be deemed a final hearing for the purpose of disposing of the bill upon its merits. The sole question considered by the Court was whether the original restrictive covenants and those set up in the agreement of April 10, 1911, covering lots Nos. 7 to 22, inclusive, of the "Dean Estate," precluded appellees, upon the complaint of appellant, from erecting the apartment house contemplated to be faced on Riverside Avenue, at the corner of Lenape Avenue, upon lots Nos. 18 to 22, inclusive.

At the conclusion of the argument on the return day of the Order to Show Cause and preliminary restraint, his Honor, Vice-Chancellor Buchanan, advised the decree appealed from.

ARGUMENT.

The grounds of appeal are: (1) The prayer contained in the Bill of Complaint should have been granted, for the reasons set up in said Bill. (2) The restraint imposed upon defendants should not have been dissolved, nor complainant's bill been dismissed. (3) The restrictions pleaded by complainant should have been enforced against defendants, and defendants should have thereby been enjoined against erecting or causing to be erected on their lands any apartment house, or any dwelling houses other than single dwellings in accordance with the provisions of said restrictions. (4) The said restrictions are clear, definite, certain and sufficiently free of doubt to entitle complainant to a permanent injunction against defendants in accordance with the prayer of his bill, and are not vague and uncertain, nor indefinite and doubtful so as to entitle a court of equity to deny complainant his right to the relief prayed for. (5) The decree is erroneous in so construing the effect of the said restrictions, thereby permitting defendants to erect an apartment house upon their lands, for the plain and reasonable meaning of the said restrictions from their context is that only single dwellings may be constructed upon said lands, and not apartment houses.

Point 1—The prayer contained in the Bill of Complaint should have been granted, for the reasons set up in said bill.

The restrictive covenants contained in the agreement of April, 10, 1911, are to be found on page 19, of the State of the Case, beginning line 11, and the additional covenants therein referred to are to be found on page 29, of the State of the Case, beginning line 23. Appellees admit that these covenants are binding upon their lands, and may be enforced by appellant as owner of lot

No. 17 and part of lot No. 16. This is elementary in view of the terms of the agreement of April 10, 1911, and the notice thereof, which appellees admit having had from the references to that agreement in their title deed,, as well as actual notice of the said agreement itself. Appellant contends that the construction of an apartment house as planned by appellees is directly in contravention of the first paragraph of the restrictions set forth in the said agreement, wherein it is specifically stated "no dwellings shall be erected in pairs or rows, but that they must all be single dwellings."

Webster's New International Dictionary at page 102 defines an "apartment house" as "a building comprising a number of suites designed for separate housekeeping tenements, but having conveniences, such as heat, light, elevator service, etc., furnished in common." At page 687 "dwelling house" is defined as "a house occupied as a residence in distinction from a store, office or other building," and "dwelling" is defined as "habitation; place or house in which a person lives; abode; residence; domicile." Accordingly, an apartment house in the strictest sense of the word is a dwelling. However, it is not a dwelling house in the usual and accepted sense of the word as used in describing a separate, private or single dwelling. It is simply a special sort of dwelling. Now, the use of the word "single" connotes two things—first, a separate dwelling, as opposed to contiguous dwellings; second, one familied or private, as opposed to public or many familied use of the dwelling. Webster's New International Dictionary at page 1961 defines "single" as "one only as distinguished from more than one; consisting of one alone; individual; separate. Peculiar to or characteristic of one person or thing; concerning one only; hence private, not public."

An apartment house is a number of dwellings, or places of abode under one roof and within one building, to contain as many families as there are separate apartments

provided, in the instant case twenty-one. A "single dwelling" is a separate building for the dwelling use of one family. Particularly in the instant case is it true that "single dwelling" precludes an apartment house, because of the further restriction that dwellings shall not be erected in rows, or pairs, and further because each such single dwelling shall be erected on a lot of at least 33 1-3 feet frontage. Appellees' lots have a frontage of 135 feet on Lenape Avenue, and under the "Third" clause of the restrictions (page 19, line 15, State of the Case), no more than four single dwellings could be erected thereon without conflicting with the restriction. The apartment house proposed will admittedly house twenty-one families. Accordingly, the obvious purport and intent of the restrictions cited must be deemed to have precluded an apartment house, for to hold otherwise is to nullify the neighborhood plan which the restrictions set up.

We find no cases reported in New Jersey containing a definition of "single dwelling." The leading case in this State for the interpretation of "private dwelling" in connection with restrictive covenants is *Skillman* v. *Smatheurst*, 57 N. J. Eq. 1, the opinion of which is by Chancellor McGill. Therein he states that:

> "Not only does the term 'a private dwelling,' by force of the word 'dwelling,' restrict the character of building by eliminating all buildings for business purposes, such as stores, livery stables, factories and the like, but it also by force of the word 'private' excludes buildings for residential purposes of public character, such as hotels or general public boarding or community houses."

We contend that the proper definition of "single dwelling," as that phrase is commonly used, is virtually synonymous with private dwelling, and as stated above the prohibition of dwellings in pairs or rows in this same clause

has quite a significant bearing on the meaning of "single dwelling." In fact, we think that the prohibition against the erection of dwellings in pairs or rows of itself precludes the appellees from constructing an apartment house and then claiming that it is within the clause upon the ground that an apartment house is a dwelling, for the reason that an apartment house is a number of dwellings, under one roof in one building, and must, therefore, be actually dwellings in rows or pairs.

In *Skillman* v. *Smatheurst* (supra), two cases are cited as defining the term "single dwelling," that of *Gillis* v. *Bailey*, 21 N. H. 149, decided in 1850, and that of *Hutchinson* v. *Ulrich*, 145 Ill. 336, decided in 1883. These cases are cited by Chancellor McGill in support of his definition of "a private dwelling," and actually upon the theory that they are as analogous authorities as could be cited at that time. In the first of these cases the court decided that "single dwelling" meant virtually a single, private family dwelling, and that the plain purpose of the provision of the restriction for "single dwellings" was to eliminate congestion, and that, therefore, community houses, though they might be single buildings, would not tend to that end, and were contrary to the restrictive covenant, and thereby forbidden. In the latter case the contrary result was reached by the court, and no significance given the adjective "single" and "flats" were construed as within the term "single dwelling." Chancellor McGill points out in his citation of these cases that the court in the latter case rested its decison largely upon the fact that when the restrictive covenant was imposed upon the lands, flats were existent in the neighborhood, and that the parties to the instruments containing the restrictive covenants, having notice of the flats nearby, should have stated positively that flats were prohibited by these restrictive covenants in order to have them precluded. So this authority is clearly distinguishable from the instant case for that reason.

Appellees allege that there are three apartments in the immediate neighborhood of the Lenape Avenue lots included in the restrictive agreement of Apirl 10, 1911 (page 47, line 20, and page 48, State of the Case). One of these apartments, the Westfield, was erected in 1914, as stated by appellees, so it could not have been in the minds of the parties to the agreement of April 10, 1911. Furthermore, the Wilmeta is almost one mile away from Lenape Avenue, and is in no sense in the same neighborhood. The other apartment, the Glencoe, is on West State Street within a few hundred feet of the land in question, but its location is on an entirely different street from Lenape Avenue. The latter is a side street from State Street, and is a matter of thirty to forty feet in width, whereas State Street at that point is over one hundred feet wide. Furthermore, the restrictive phrase in our case differs from that in *Hutchinson* v. *Ulrich*, in that "single dwelling" is modified by the clause "no dwellings shall be erected in pairs or rows" in the same paragraph. This modification is significant of the intent of the parties to the agreement to prevent congestion and thus avoid apartment houses. To follow the rule in the Hutchinson case to its logical conclusion would require restrictions to state specifically all of the types of construction prohibited as well as all of those permitted. See 18 A. L. R. 454, note (b) for authorities holding that a "dwelling house" means a home for use of single family. Cases there cited to the contrary are those where character of neighborhood included in restrictions has changed, or other types of dwellings have been erected by consent or without objection. Also 18 A. L. R. 457 note (c) gives authorities for "single dwelling" precluding an apartment house, and again contrary authorities cited are shown to be based upon some reason beyond the plain meaning of the phrase itself.

Now the contention that the agreement of April 10th, 1911, gives the owner of lots 17-22, inclusive, the right

to face the dwellings erected thereon on Riverside Avenue, and thus escape the restrictions in the agreement covering the other lots is quite true on the face of it. But complainant is the owner of lot No. 17, and defendants only control lots No. 18 to 22, and accordingly cannot face 17 to 22 as a group on Riverside Avenue. That the intention was to give the owner the option of so facing those lots as a group appears from a simple reading of the clause which says "the owner of lots numbered 17, 18, 19, 20, 21 and 22 desiring to front these lots and the dwellings to be erected on them on Riverside Ave., instead of Parkline Ave." There is no alternative for less than all the lots 17-22 inclusive, and it is apparent that the parties to the agreement had in mind that group as a whole, and not any part of it. Otherwise, there would be one or more lots on Parkline Avenue which would not be covered by the restrictions which cover other properties on that Avenue. Furthermore, the symmetry and beauty of the block would be seriously affected if the owner of the lots at Riverside and Lenape Avenue was permitted to determine for himself the number of those lots (17-22, inclusive), which he would face on Riverside Avenue, for he could make the lots so shallow from Riverside Avenue as to force the placing of dwellings thereon right against the adjoining lot and dwellings on Lenape Avenue. And finally, it is to be noted that the agreement states, "but lots numbered 15, 16 are to be covered by the foregoing restrictions and regulations," even if 17 to 22, inclusive, are faced on Riverside Avenue, thus showing that these latter lots should at least be protected to the extent of having lots adjoining them facing Riverside Avenue of a depth of at least 160 feet on Lenape Avenue.

Point 2—The restraint imposed upon defendants should not have been dissolved, nor complainant's bill been dismissed.

This point is considered as included in Point 1, and the argument under that point equally applies.

Point 3—The restrictions pleaded by complainant should have been enforced against defendants, and defendants should have thereby been enjoined against erecting or causing to be erected on their lands any apartment house, or any dwelling houses other than single dwellings in accordance with the provisions of said restrictions.

This point is also considered as included in Point 1, and the argument under that point equally applies.

Point 4—The said restrictions are clear, definite, certain and sufficiently free of doubt to entitle complainant to a permanent injunction against defendants in accordance with the prayer of his bill, and are not vague and uncertain, nor indefinite and doubtful so as to entitle a court of equity to deny complainant his right to the relief prayed for.

Appellant agrees that the restrictions relied upon would not apply to lots 17 to 22, inclusive, if appellees, under the sixth paragraph of the agreement of April 10, 1911, faced these lots on Riverside Avenue, and in that case no objection would lie to appellees building an apartment house thereon. But as stated before, appellees do not so propose. Instead, as owners of lots 18 to 22, they face those lots on Riverside Avenue, and then rely on this same clause in order to avoid the imposed restric-

tions. That clause gives them no such right. It does not state, nor infer, that any less than all the lots 17 to 22 must be so faced in order to come within its provisions. If the clause meant other than it states, it would have an added statement to the last two lines of the clause (page 14, lines 8-10, State of the Case), to the effect "and such of lots 17 to 22 as are not faced on Riverside Avenue under the above proviso" The court will give effect to the plain meaning of the wording of this clause, and it is only by adding or taking away words from the clause itself that any possible doubt can arise as to its meaning. As it stands, appellees cannot comply with its requirements because they do not own the entire tract stated. The meaning of this clause and its operation in respect to appellees as the owners of lots 18 to 22, inclusive, is fully considered and answered in Point 1, pages 9-10 hereof.

It is argued that this case is controlled by the rule that restrictions upon the use of lands are always to be strictly construed, and ambiguities and uncertainties resolved in favor of the owner's unrestricted use of the land. *Marsh* v. *Marsh*, 90 N. J. Eq. 244, is cited as an authority for that rule, but in what way does it control the case at bar. It was decided upon the reasoning that the offense complained of was simply an enlargement of that which admittedly was not an infraction of the restriction, and if the original act was not a breach, no more could the later act be one. *Underwood* v. *Herman* & *Co.*, 82 N. J. Eq. 353, is also cited, and that is a case where the court held doubt arose through the various land owners in the restricted area having built various types of dwellings, one-family, two-family, etc., and then objection was laid to the erection of an apartment house. The very acts of the various land owners without objection, showed the questionable nature of the restrictive words, and the court properly refused to enjoin. So in *Howland* v. *Andrus*, 81 N. J. Eq. 175, it is conclusively shown that doubt arose

as to the meaning of the restrictions. *Fortescue* v. *Carroll*, 76 N. J. Eq. 583, is one of the leading cases in this regard, and again the restriction is not clear in its application to the case complained of.

But, in the instant case where is the doubt? The first clause of the restrictive agreement of 1911, plainly provides that no dwellings shall be erected in rows or pairs, but only single dwellings. Appellees claim that an apartment house is a single dwelling in the sense of this clause. By what possible stretch of the imagination, or strain of the plain meaning of the English language can this be so? Their answer is that it is doubtful what the clause does mean. We say that there is no doubt about it denying the construction of an apartment house. It is suggested that the sixth clause of the restrictive agreement gives appellees the right to face lots 18 to 22 on Riverside Avenue, and thus avoid the prior provisions of the restrictions. Does it so read? It plainly states lots 17 to 22, inclusive, and gives no alternative for appellees to rest on. Then appellees say that it is doubtful and ambiguous. If it is doubtful and ambiguous in its meaning, then no force is given to the plain and concise statement of that clause.

We contend, in conclusion, that the courts in this State have never carried the rule in respect to refusing to enforce restrictions on the use of real estate because of ambiguities to the extent that they deny the plain language of restrictions. Probably restrictions may be drafted in a more forceful manner than those pleaded, but their meaning is nevertheless so apparent from their context that no doubt really arises on the face of these clauses. To deny them their patent meaning is to permit one of the persons bound by the agreement of April 10, 1911, to break it at the expense of the others, who have abided by it.

Point 5—The decree is erroneous in so construing the effect of the said restrictions, thereby permitting defendants to erect an apartment house upon their lands, for the plain and reasonable meaning of the said restrictions from their context is that only single dwellings may be constructed upon said lands, and not apartment houses.

This point is considered as included in Point 4, and the argument under that point equally applies.

Appellant, therefore, respectfully contends that the final decree appealed from should be reversed and set aside.

MINTON & ROGERS,
Solicitors and of Counsel for the Complainant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

WILLIAM K. PAFF,
Complainant-Appellant,
and
HERBERT P. MARGERUM AND ARDMORE REALTY COMPANY, A CORPORATION,
Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS.

STATEMENT OF THE CASE

The bill in this cause was filed to restrain the erection of an apartment house on land adjoining land owned by the complainant as being in violation of building restrictions. The matter came on to be heard on bill, affidavits, order to show cause and answering affidavits and by agreement of counsel this hearing was deemed and taken to be a final hearing. The following facts are undisputed: The complainant is the owner of land in Trenton fronting 37 feet on Lenape (formerly Parkline) Avenue known as the southerly 12 feet of lot No. 16 and all of lot No. 17 on a plan of lots of the "Dean Estate" filed in the County Clerk's Office. On this land is erected a dwelling house. Lot No. 17 was conveyed in May, 1901, by the then owner and the conveyance contained, among other things, the following convenants and restrictions:

"This conveyance is made under and subject nevertheless to the following restrictions, covenants and conditions which are hereby made a part of the consideration for this conveyance and are hereby severally accepted and agreed to by the party of the second part hereto:

(1) That no building or any part thereof erected or to be erected upon any part of the land hereby conveyed shall be used as a hotel, tavern, drinking saloon, blacksmith shop, slaughter house, bone-boiling establishment, tannery, skin-dressing establishment, glue, soap, candle or starch manufactory, or for other offensive purposes or occupations;

(2) That no dwelling or other building shall be erected upon the said described lots of land or premises within twenty feet (20') of the street line, provided that this prohibition shall not be construed to extend to bay windows, open porches, steps or cellar doors.

Thereafter several conveyances were made of the same lot always subject to the same covenants and restrictions until in August, 1910, it came into the hands of one Oliver M. Schafer, subject to the same burdens. In August, 1910, various conveyances by different grantors were made to said Schafer, in addition to lot No. 17, of lots Nos. 16, 18, 19, 20, 21, 22 on said plan of lots subject to the aforesaid covenants and restrictions.

On April 10, 1911 Oliver M. Schafer was the owner of lots 15 and 16 as well as 17, 18, 19, 20, 21 and 22; James Glenn was the owner of lots 7 to 10, inclusive; Alfred F. Robertshaw was the owner of lots 11 to 14 inclusive. On that date these persons entered into an agreement to adopt, in addition to the foregoing restrictions, the following, to bind all of lots 7 to 22 inclusive:

"FIRST—That no dwellings shall be erected in pairs or rows but that they must all be single dwellings.

SECOND—That no dwelling shall be erected to cost less than Four Thousand Dollars.

THIRD—That no dwelling shall be erected on a twenty-five foot lot but the ground for each dwelling shall

have a frontage of not less than thirty-three and one-third feet.

FOURTH—That no dwelling shall be erected on the premises within thirty feet of the front property line, providing that this prohibition shall not be construed to extend to bay-windows, open porches or steps.

FIFTH—That no out buildings shall be erected on the premises within one hundred feet of the front property line.

SIXTH—It is agreed that in the event of the owner of lots numbered, 17, 18, 19, 20, 21 and 22 desiring to front these lots and the dwellings to be erected on them on Riverside Ave., instead of Parkline Ave., the dwelling and out building nearest Parkline Ave., may be erected not less than twenty feet from the property line of Parkline Ave., and the foregoing restrictions and regulations are not to apply to these lots when they front on Riverside Ave., but lots numbered, 15, 16 are to be covered by the foregoing restrictions and regulations.

This agreement was recorded in 1911. In 1920 Schafer conveyed the southerly 5 feet of lot No. 17, all of 18, 19, 20, 21 and 22 to the defendant, Margerum, subject to the aforesaid restrictions and Margerum, is now the owner of these lots, excepting the said 5 feet of lot 17 which he conveyed in 1920 to the complainant, subject to the restrictions. The defendant, Margerum, granted an option to the defendant, Ardmore Realty Company of lots 18, 19, 20, 21 and 22 and the latter Company has commenced on these lots the erection of an apartment house having excavated the cellar. The apartment house was being erected to face Riverside Avenue. This would be at the corner of Riverside and Lenape Avenue.

It is also undisputed that defendant Company intended to construct an apartment house designated to be five

stories in height, to accommodate twenty-one families; that the apartment house was to consist of one building, have one foundation, one roof and its exterior walls were to be continuous, have one entrance for all families, with an elevator, to be of beautiful and dignified appearance, to be constructed of brick and steel, to have a marble lobby and a court in front, an oil burning heating system and to be most modern in all respects.

The complainant in his affidavit set forth that the section is a residential one, which is not denied, but says it is an exclusive residential section. The defendants, however, denied this and proved that directly across the street on Lenape Avenue is located Junior High School No. 3, an extremely large public school building accommodating hundreds of pupils and that connected with it are several one story portable frame schools.

It is also undisputed, that in addition to facing the building on Riverside Avenue it was not intended to violate any building line restriction; said building was to be erected at least twenty feet from the line of Lenape Avenue, and at least thirty feet from the line of Riverside Avenue. It is also undisputed that there is in existence now on the southeast corner of West State Street and Eastfield Avenue an apartment house erected in 1907, prior to the agreement containing the restrictions made in April, 1911, by Isaac Glenn a brother of one of the singers of this agreement. The land on which this apartment house is erected is on part of the "Dean Estate" and is in the same square as lots 18, 19, 20, 21 and 22 and is only a few hundred feet distant from Lenape and Riverside Avenue, being only one block west of Lenape Avenue and one block north of Riverside Avenue; that another apartment house is in existence in the neighborhood about four blocks from Lenape Avenue and West

State Street; that this was erected in 1909; that Alfred F. Robertshaw, one of the signers of the agreement in 1911, was at the time a builder familiar with various types of buildings, including apartment houses.

The complainant asserted that there was uniformity of architectural design and symmetry of construction of the buildings on said land; this was denied, the defendants proving that some of the houses on the land are of stucco, some of frame, some of brick, some of Colonial design and others of other designs. There is, however, no question but that on lots 7 to 17 the houses are one-family houses. On Riverside Avenue immediately adjoining lots 18 to 22 are houses in pairs, of various types of construction. It was also proven that from an aesthetic point of view the land in the neighborhood will not be injured; that the zoning ordinance of the City permits the type of building in question in any part of the City.

In short, the defendants admitted the restrictions but said they were not violating them but building in conformity therewith.

Defendants in denial of the relief asked maintain the following propositions:

I.

THERE IS NOTHING IN THE WORDS OF THE RESTRICTIONS THAT PREVENTS THE ERECTION OF AN APARTMENT HOUSE ON THE LAND IN QUESTION.

II.

THE WORDS "SINGLE DWELLING" IN A RESTRICTIVE BUILDING COVENANT DO NOT

NECESSARILY EXCLUDE AN APARTMENT HOUSE; ESPECIALLY NOT WHERE THE WORDS ARE USED UNDER THE CIRCUMSTANCES IN THIS CASE.

III.

THE RESTRICTIONS IN THISE CASE WHEN CONSIDERED FOR THE PURPOSE OF EXCLUDING AN APARTMENT HOUSE ARE AT BEST VAGUE, UNCERTAIN AND DOUBTFUL AND WHERE A RESTRICTIVE COVENANT LACKS CLARITY AND CERTAINTY AND IS DOUBTFUL RELIEF WILL BE DENIED.

ARGUMENT

I.

THERE IS NOTHING IN THE WORDS OF THE RESTRICTIONS THAT PREVENTS THE ERECTION OF AN APARTMENT HOUSE ON THE LAND IN QUESTION.

The restrictive words with which we are concerned appear first in the deed of May, 1901, and second in the agrement of April 10, 1911.

1. As to the deed. The proposition that seems to stand out upon examination of the words in this deed is that the parties restricted the land against a number of types of buildings and uses but said nothing whatever about apartment houses.

2. As to the agreement. By the first convenant in this agreement complainant contends that the words "single dwellings" exclude apartment houses. This nowever, we contend, overlooks the effect of the sixth provision of the same agreement, even though we assume for the moment, for the sake of argument, that apartments can never mean single dwellings.

By the sixth provision it is stated that if the owner of lots 17, 18, 19, 20, 21 and 22 desires to front these lots and the dwellings to be erected on them on Riverside Avenue, instead of Lenape Avenue, the "foregoing restrictions and regulations are not to apply to these lots, when they front on Riverside Avenue, but lots 15 and 16 are to be covered by the foregoing restrictions and regulations."

There is, of course no dispute as to the apartment house and the lots on which it is proposed to erect it fronting on Riverside Avenue. Among the "foregoing restrictions and regulations" is, of course, the first provision stating that there must be single dwellings. If, then, we consider the words of the sixth provision the words of the first provision do not apply to the lots here in question when they front on Riverside Avenue. Lots 15 and 16 were mentioned in this portion of the sixth provision because Oliver Schafer was the owner of these lots as well as 17 to 22 and it was probably intended that there should be no question but that these lots were to be bound, inasmuch as some confusion might result from the fact that at the time he was owner all of the lots 15 to 22.

But it may be urged that this does not take into consideration all of the words of the sixth provision. It may be said that the sixth provision also says that if the owner of lots 17 to 22 "desiring to front these lots and

the dwellings to be erected on them on Riverside Avenue instead of Lenape Avenue, the dwelling and outbuilding nearest Lenape Avenue may be erected not less than twenty feet from the property line of Lenape Avenue and the foregoing restrictions and regulations are not to apply to these lots when they front, etc." That is to say, the sixth provision refers to dwellings. But, if we conclude that because the first portion of the sixth provision refers to dwellings that that means that no apartment house can be erected on these lots whether it front on Riverside Avenue or not, then we give no effect whatever to the rest of the sixth provision that "the foregoing restrictions and regulations are not to apply to these lots if they front on Riverside Avenue." This portion of the sixth provision then becomes meaningless.

And it is, of course, a rule of construction of writings that all parts of a writing and every word in it, will, if possible, be given effect. This is so well settled and clear as hardly to need citation of authority. See 13 C. J. 527, para. 486.

It is also a settled rule of construction—to use the words of Mr. Justice Swayze—that "in construing a document, the grammatical and ordinary sense of the words is to be adhered to, unless they would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further." Thompson vs. Trenton Water Power Co. 77 N. J. L. 672, 73 Atl. 410 (Court of Errors and Appeals 1909)

Now, it is unquestionably possible to give a meaning to the word "dwelling" which will not exclude an apartment house and thereby give effect to the portion of the provision that the "foregoing restrictions and regulations are not to apply" in certain cases. 19 C. J. 845, says: "In its broadest significance the word (dwelling) denotes a building used as a settled human abode." Goater vs. Ely 80 N. J. Eq. 40; 82 Atl. 611.

In Goater vs. Ely (Supre) the Court said:

"I need not cite authorities for the principle that apartment or flat houses are dwelling houses."

See also Johnson vs. Jones 244 Pa. 386, 90 Atl. 649;
Hamnet vs. Born 247 Pa. 418, 93 Atl. 505;
White vs. Collins 81 N. Y. Supp. 434, 436; 82 App. Div. 1.
Hutchinson vs. Ullrich, 145 Ill. 336, 34 N. E. 556 (1893).
Robbins vs. Bangor 100 Me. 496, 62 Atl. 136 (where a hotel was held to be a dwelling house)

In Johnson vs. Jones (Supra) the restriction was that nothing but a church or dwelling house should be erected. The Court held that an apartment house was not repugnant to the restriction, that it was a dwelling house within the meaning of the restriction.

Indeed, even appellant in his brief admits that in its strictest sense an apartment house is a dwelling.

Moreover, if it be contended that in their ordinary sense the words "dwelling house" do not mean apartment house, (which we do not admit is true in this case) we are confronted with the other rule of construction mentioned by us that this meaning may be modified so as to avoid the inconsistency which would otherwise result.

In other words, it seems to us, that the plain meaning of the sixth provision is that none of the foregoing restrictions apply if the lots in question and building thereon face Riverside Avenue, but that if it be urged that the words "dwelling" changes this, then under the rules of construction set forth above there is no restriction against an apartment house in such event, and under any view of the sixth provision the complainant's position is unsound.

The appellant, moreover, admits in his brief that "the contention that the agreement of April 10, 1911, gives the owner of lots 17 to 22 inclusive, the right to face the dwellings erected thereon on Riverside Avenue and thus escape the restrictions in the agreement covering the other lots is quite true on the face of it". Again he says: "Appellant agrees that the restriction relied upon would not apply to lots 17 to 22 inclusive, if appellees, under the sixth paragraph of the agreement of April 10th, 1911, faced these lots on Riverside Avenue, and in that case no objection would lie to responents building an apartment house thereon". He attempts, however, to avoid the effect of this by saying that this means all of lots 17 to 22 and defendants are not the owners of all of the lots. This, however, is discussed very fully in the last point of our brief.

(There is also further discussion of the meaning of the sixth provision under the last point of our brief.)

II.

THE WORDS "SINGLE DWELLING" IN A RESTRCTIVE BUILDING CONVENANT DO NOT NECESSARILY EXCLUDE AN APARTMENT HOUSE; ESPECIALLY NOT WHERE THE WORDS ARE USED UNDER THE CIRCUMSTANCES IN THIS CASE.

A. So far as we have been able to discover, the words "single dwelling" have never directly or expressly received interpretation in the courts of this state, at least not in the connection here involved. In Skillman vs. Smathehurst 57 N. J. Eq. 1, 40 Atl. 855 (1898) the words "private dwelling" were interpreted by Chancellor McGill. In that case the restrictive covenant provided

that there shall not be erected on the land "any building other than for the use or purpose of a private dwelling". The bill alleged that the defendants were erecting a three story frame flat house suitable for three families. The court held the covenant was broken by the erection of such a building.

The court in that case also held that the word "dwelling" restricts the character of building by eliminating all buildings for business purposes, such as stores, factories, etc.; that the word "private" excluded buildings for residential purposes of public character such as hotels and community houses. The court's words were:

"Not only does the term 'a private dwelling' by force of the word 'dwelling' restrict the character of buildings, by eliminating all buildings for business purposes, such as stores, livery stables, factories, and the like, but it also, by force of the word 'private,' excludes buildings for residential purposes of public character, such as hotels or general public boarding or community houses."

Here the important word was "private". If this appeared before "dwelling" it was an effectual way to prevent the erection of an apartment house.

This was also held in Koch vs. Gorruflo, 77 N. J. Eq. 172, 75 Atl. 767 (1910).

Since these decisions were law in this State at the time the 1911 agreement was drawn, it may perhaps well be asked, especially in view of the fact that the agreement was drawn evidently by a person learned in the law, "Why did the parties not say 'private dwellings' instead of 'single dwellings' if they intended to exclude a community or apartment house?" The fact that the building in the Skillman case was called a flat house makes no difference. There is no difference between a flat house and an apartment house. Lignot vs. Jaekle 72 N. J. Eq. 233, 65 Atl. 221 (1906.)

B. Skillman vs. Smathehurst (Supra) is also important here because the court in that case, in searching for decisions in other states to support its meaning of the words "private dwelling" came across two decisions defining the words "single dwelling", viz: Gillis vs. Bailey 21 N. H. 149 (1850) and Hutchinson vs. Ulrich 145 Ill. 336, 34 N. E. 556 (1893). In the former case the New Hampshire court decided that a building for three families could not be erected under this provision, but based its decision on a preamble to the restriction which the court deemed manifested an intention to prevent density of population. Appellant in his brief, does not state that the basis of the decision was the preamble but Chancellor McGill pointed this out to be so. In the latter case the restriction was that the "purchaser is to erect on the premises described herein a single dwelling, costing not less than $7500.00" and that the seller should dispose of his eleven remaining lots to parties who will cause to be erected single dwellings only on each lot of 50 feet"; it was also shown that at the time the restriction was made there were apartment houses near the land in question. The court permitted an apartment house to be erected. The New Jersey court in the Skillman case in discussing the Hutchinson case said:

> "The court thought that the intention of the owner was to prohibit the erection of several small dwellings on each 50-foot lot, and to secure the erection of large structures on the property, and to require the property to be used for residential purposes. It appeared in the case that apartment houses were then existent near the property. The court remarked, in view of this material circumstance: "If, therefore, it was the intention to prohibit the erection of a flat on the property, why did not the parties say so in the deed? Or, if they intended that only a building

> such as is usually built for a private residence of a family should be erected, why not say that in the deed?" It added: "There can be no doubt in regard to the fact that the parties knew the difference between a flat and an ordinary dwelling house erected as a private residence, and it is unreasonable to believe that the language incorporated in the deed would have been used if the intention was to prohibit the erection of a flat." It is observed that in both these cases the terms used was a "single dwelling" or "a single dwelling house." The later case attempts to reconcile its difference from the earlier by attributing the conclusion of the New Hampshire court entirely to the intent evinced in the preamble to the condition imposed. But at the same time it rests the conclusion reached by it largely upon the fact that, when the provision of the deed it considered was made, flat houses existed near the land in question, and were known to the parties, and yet were not expressly excluded."

The Illinois case was held not a precedent for the defendant in the Skillman case because of the use of the word "private".

Hutchinson vs. Ulrich was referred to at length by Chancellor McGill and was not disapproved.

Defendants, therefore, contend also that upon the specific authority of Hutchinson vs. Ulrich the words "single dwelling" do not necessarily exclude an apartment house. Appellant says that the Hutchinson case is clearly distinguishable from the case at bar for the reason that in that case there were flats in the neighborhood at the time the restrictions were imposed. Now, it was proven in the case *sub judice* that there was in existence at the time the restrictions were made and there is now in the same square as the land in question an apartment house; (see page 47, line 35, page 48, line 10, page 55, line 22, State of the case); there was and is also one in existence about

four blocks away. It is stated in appellant's brief that the Wilmeta Apartment at 636 West State Street is almost one mile from Lenape Avenue. There is nothing in the proofs as to this, except that it is about four blocks distant, and as to this the proofs should govern.

There is also nothing in the proofs as to the width of State Street on Lenape Avenue or as to whether Lenape Avenue is a side street or not. In any view, it seems to us, this is immaterial.

Appellant urges that the words "pairs or rows" show an intention not to have congestion or density of population and thus avoid apartment houses. We cannot agree with this. We believe that the significance of the words "pairs or rows" was not to prevent congestion or density of population but to prevent the erection of certain types of structures—to prevent possible ugliness of appearance of buildings and not congestion of population.

It is also urged that the third restriction of the 1911 agreement provides that "no dwelling shall be erected on a twenty-five foot lot but the ground for each dwelling shall have a frontage of not less than thirty-three and one-third feet"; that therefore, no more than four dwellings could be erected on appellees' one hundred and thirty-five foot frontage on Lenape Avenue. This, of course, overlooks the fact that appellees' frontage is one hundred and fifty-two feet on Riverside Avenue, the street on which the building is proposed to be faced. In addition, under the view we have taken of the words "single dwelling" we propose to erect only one dwelling on the frontage and, therefore, would have more than thirty-three and one-third feet for the dwelling. We do not have four dwellings or more. We have one dwelling.

The parties must have known of apartment houses being in the neighborhood, yet they said nothing in the

agreement. If they intended to prevent apartment houses, we ask, with the Hutchinson case, why did the parties not say so. In addition, one of the parties to the agreement was a builder, familiar with apartment houses; another party was a brother of the man who erected the apartment house in the same square. The case is even stronger than the Hutchinson case.

Hence we say that the restriction does not prevent an apartment house, especially under the circumstances in this case.

Appellant says that if we carry Hutchinson vs. Ulrich to its logical conclusion it would be necessary to state specifically all of the types of construction permitted as well as prohibited. We say that is not its logical conclusion. Hutchinson vs. Ulrich only arrives at its result because the parties must be taken to have had apartment houses in mind when they made the restriction and couched it in otherwise ambiguous language. The logical result of the Hutchinson case is that where the parties must be taken to have had in mind certain types of buildings which are in the vicinity and desire to prevent their erection they must make their words unmistakably clear.

III.

THE RESTRICTIONS IN THIS CASE WHEN CONSIDERED FOR THE PURPOSE OF EXCLUDING AN APARTMENT HOUSE ARE AT BEST VAGUE, UNCERTAIN AND DOUBTFUL AND WHERE A RESTRICTIVE CONVENANT LACKS CLARITY AND CERTAINTY AND IS DOUBTFUL RELIEF WILL BE DENIED.

Defendants have been contending hitherto that the restrictions in question so far from preventing the erection of an apartment house have clearly not prevented it both

upon the actual construction of the words and upon authority.

But assuming for the purpose of argument that this position is unsound, defendants contend that surely the question is at least doubtful. And to doubt is to deny. This rule, with relation to restrictive convenants, is so firmly established in this State that it can no longer be questioned. Fortescue vs. Carroll 76 N. J. Eq. 583, Court of Errors and Appeals (1910), 75 Atl 923; Goater vs. Ely, 80 N. J. Eq. 40, 82, Atl 611 (1912); Newberg vs. Barkalow, 75 N. J. Eq. 128, 71 Atl. 752, (1909).

In Fortesque vs. Carroll (Supra) this court expressed itself as follows:

"If the view thus expressed does no more than render it doubtful whether the appellant had violated the restriction in his deed, the result would be a reversal of the decree of the court below; for it is well settled that, in cases where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, "to doubt is to deny". This is the established rule, not only because restrictions of the lawful uses of property are against common right, but also because restrictions, in the framing of which a subsequent purchaser has had no voice, ought to be so clear that by the acceptance of the deed that declares them he may reasonably be deemed to have understood and acceded to them. The rule is sometimes stated that such restriction are not favored by the law. I do not see that anything is gained by this personification of the law and the ascription to it of personal preferences. 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. In a recent case Vice Chancellor Howell correctly stated the rule thus: "It must be conceded that restrictive covenants must not be vague or uncertain; that the complainant's right to insist upon the covenant and to invoke the injunctive power of the court must be clear and satisfactory."

The court in Goater vs. Ely (Supra) said:

"The restrictive covenants are strictly construed against the person claiming the right to enforce them."

Speaking in a similar vein the Illinois court in the Hutchinson case said:

"If there is any doubt whether the restrictions were to cease then or whether they were to be permanent, the existence of the doubt is to deny the existence of the easement or privilege. All doubts must be resolved in favor of natural rights and against restrictions thereon." In this country, real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence it is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use, and hence in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee all doubts should, as a general rule, be resolved in favor of a free use of property and against restrictions.

In the case at bar if we construe the restrictive covenants strictly, do we not find that the most that can be said for the complainant is that the restriction against an apartment house facing Riverside Avenue is doubtful? Again, we ask, if the persons making the restrictions wished to exclude apartment houses why did they not say so? Construing the restrictions most strongly against the complainant and in favor of the freer use of

the land, does not the fact that the sixth provision states that in the event of facing Riverside Avenue the foregoing restrictions are not to apply, but does not say "excepting the first provision," render the sixth provision at most doubtful—even if the single dwelling in the first provision could be considered to exclude an apartment house?

Again, is it so "clear and satisfactory" when the words "single dwellings" were used under the circumstances of this case, where the parties must have been aware of the existence of apartment houses in the neighborhood and at least one of them was a builder and another the brother of the owner of an apartment house in the same square and where the restriction was evidently drawn by a lawyer who must be taken have known that the word "private" would have been effectual, that apartment houses were excluded?

Turn and juggle the words as we will, we cannot see that the restriction is free from the vagueness and doubt which will entitle the complainant to relief.

The appellant contends, however, that because the wording of the sixth provision of the 1911 agreement is that "if the owner of lots 17 to 22 desiring to front, etc.", and the defendants are no longer the owner of 17 to 22, but only of 18 to 22, that the provision does not apply even if lots 18 to 22 face Riverside Avenue; that they cannot face 17 to 22 on Riverside, that the intention was to face 17 to 22 as a whole, as a group, that "there is no alternative for less than all the lots 17 to 22 facing Riverside", that the symmetry and beauty require the whole group to be faced because otherwise the lots on Riverside Avenue would be so shallow as to force the placing of dwellings right against the adjoining dwellings on Lenape Avenue, that the plain meaning of the words is all the

lots 17 to 22 must be so faced to avoid the restriction and that it is only by taking away or adding words that any doubt can arise.

This argument, in our opinion, is entirely fallacious, for the following reasons:

1. That in construing the meaning of a written instrument what may sometimes apparently be the plain meaning of some of the words is not necessarily the plain intention of the parties when the instrument is read as a whole. The plain intention of the parties in this case gathered from the whole instrument is to see that on Parkline Avenue only single dwellings (in the sense in which the appellant contends the words are used) shall face this street. That is absolutely clearly its purpose. We can see that this is so from the fact that only the three persons who owned the land that could at the time be faced on Parkline, executed the agreement of 1911, that the only lots involved were those that could face on Parkline (i. e. Lenape) that nothing was said anywhere in the agreement as to the kind of buildings to be placed on any other street. From this it is clear that these persons wanted only certain types of buildings to face Lenape Avenue. They were not in the slightest concerned with what faced on Riverside Avenue, provided what faced on Riverside Avenue did not go so far up Lenape Avenue as to go beyond the northerly line of lot 17. And here the appellant concerns himself with what faces Riverside Avenue even though it does not go beyound lot 18. That is to say, if we consider the whole agreement it seems to us that not only is it doubtful that the whole group were not intended to face on Riverside Avenue to avoid the restrictions but it is clear that the whole group need not so

face. No words are being added or taken away, but the agreement as a whole discloses its meaning and purpose.

2. Moreover, the words of the provision are that "if the owners of lots 17 to 22 desiring to front these lots and the dwellings to be erected on them on Riverside Avenue, then the restrictions are not to apply". The clear implication from these words, it seems to us, is that the owner could erect dwellings on as many of these lots as he desired. If we follow the contention of the appellant to its logical conclusion, the owner of these lots 17 to 22 would have to build on all of these lots—not on any less because it says "and the dwellings to be erected on them"—that he could not leave lot 17 vacant if he wanted to, even though he continued to own it—if he wished to avoid the restriction and build a pair of houses on Riverside Avenue. The restriction, in other words, would under this interpretation, compel him to build on all of these lots, because appellant argues that 17 to 22 means all of 17 to 22. Therefore, if he desired to turn 17 to 22 he would have to build on all of 17 to 22—he could leave none of it vacant. The absurdity of this situation, we believe, shows us that the parties could not have intended that.

3. Again, if the words "lots 17 to 22" mean so clearly only 17 to 22 and no less, then it is just as logical to say the parties meant no more than 17 to 22; and if so, why did the parties refer to lots 15 and 16 in the same provision? If these words meant only 17 to 22 as a group, why speak of other lots? Would that not be surplusage? Clearly, the parties were concerned with the proposition that no more than 17 to 22 could be turned and not with the proposition of less being turned.

4. Furthermore, if lots 17 to 22 were intended as a whole to be turned, so that all of it were to be included, would it not follow that the owner of 17 to 22, if he continued to own them all, could not leave vacant or build

houses in pairs upon that portion thereof as would be on the extreme west; he could not leave vacant or build in pairs upon the part which would face Riverside Avenue furthest from the corner of Riverside and Lenape Avenue. The width of lot 22 as it faces Riverside Avenue is about one hundred and fifty feet. The owner could not leave vacant or build in pairs on that portion of lots 17 to 22 which adjoins lots 32 to 37. He would have to build up his whole frontage on Riverside Avenue to a depth of one hundred and sixty feet. Again, we say, that the absurdity of this situation likewise precludes the conclusion that the appellant contends for.

5. The appellant contends further in his brief that "otherwise, there would be one or more lots on Parkline Avenue which would not be covered by the restrictions which cover other properties on the Avenue". We say that the contrary is true, namely that if 18 to 22 only are turned, the appellant has an additional lot—lot 17—covered by the restrictions which cover other properties on Parkline Avenue. And besides, we submit, this statement begs the question.

6. It is further urged that if the owner of these lots were permitted to determine the number of these lots that he could face on Riverside Avenue he could make the lots "so shallow from Riverside Avenue as to force the placing of dwellings thereon right against the adjoining lots and dwellings on Lenape Avenue" and beauty and symmetry would be affected. This is also unsound. Where in the agreement is there anything as to how deep these lots must be? There is nothing in the agreement to require lots of one hundred and fifty feet or one hundred and sixty feet. And that cannot be read into it. Besides, if the owner of 17 to 22 erected single dwellings of the kind appellant desires, what in the agreement is there to prevent him from erecting very long "single dwellings"

"forcing" them to be placed "right against the adjoining dwelling" on Lenape Avenue? He could very well have placed a large garden in front on Riverside Avenue and laid his foundation wall so far back that the rear of the dwelling would almost touch the dwelling on Lenape Avenue. And, of course, no complaint could be made as to that. How then can appellant now properly urge the "shallowness" of the lots as an argument in his behalf?

7. Lastly, according to appellant's position, the only thing left for the owner of 18 to 22 to do, after he has sold lot 17 is to erect what appellant calls "single dwellings" on Riverside Avenue. Surely the parties did not intend that. If that was the intention, why did they not speak of the only type of dwellings that could in certain events be erected on Riverside Avenue? We cannot bring our minds to the conclusion that merely because the owner of lots 17 to 22 sold one of them he can only erect "single dwellings" on Riverside Avenue.

To summarize, briefly, the sixth provision clearly permits the erection of an apartment house on lots 18 to 22 if they face on Riverside Avenue. Counsel admits this would be so if all six lots, 17 to 22, were owned by defendants. We maintain that this clearly does not change the effect of the provision and is not in accord with the intention of the parties gathered from the whole instrument and surrounding circumstances; that the words single dwelling, especially under the circumstances of this case do not even prohibit it, and that lastly, the restrictions are at the very best certainly doubtful and should not be enforced in this case.

Respectfully submitted,
PERLMAN AND LERNER
Solicitors and of Counsel with
Defendants-Respondents.