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Notice of Appeal.

(Filed June 15, 1923.)

In Chancery of New Jersey.

Between

RUSSELL MARSTON,
Complainant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants,

and

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

} On Bill, &c.

RUSSELL MARSTON hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from all and every part of the order dismissing the bill and counterclaim, made on or about the 5th day of June, 1923, in the above stated cause.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors of Russell Marston,
Complainant and Appellant.

Dated June 14th, 1923.

Notice of Appeal.

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

ALBERT C. WALL,
Of Counsel with Appellant.

Service of within notice is hereby acknowledged this 14th day of June, 1923.

OSBORNE, CORNISH & SCHECK,
Solictors of Defendants
Andrew Lenart & John D. Munther.

Served on Hopkins & Herr, Solicitors of Defendant, William G. Lentz, October 8th, 1923.

Petition of Appeal.

(Filed September 5, 1923.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

RUSSELL MARSTON,
Complainant-Appellant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,

and

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Russell Marston, the complainant-appellant in the first of the above consolidated causes and defendant-appellant in the second of the above consolidated causes, respectfully shows that your petitioner finds himself aggrieved by a final order made in the Court of Chancery by Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the fifth day of June, in the year one thousand nine hundred twenty-three in these respects, to wit:

Petition of Appeal.

1. That the said decree adjudges that the complainant, Russell Marston, is not entitled to the relief sought and prayed for in his bill of complaint and that his bill of complaint be dismissed and that the said complainant pay to the solicitors and counsel of the defendant Lenart and the defendant Lentz their costs to be taxed.

2. And your petitioner humbly appeals from the parts of the order of the Chancellor which decree as aforesaid, upon the ground that the same is erroneous.

Your petitioner therefore prays that the said order of the said Chancellor dated June fifth, in the year one thousand nine hundred twenty-three, may be in the particulars aforesaid reversed, set aside and for nothing holden and that your petitioner shall have such relief in the premises as to this Honorable Court shall seem meet.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors of Russell Marston,
Complainant-Appellant.

We hereby consent to the filing of the within Petition of Appeal as of time.

OSBORNE, CORNISH & SCHECK,
Solicitors of Defendant Andrew Lenart.

Served on Hopkins & Herr, Solicitors of Defendant, William G. Lentz, October 8th, 1923.

Answer to Petition of Appeal.

(Filed September 18, 1923.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

RUSSELL MARSTON,
Complainant-Appellant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,

and

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

The answer of the respondent, Andrew Lenart, to the petition of appeal of the above named appellant.

This respondent not acknowledging any or all of the matters which in said petition of appeal are contained to be true, for answer, nevertheless says and admits that a final decree was, on the 5th day of June, One Thousand Nine Hundred and Twenty-three, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition as therein stated; but, as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said final decree, in the particulars mentioned in said petition, is agreeable to equity, and he prays that the same may be, in said particulars, affirmed, with costs to be adjudged to this respondent.

OSBORNE, CORNISH & SCHECK,
Solicitors and of Counsel with Respondent,
Andrew Lenart.

Order Dismissing Bill and Counterclaim.

(Filed June 5, 1923.)

IN CHANCERY OF NEW JERSEY.

Between RUSSELL MARSTON, Complainant, and WILLIAM G. LENTZ and ANDREW LENART, Defendants, and WILLIAM G. LENTZ, Complainant, and ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON, Defendants.	On Bill, etc. Consolidated Causes.

These causes coming on to be heard in the presence of Wall, Haight, Carey & Harepence, of counsel with complainant, and Osborne, Cornish &

Scheck, of counsel with the defendants Andrew Lenart and John D. Munther, and Hopkins & Herr, of counsel with the defendant William G. Lentz, and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and considered, and it appearing to the Court that the complainant, Russell Marston, is not entitled to the relief sought and prayed for in his bill of complaint, and it further appearing that, because the complainant is not entitled to the relief prayed for, it becomes unnecessary to determine whether the defendant, William G. Lentz, is entitled to the relief sought and prayed for in his bill of complaint and counterclaim in the consolidated cause: It is on this fifth day of June, One Thousand Nine Hundred and Twenty-three, by the Chancellor of the State of New Jersey,

ORDERED, ADJUDGED AND DECREED, that the bill of complaint of the complainant, Russell Marston, be and the same is hereby dismissed; and it is

FURTHER ORDERED, that the complainant, Russell Marston, pay to the solicitors and counsel of the defendant Andrew Lenart his costs in this suit to be taxed, and to the solicitors and counsel of the defendant William G. Lentz, his costs in this suit to be taxed, and that execution issue therefor according to the practise of this court; and it is

FURTHER ORDERED, that the bill of complaint

and counterclaim of the said William G. Lentz be and the same is hereby dismissed.

E. R. WALKER,
C.

Respectfully advised,
JOHN E. FOSTER,
V. C.

We hereby consent to the form of the above order.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with Complainant,
Russell Marston.

OSBORNE, CORNISH & SCHECK,
Solicitors for and of Counsel with Defendants,
Andrew Lenart and John D. Munther.

HOPKINS & HERR,
Solicitors for and of Counsel with Defendant,
William G. Lentz.

A true copy.
JESSE R. SALMON,
Clerk.

Opinion.

(Filed May 24, 1923.)

IN CHANCERY OF NEW JERSEY.

Between

RUSSELL MARSTON,
Complainant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants,

and

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Bill &c.

Consolidated Causes.

Submitted May 11, 1923.

Decided May 21, 1923.

MESSRS. WALL, HAIGHT, CAREY & HARTPENCE, and MR. JOHN GREYTON BOSTON (of the New York Bar) for Russel Marston.

MESSRS. OSBORNE, CORNISH and SCHECK for Defendants Andrew Lenart and John D. Munther.

MESSRS. HOPKINS & HERR for William G. Lentz.

FOSTER, V. C.

By consent of counsel these causes were consolidated; and were submitted on a stipulation of

facts and certain exhibits consisting of maps and deeds.

The controversy is over a restrictive building covenant and Marston as complainant asks to have the defendants Lentz and Lenart enjoined from building more than one dwelling on a plot known as the DeGomme lot; on the southwesterly corner of Charlton and Raymond Avenues in South Orange. In case Marston succeeds, then Lentz asks to have it determined that between him and Lenart he has the right to build on the one-third portion of the lot which is owned by him, and if he prevails Lenart will be unable to build on the remaining two thirds of the lot.

From the facts agreed upon it appears that one John G. Vose, between 1864 and 1866 acquired title to tracts of land aggregating 210 acres. Under date of January 1, 1867 he had a map made, which was not filed, on which the lands are shown divided into plots of various sizes from about one to over seven acres. Between January 1, 1867, and September 19th, 1868, Vose conveyed in the vicinity of the premises in question plots and parts of plots shown on this map, and he restricted some of the plots so conveyed to one house, and others to two, three and four houses respectively.

On September 19, 1868 Vose conveyed to DeGomme the lot in question which is the easterly portion of plot S, as shown on the 1867 map, having a frontage of 145.2 feet on Raymond Avenue and a depth of 300 feet. This deed recited that the premises conveyed were a part of "The Estate called Montrose," and it contained a restrictive covenant specifying in great detail the kind and character of the buildings that could not be erected, and the lines of business that could not

be conducted thereon, the pertinent part of this covenant being,

> "That the said premises * * * shall not at any time hereafter be used or occupied * * * for the erection of any buildings of any kind or description excepting one dwelling house with appropriate gardeners' cottages &c., * * * appropriate for a gentleman's country residence; * * * the covenant aforesaid shall be attached to the said premises and run with the land and shall be inserted in any and all further conveyances, &c."

In November, 1869, a new map of the property, entitled "Map of Montrose showing lands of John G. Vose, &c.," was filed. This showed the names of the owners of plots sold since January, 1867; and it differed from the map of 1867 by showing at the northeasterly corner of the tract at a point over 2,000 feet from the DeGomme lot, a new street and changes in the subdivision of the plots; it also showed a new street at the northwesterly corner of the tract over 1500 feet from the DeGomme lot and three plots on the map of 1867 containing about 21 acres were shown to be sub-divided into fourteen plots; it also showed a new street now known as Irving Avenue and to produce this street, two of the Grove Road plots are shown to have been reduced in area. And the original plot L is shown as two plots each marked L and each containing over 2.50 acres. Some time between September 1868 and December 1872 Charlton Avenue was laid out through plots T. and U. and it is not shown on either of the maps mentioned.

On December 31, 1872, Vose conveyed to one Freeland a lot on the easterly side of Charlton

Avenue 100 feet south of Raymond Avenue, having a frontage of 100 feet on Charlton Avenue and a depth of 200 feet, this conveyance contained the same recitals and covenants as the deed to DeGomme.

By an agreement dated May 5, 1873, between Vose and DeGomme they undertook to modify the restrictions on the DeGomme lot to permit the erection of three houses thereon; and in the map of 1873 the DeGomme plot is shown as three lots.

In November, 1873, a map showing part of the Vose tract and lands of other parties was filed, and this shows that the westerly part of lot L and plots M. T. U. E. and D. as shown on the maps of 1867 and 1869 have been divided into 47 smaller lots. It also appears that with the exception of the plots owned by Marston and his wife, the whole of plots V and U, and the westerly half of L as shown on the map of 1869, and in fact, the unsold portions of the Vose holdings, were lost to him by foreclosure in 1877.

Marston derives title by mesne conveyance from Freeland, his wife owns the next plot north, 100 by 200 feet at the corner of Charlton and Raymond Avenues. Both plots are improved as one and used as a residence by the Marstons. The house stands on the wife's plot, and the husband's plot is used as part of the lawn and gardens and the garage stands on it.

The defendant Munther acquired title to the DeGomme lot by mesne conveyances from DeGomme and in May, 1922, he conveyed the southerly 100 feet front on Charlton Avenue to Lentz and in September, 1922, he conveyed the balance of the plot to Lenart. The latter proposes to erect two houses on his lot and Lentz proposes to erect one house

on his part of the plot; but if complainant prevails only one house can be built on this entire plot and Lentz claims the prior right to build his house on his one-third of the plot because of the priority of title and this contention if sustained will leave Lenart in the ownership of the remaining two-thirds of the plot and unable to erect any building or structure of any kind thereon.

It also appears that by the foreclosure proceedings of Vose's unused holdings and by the expiration of the restrictions on adjoining plots or on plots in the immediate vicinity of Charlton, Raymond and Ralston Avenues and Grove Road, that complainants and defendants properties are to a great extent isolated in an unrestricted neighborhood.

It further appears that Marston acquiesced in the erection of two houses several years ago, on what is known as the Fort property, directly across the street from the lot owned by him or his wife, although this property was restricted to one house, and it also appears that complainant further acquiesced in the violation of the restrictions on the Turrell lot, about 300 feet from his property; for he was made a party defendant in an action in this court, brought by Turrell against Donwitzer to have this restriction declared void; and with knowledge of the purposes of this litigation complainant permitted a decree by default to be taken against him and the restriction was declared void as to the Turrell lot.

It is stated that the houses which the defendants Lentz and Lenart intend to build are to cost over $25,000 each, and that they are to be of the character suited to the neighborhood, as to expense and style.

From these facts it is apparent that whatever

plan or scheme Vose had in mind in 1866 for the development of his property into "Gentlemens' Country Residences," while it may have been a general, it was not a uniform scheme and whatever it was, it was abandoned almost from its inception and his plans and plotting of the property were radically changed from time to time; such change being indicated by reduction in the size of the plots, by changes in the number of houses that could be built thereon, by the opening of streets and by the subdivision of plots, &c.

During the fifty-five years that have elapsed since these restrictions were imposed great changes have taken place in the character of the neighborhood with a pronounced increase in its population; as well as a great increase in the demand for housing accommodations, due in part to the improvement in the transportation facilities now avaliable for reaching this property.

Complainant and others interested have recognized these changes and because of them or for other reasons satisfactory to him and them, have acquiesced in the violation of this restriction.

In *Fort* v. *Field,* Vice-Chancellor Fielder had occasion to consider these restrictions and the changes in the circumstances I have indicated; and he reached the conclusion, in which I fully concur, that there had been such a pronounced change in the character of the neighborhood and such a general acquiescence by those interested, in the violation of this restriction that it amounted to an abandonment and estoppel.

My conclusion is that whatever scheme of development Vose originally had was abandoned, and that complainant by his continued acquiescence in repeated violations of this restriction is now

estopped from invoking its protection in this action.

My conclusion in this matter is strengthened by the fact that to grant the restraint complainant seeks would be a great hardship upon one or both defendants, and would probably result in leaving Lenart in the ownership of part of a lot which he could never improve nor derive any benefit from. A denial of the restraint will not produce any material injury or inconvenience to complainant, or his property, particularly in view of the character of the dwellings Lentz and Lenart intend to build on the respective properties and I will therefore advise that the bill be dismissed.

Stipulation of Facts.

(Filed February 21, 1923.)

IN CHANCERY OF NEW JERSEY.

Between RUSSELL MARSTON, Complainant, and WILLIAM G. LENTZ and ANDREW LENART, Defendants.	On Bill, etc.

It is hereby stipulated by and between the complainant and each of the defendants that the facts set forth below are, for the purposes of this cause, admitted to be true, and that the statement of facts, so set forth shall be offered and received in evidence on the trial of the cause, without ob-

jection, as sufficient proof of every fact contained in said statement, with leave, however to each of the parties to introduce such further evidence as he may desire, on the trial of the cause.

The admitted facts are as follows:

1. The map annexed to the answer of the defendant Lenart as Exhibit "A" is a true copy of a portion of a map made by authority of John G. Vose, which was filed in the office of the Register of Essex County in November, 1869, and is now on file in said office.

2. The lands shown on said map were conveyed to said Vose by deeds from the following grantors dated, respectively, as follows:

Henry M. Graham, June 9th, 1864.
Lydia Freeman, March 17th, 1865.
Henry A. Page, May 23rd, 1866.
Benjamin E. Baldwin, July 30, 1866.
Alexander S. Crane, Aug. 18, 1866.
Ebenezer Deas, Sept. 20, 1866.
Benjamin E. Baldwin, Sept. 24, 1866.
Daniel J. Sprague, Sept. 28th, 1866.
Samuel P. Smith, Nov. 12th, 1866.
Abijah F. Tillon, Adm., etc., Nov. 13th, 1866.

The entire tract covered by said deeds embraced about 210 acres. The lands of complainant and of the defendants were a part of the premises purchased by said John G. Vose from Ebenezer Deas by the deed mentioned above.

3. By deed dated May, 1870, made by Benjamin E. Baldwin said Vose acquired another tract adjacent to the tracts above mentioned.

3½. A map showing the said tracts of land, bearing date January 1, 1867, was made by author-

ity of the said John G. Vose and is the map referred to in the deeds by John G. Vose to Charles DeGomme and by John G. Vose and Theodore H. Vreeland, mentioned in the complaint in this action. The original of said map seems to have been lost, but there are in the offices of old surveyors in the City of Newark what purport to be copies of said map, and it is admitted that the copy of said map in the possession of Borrie & Kreiner, submitted in evidence in this action, is a true copy of said original. It differs from the map filed in 1869 only in the following particulars: (1) That the latter shows the ownership of persons to whom Vose had made conveyances in the interim; (2) the 210 acres, comprising Montrose in the earlier map, is tinted in brown instead of in blue; (3) the following changes in lot lines were made:

(a) Randolph Place, near Montrose Station, shown on the '69 map, is not shown on the '67 map, and the plots on each side of Randolph Place and each side of Montrose Avenue property line, between Scotland Road and the Railroad, divided into 14 plots on the '69 map, were shown as 3 plots on the '67 map; that is, those, which on the original map, were shown as lots numbered 3, 4 and 16 on the '67 map, having a total acreage of 21.1 acres, are shown on the '69 map in 14 plots.

(The property between Randolph Place and Scotland Road, marked on the '69 map "C. Coudert, Jr.," is the property which is the subject of the litigation in the case of Coudert *v.* Sayre, reported in 46 Eq., 386. Lot 16, referred to in that case, comprised, in addition to the property marked "C. Coudert, Jr.," on the '69 map, the two lots lying between that and the Railroad and the portion of Randolph Place in between.)

(b) In the area between Montrose Avenue and Mosswood Avenue, the '67 map does not show Mosswood Avenue, but shows lots 14 and 15, having 6.90 acres and 7.80 acres area, respectively, where, on the '69 map, there is shown one big lot without name or number.

(c) The area between the last mentioned tract, extending easterly to Centre Street, and shown on each side of Warwick Avenue, Sterling Place and Paxton Avenue (lots 101 to 126, inclusive), on the '69 map, are shown on the '67 map as one large undivided tract.

(d) On Grove Road, southerly from Montrose Avenue, the street extending northerly between lots H and J is not shown on the '67 map.

(e) Lot L, shown in two portions on the '69 map, is shown undivided on the '67 map.

(f) Lot S, shown in two parts as S½ and S½ on the '69 map, is shown in one lot on the '67 map, and having an area of 1.85 acres.

(g) Lot W, shown in two parts on the '69 map, is shown as one tract, having an area of 1.85 acres on the '67 map.

Otherwise, the two maps are identical.

4. Said Vose caused a later map to be made of all his said holdings. Said map was dated May, 1873, and filed November, 1873, and is now on file in the office of the Register of Essex County. It is hereinafter called the map of 1873, and Exhibit B attached to answer of defendant Lenart shows the portion of said map in the immediate vicinity of the premises of complainant and defendants.

5. Said map, filed in 1869, and said map of

1873 differed in that the map of 1873 showed the parcels that had been conveyed by Vose in the interval between the making of the two maps, with the dimensions as sold and with the name of the purchaser lettered on the parcel, and showed that most of the lands then remaining unsold by Vose were divided into smaller plots than on the map filed in 1869, and that on the map of 1873 a new street, Charlton Avenue, was shown laid out with its west line on a line with the easterly line of the DeGomme lot (now the land of defendants), running through Ralston Avenue north to Turrell Avenue. Defendants' and complainant's lands are in the block which was bounded on the map filed in 1869, by Scotland Road on the west, Raymond Avenue on the north, Grove Road on the east and Ralston Avenue on the south. On the map of 1873, this block is divided into two blocks by Charlton Avenue; defendants' lands are on the west side, and plaintiff's lands on the east side of that street.

The differences in plottage in the immediate vicinity of plaintiff's and defendants' premises, as shown on said two maps, are as follows:

Map filed in 1869:

Northeast corner of Raymond Avenue and Scotland Road, lot P, 4 acres, 450 feet on Raymond Avenue, 370 feet on Scotland Road, 346 feet on lot O. Next lot east, lot O, 250 feet on Raymond, 346 feet on west line, 340 feet on east line. Next lot east, lot N, 253 feet on Raymond, 340 feet on west line, 335 feet on east line, 2 acres. Next lot east, lot M, 2 acres. Next lot east, lot L, 386 feet on Raymond Avenue by about 349, more or less, feet in depth.

Southeast corner of Raymond Avenue and Scot-

land Road, lot Q, 452 feet on Raymond Avenue, 300 feet on Scotland Road, and on east line, 448 feet on south line, 3.10 acres. Next lot east, lot R, 253 feet on Raymond Avenue and in rear, 300 feet in depth, 1.85 acres. Next lot east, lot S, shown in two parts (of which defendants' lot is part) 253 feet on Raymond Avenue and in rear, 300 feet in depth, 1.85 acres. Next lot east, lot T, of which plaintiff's premises is part, and out of which Charlton Avenue has been taken, 3.90 acres. Northeast of Ralston Avenue and bounding lot T on the south, is lot U, 3.58 acres. Next lot west, lot V, 253 feet on Ralston Avenue and in rear by 300 feet in depth. The next lot west, lot W, 253 feet on Ralston Avenue and in rear by 300 feet in depth. Next lot west, lot X, northeast corner of Scotland Road and Ralston Avenue, 411 feet on Ralston Avenue, 302 feet on Scotland Road, 448 feet on north line, 300 feet on east line, 2.82 acres.

The entire frontage on the south side of Ralston Avenue, from Scotland Road to Grove Road had been owned by Vose but had been conveyed away by him in two parcels as below set forth, one to Brewer, and one to Sprague, and those parcels were shown on the map filed in 1869 as the property of Brewer and Sprague respectively.

Map of 1873:

The several parcels which had been conveyed by Vose as hereinbelow set forth were shown according to their dimensions as so conveyed.

Lots T and U on the map filed in 1869 were cut up into lots fronting on Grove Road and Charlton Avenue each having a frontage of 100 feet. Lot V was cut up into three lots, one adjoining the DeGomme lot (which is now owned by defendants), fronting 100 feet on Charlton Avenue, another 200 feet on Charlton Avenue by 100 feet on

Ralston Avenue, and the third 108 feet on Ralston Avenue.

Lots westerly part of L and M were cut into six lots, one 250 feet on Charlton Avenue by 200 feet on Raymond Ave., and three fronting 90 feet on Raymond Avenue—one on Charlton Avenue and one on "Proposed Road."

The DeGomme lot (which had theretofore been conveyed away by Vose) was shown as three lots, each fronting 100 feet on Charlton Avenue.

(Lots M, westerly part L, lots T and U were conveyed by said Vose subsequent to his conveyance to DeGomme.)

6. In the immediate vicinity of the premises in question Vose made the following conveyances:

Prior to January 1, 1867.

To Daniel J. Sprague, 4.17 acres, southeast corner of Scotland Road and Ralston Avenue, 267 feet on Scotland Road by 713 feet on Ralston Avenue, unrestricted, by deed dated September 28th, 1866, and recorded October 1st, 1866.

To William A. Brewer, 7.41 acres adjoining Sprague on East, 629 ft. on Ralston Ave. by 483 ft. on Grove Road, by deed dated October 3, 1866, and recorded December 21, 1866. This deed contained a covenant substantially the same as the covenants contained in Vose's deeds to DeGomme and Freeland as set forth in the bill of complaint in this action, except that there was no limit to the number of dwelling houses that might be built on the parcel, and that that part of the covenant which restricted buildings to dwelling houses suitable for country residences was limited to endure only for twenty-five years from the date of the deed.

To King the parcel north side of Raymond Avenue, shown as lot O on map filed in 1869, by deed dated October 22, 1866 and recorded November 1,

1866. This plot was limited to one dwelling house and otherwise restricted by perpetual covenant substantially the same as the covenants in the deeds to DeGomme and Freeland.

To Woodward, lot south side of Raymond Avenue, 145 feet front on that Avenue by 300 feet deep, being the southerly 145 feet of plot shown as lot R, on map filed in 1869. This lot was limited to one dwelling house and otherwise restricted by covenant substantially the same as the covenants in the deeds to DeGomme and Freeland.

7. After January 1, 1867, and down to and including September 18, 1868, Vose made conveyances of lots in the immediate vicinity of complainant's and defendants' premises, each containing covenant substantially the same as the covenants in the DeGomme and Freeland deeds, except in cases noted below as to the number of dwelling houses permitted.

To Phillips, plot N on map filed in 1869, immediately opposite the DeGomme lot, restricted to two houses, by deed dated May 14, 1867, and recorded May 27, 1867.

To George K. Brewer plot V, on said map, immediately adjoining the DeGomme lot on the south, restricted to two houses, by deed dated May 14, 1867, and recorded May 28, 1867.

To Condit, plot X on said map, northeast corner Scotland Road and Ralston Avenue, restricted to one house, by deed dated February 14, 1868, and recorded March 4, 1868.

To Dickinson, plot Q on said map, southeast corner of Scotland Road and Raymond Avenue, restricted to three houses by deed dated July 14, 1868, and recorded July 22, 1868.

To Dickinson, plot P, on said map, northeast corner of Scotland Road and Raymond Avenue,

restricted to four houses by deed dated October 18, 1867.

To Matthews the westerly one-half of plot W, restricted to one house by deed dated July 20, 1869.

To Brewer, the easterly one-half of plot W, restricted to one house by deed dated September 25, 1867.

To Matthews, the westerly one-half of plot S, restricted to one house, by deed dated July 28, 1868.

To Bartlett, the easterly one-half of lot R, restricted to one house, by deed dated August 10, 1868.

To DeGomme, premises in question September 19, 1868.

To Griffin, southwest corner of plot M, 250 x 200, restricted to one house by deed dated April 30, 1873.

8. By deed dated December 31, 1872, and recorded January 4, 1873, said Vose conveyed to Freeland the premises now owned by complainant. Said deed contained description and covenant as set forth in the bill of complaint in this suit. Complainant derives title by mesne conveyances from said Freeland. That practically all the deeds from John G. Vose for portions of the 210 acres acquired by him as set forth in paragraph 2 hereof contained, the same restrictive covenants set forth in the deed to DeGomme, mentioned in the bill of complaint, varying as herein stated.

9. On or about May 5, 1873, the said John G. Vose executed and gave to the said Charles DeGomme (he being then the owner of the premises before referred to as having been conveyed to him) the following paper writing:

Stipulation on Facts.

"WHEREAS, in and by a certain conveyance made by John G. Vose to Charles DeGomme, dated September 19, 1868, and recorded in the Register's office of the County of Essex, New Jersey, in Book Z 13 of Deeds for said County, on pages 539, 540, 541, and 542, the said grantee was among restrictions limited to the erection of only one dwelling house upon the whole plot of one acre of land and certain out-buildings as in said conveyance will more fully appear. And, whereas, Charles DeGomme, the grantee of the lot of land, has applied for the privilege of erecting more than one dwelling house upon the said lot. Know all men by these presents, that in consideration of the agreement hereby made by said grantee that all the dwelling houses and out-buildings which may be erected upon the said plot shall be such as are appropriate for a gentleman's country residence, the said grantor agrees that the limitation as to the number of dwelling houses so to be erected on the said plot shall be opened so as to permit the erection of three such houses and appurtenances. All the other covenants and restrictions in the said deed, excepting only as to the number of dwelling houses and appurtenances, to remain in full force. Mr. DeGomme is to have access to Charlton Avenue.

In Witness Whereof the parties have hereunto set their hands and seals this fifth day of May, A. D. 1873.

(Signed) John G. Vose L.S.
(Signed) Charles L. DeGomme L.S."

This writing was not acknowledged by either of the parties, but on January, 1897, was delivered to the Register of Essex County and by him recorded in Miscellaneous Book F in his office, page 49, and was also filed by him in his office.

10. That the premises contained in lots M, L, T, and U, as shown on the first mentioned map, were conveyed by said John G. Vose subsequent to the conveyance to DeGomme aforementioned, in accordance with the layout as shown on the second map. That that portion of the premises in lots "T" and "U" which fronted on the new street called Charlton Avenue, including the premises now claimed to be owned by the complainant, was sold by the said John G. Vose in lots having one hundred (100) feet front on Charlton Avenue.

11. That the land described in the deeds referred to in the deed from the said John G. Vose to the said DeGomme comprised about two hundred and ten (210) acres in the Village of South Orange belonging to the said John G. Vose, and which he originally planned to develop so that the various tracts therein should be used only for the purpose of gentlemen's country residences, and that he did lay out the said premises into lots and plots suited to such purpose upon a map (being the first map above referred to) which he caused to be filed in the office of the Register of Essex County on November 3, 1869, a copy of which map is still on file in the said Register's office. The premises shown on that map, and on the map of 1873, were sold—some being restricted with limitation as to time, some being restricted without limitation as to time, and some being unrestricted. That the restrictions as to the land comprising the above mentioned tract of two hundred and ten

(210) acres were made, as created in the conveyances by the said Vose, without any uniformity as to the number of buildings to be contained in the said plots, as is specifically shown by his conveyances for the following plots:

(a) The lot situate at the southeast corner of Scotland Road and Ralston Avenue being 267 feet front on Scotland Road by 714 feet on Ralston Avenue, without restrictions; (b) premises situate at the southwest corner of Grove Road fronting 629 feet on Ralston Avenue and extending along Grove Road to South Orange Avenue with restrictions limited as to time, which restrictions have since expired; (c) premises situate at the northeast corner of Ralston Avenue and Scotland Road having a frontage of 302 feet on Scotland Road and extending along Ralston Avenue 455 feet, with a restriction limiting the number of dwellings erected thereon to *one:* (d) the lot adjoining the last preceding lot on the north, being 303 feet on Scotland Road by 452 feet on Raymond Avenue was restricted to the erection of three dwellings therein; (e) the lot adjoining the second preceding lot, having a frontage of 145 feet on Ralston Avenue by a depth of 300 feet was restricted to one building thereon; (f) the lot adjoining the last preceding lot having a frontage of 108 feet on Ralston Avenue and being 300 feet in depth was restricted to one building; (g) the lot adjoining the last described lot having a frontage of 253 feet on Ralston Avenue by a depth of 300 feet was restricted to two buildings for twenty-five years; (h) the lot at the southwest corner of Charlton and Raymond Avenues, being 145 feet on Raymond Avenue by 300 feet in depth, was restricted to the erection of one house thereon; (i) the adjoining lot on the

west, being 108 feet front by three hundred feet in depth, was restricted to one house thereon; (j) the next adjoining lot on the west, being 108 feet front by 300 feet in depth, was restricted to one building thereon; (k) the next adjoining lot on the west, being 145 feet front by 300 feet in depth, was restricted to one building; (l) the lot on the northeast corner of Scotland Road and Raymond Avenue, having a frontage of 356 feet on Scotland Road and a depth of 447 feet on Raymond Avenue, was restricted to the erection of four dwellings thereon; (m) the lot adjoining the last mentioned lot on the east, having a frontage of 253 feet on Raymond Avenue and depth of 340 feet front, was restricted to one dwelling; (n) the lot adjoining the last mentioned lot on the east, having a frontage of 253 feet and depth of 340 feet, was restricted to two dwellings; (o) the tract fronting Charlton Avenue, between Raymond Avenue and Ralston Avenue, was conveyed in lots 100 feet front by 200 feet in depth, restricted each to one dwelling house; the property on the northwest corner of Charlton and Raymond Avenues, being 250 feet on Charlton Avenue and 200 feet on Raymond Avenue, was restricted to one dwelling house; (p) a large tract in block bounded by Turrell Avenue, Charlton Avenue, Grove Road and Irving Avenue, was conveyed without restrictions as to number of dwelling houses; (q) a large tract in the block bounded by Charlton Avenue, Montrose Avenue, Grove Road and Irving Avenue was conveyed without restrictions as to number of dwellings; (r) the lots fronting on Montrose Avenue, Berkeley Avenue and the easterly side of Scotland Road were restricted apparently to the erection of one house on two acres of land, with the exception of what was known as the Vose Homestead, which comprised several

acres of land and was sold without restrictions. All of the properties described in this paragraph are in the neighborhood of the property here in question, to wit, property mentioned in paragraph (o) being immediately opposite.

12. That:

(a) The premises on the northeasterly corner of Charlton Avenue and Raymond Avenue was sold by John G. Vose in a lot having a frontage of 200 feet on Raymond Avenue and 250 feet on Charlton Avenue, and was restricted to one dwelling; that there is now, and has been for several years, located on this tract two houses and a cellar for a third house where one of the houses now on the tract (one fronting on Raymond Avenue) formerly stood. When Judge Fort bought the premises there was one house located on the corner. He built a new house fronting on Charlton Avenue; moved the house on the corner around to face on Raymond Avenue; leaving a lot on the corner in which was this cellar from which the house had been moved and which he did not demolish but fixed up as a sort of sunken garden, which still remains in that condition.

(b) Four dwellings were erected and now stand on land situate on the northwest corner of Charlton and Ralston Avenues, which lots were restricted to the erection of two dwellings for twenty-five years.

(c) Three dwellings were erected and now stand on land situate on the northeast corner of Scotland Road and Ralston Avenue, which were restricted to one dwelling.

(d) Seven dwellings were erected and now stand on a tract of 11.3 acres on the south side of

Montrose Avenue on both sides of Charlton Avenue, which tract was restricted to six dwellings.

All of the facts in this Section 12 above set forth are and for a long time have been known to plaintiff and plaintiff never took any steps to enforce by suit or otherwise the restriction against the erection of any of the houses so mentioned.

(e) On the 12th day of June, 1914, William F. Turrell, Elise T. Underhill and Helen E. W. Pearson filed a bill of complaint in this court alleging that they were in peaceable possession of and the owners in fee simple of lots on Turrell Avenue beginning 500 feet southeasterly from Charlton Avenue.

The land described in the bill of complaint in said suit are the premises referred to in the answer of the defendant Lenart in this case (page 10, paragraph "e") as

> "A large tract of land bounded by the southeasterly line of Turrell Avenue and Grove Road, containing 3.25 acres more or less * * * restricted to one dwelling house."

This is shown on '69 map as the easterly lot L and on the '73 map is designated by the word "Turrell."

The complainant in this cause and his wife, Constance Turrell Marston, among others, were defendants. The title to the said premises was derived by mesne conveyances from one John G. Vose, and the deed from him, recorded in Book C 14, page 343, contained restrictions, fully set out in the bill of complaint (which are the same restrictions contained in the deed from Vose to DeGomme mentioned in the bill of complaint in this cause) restricted the said premises, among

other things, to the erection of one dwelling. The said deed, C 14, page 343, also recited certain deeds as the source of the title to the Montrose section, being the same deeds recited in the said deed to DeGomme. The bill of complaint alleged that no uniformity of restriction was followed in the Vose deeds; that the defendants in the cause had permitted violations without objection; that the restrictions had been violated by the owners of the premises mentioned in that cause; that the character of the land is so changed that it was impossible to use the lands in accordance with the attempted restrictions theretofore imposed; that only persons who, or whose predecessors in title, acquired lands from the said Vose, within two thousand feet of complainant's land, were made parties defendant; that all persons who acquired title from the said Vose at a greater distance than two thousand feet from complainant's land could not be injured or damaged by any violation of the said restrictions, and that no suit was pending to enforce the validity of the restrictive covenants, and the bill prayed that complainants might be decreed to have a perfect title to the lands mentioned, free from all restrictions, as above recited. There were sixty-one parties defendant who were owners of lots coming out of the ten tracts mentioned in the DeGomme deed. Of said defendants, Carrie A. Dormitzer, Graham Scott, Security Savings Bank of the City of Newark, William John Gardner, Roberta C. Gardner, Kate E. Durbrow, John F. Fort, Frederick Pring, Wallace H. Sinclair, Robert S. Sinclair, Arthur B. Leach, John R. Hardin and Alfred B. Thacher, joined in an agreement with the plaintiffs and William H. Turrell, Edgar T. Wood and Harvey I. Underhill as below set forth. The bill was dismissed as to them and also as to another

defendant, Sarah H. Holden. The bill of complaint was duly taken *pro confesso* as against all other defendants, and as against them a final decree was entered, holding that the restrictions mentioned in the bill were void in so far as they purport to limit the number of dwelling houses to be erected on said premises, and that the defendants, and each of them, have no right to enforce the said restrictions against the present or any subsequent owner of the said lands. Said agreement recited the deed C 14, 343, the description and the restrictions therein; that the first parties owned lands, or interest in lands which were part of the lands conveyed to said John G. Vose by the deeds, specified in deed C 14, 343; that the second parties desired to subdivide their lands into seven lots, and requested the first parties to agree. The agreement then provided that the first parties consented to the subdivision of the lands mentioned into seven plots with a dwelling house and appropriate out-buildings on each lot, and provided further for certain new restrictions. An abstract of the proceedings in said cause is annexed hereto as "Exhibit A" and a copy of said agreement is annexed hereto as "Exhibit B."

There are now seven dwellings erected on the premises mentioned in the said deed C 14, page 343.

(f) That there are other violations of the restrictions as to the number of dwelling houses permitted to be erected as contained in said Vose deeds, none of which violations have been sought to be enjoined by complainant or by any parties who were entitled to enforce the same.

13. In the immediate neighborhood of defendants' property, the following situation appears:

On the northerly side of Raymond Avenue, between Charlton Avenue and Grove Road there are four houses on lots of 100 feet front or less; on the southerly side there are four houses on lots of 100 feet or less; on the southerly side of Turrell Avenue, between Grove Road and Charlton Avenue, there are seven houses on lots of 100 feet front or less, and on the northerly side of said Avenue there are ten houses on lots of 100 feet front or less; on the northerly side of Turrell Avenue, between Scotland Road and Charlton Avenue, there are six houses standing on lots with 100 feet front or less, and the same number on the southerly side; that on Ralston Avenue, on the northerly side between Grove Road and Scotland Road, there are six houses on lots with 100 feet front or less, and eight houses on the southerly side on lots differing in frontage between 75 and 100 feet; that on Irving Avenue, on the southerly side, between Scotland Road and Charlton Avenue, there are seven houses on lots of 100 feet or less, and on the same side of the same Avenue, between Charlton Avenue and Grove Road there are nine houses of 100 feet front or less; that on the northerly side of Irving Avenue, between Scotland Road and Charlton Avenue, there are four houses on lots with frontages not greater than 150 feet; that on both sides of Scotland Road between Irving Avenue and Ralston Avenue, the frontage of many of the lots is 100 feet; and none of the lots are greater than 150 feet front on Scotland Road; that on the easterly side of Charlton Avenue, between Montrose Avenue and Irving Avenue, there are four houses on lots with 90 feet front, and one house on a lot of 197 feet front; and on the westerly side there are three houses on lots of 100 feet front.

14. By agreement dated March 1, 1891, and re-

corded September 4, 1891 in Liber G 26 of deeds page 277, and acknowledged by the several parties on divers days in March, April, May, June, July, August and September, 1891, Walter D. Osborne and sixty-three others reciting that they were owners of parts of the Estate called Montrose conveyed to John G. Vose by the ten deeds hereinabove mentioned gave consent to William H. Curtiss and William F. Allen that three dwellings and no more, with such other buildings and offices as are appropriate to gentlemen's country residences to be erected upon said lot at the northeast corner of Scotland Road and Ralston Avenue, mentioned in subdivision E of section 12 of this stipulation.

By agreement dated March 1, 1891 and recorded May 23, 1894 in liber F 28 of deeds page 585, and acknowledged by the several parties on divers dates in January, February, April and May 1892, and May 1894, Edward H. Wardwell and fifteen other persons reciting that they were owners of plots in said tract, gave to said Allen and Curtiss the like consent with respect to said lot.

At least sixteen and possibly more of the persons joining in the above mentioned consents were wives of other signers.

By agreement dated and acknowledged on August 6th, 1896, and recorded August 11th, 1896, in Liber F of deeds page 44, Patrick Delany and Annie M. Delany his wife, gave consent to William F. Allen, Edwin W. Orvis and Carrie E., his wife, and T. Bayard Dod, stated in said agreement to be then the owners of parcels constituting said lot, to the erection and maintenance on said lot of three dwellings and no more, each to cost at least the sum of $10,000, together with such other buildings and offices as are appropriate for gentlemen's country residences.

15. The Vose residence plot mentioned in section 11 (r) of this stipulation continued to be owned, used and occupied as one tract improved with one dwelling and appurtenant out-buildings until the year 1910. In that year said tract was purchased by a syndicate of neighbors, and plotted by them and it has been sold by said syndicate in plots each subject to restriction to residence purposes and as to the number of houses that may be built thereon. Said tract is about two thousand feet north of Raymond Avenue.

A new street, Berkeley Avenue, was laid out and opened, running north from Montrose Avenue about along the easterly line of the J. G. Vose plot (Vose residence above mentioned) and plot 17, as shown on the map filed in November, 1869. Said plot 17, or so much as was left of it after the opening of said street, was sold restricted to one dwelling, and for many years was used and occupied as one plot improved with one dwelling. About the year 1914 it was subdivided into smaller plots by and according to agreement with the adjoining owners.

A portion of the unnumbered plot immediately east of the Vose residence, shown on said map, was purchased by the Orange Lawn Tennis Club, and used for many years, occupied by tennis courts. In the year 1916 said club moved to other grounds, and said plot was purchased by a syndicate of neighboring owners, and has been sold by said syndicate in plots, each restricted to dwelling purposes and as to the number and character of buildings that can be erected thereon.

The two northerly plots in the block bounded by Scotland Road, Randolph Place and Montrose Avenue (map filed in 1869) were sold, each restricted to one house. They subsequently came

into one ownership and an agreement was entered into in the year between the owner of said two plots and neighboring owners whereby the latter gave consent to the subdivision of said two plots into plots and said owners agreed to restrict each of said plots to the erection of one dwelling house of a specified character.

16. The agreement respecting lot on the northeast corner of Scotland Road and Ralston Avenue, which was recorded in liber C 26, page 227, as mentioned in Section Fourteen of this stipulation, was joined in by Theodore H. Freeland, who was the predecessor in title of the plaintiff.

17. It is admitted that the defendant Lenart, before purchasing property owned by him, employed the firm of Hose & Davis, of Orange, N. J., his solicitors, to examine the title, and that he was told by them, as a result of their search and of their knowledge of the neighborhood, that the premises had been restricted by John G. Vose in his conveyance to DeGomme, as set forth in the bill of complaint, in the deed to DeGomme; that the restrictions had been later modified by the agreement between DeGomme and Vose, set forth in the answer of the defendant Lenart, although this agreement was not acknowledged nor properly recorded, and that, as a result of the violations of the restrictions and the changes in the character of the neighborhood, the restriction to one dwelling house was no longer effective. That the defendant Lenart is planning to build two houses on his tract, each house to be on a lot of 100 feet fronting on Charlton Avenue and each house to have an appropriate garage as the only out-building and the defendant Lentz one house

on the 100-foot front lot owned by him; that the houses are to cost in the neighborhood of $25,000 and upwards, and are to be of a character in keeping with the residences in the neighborhood as to expense and style. That the defendant Lenart, after the commencement of this action, through his solicitors, informed the complainant, through his solicitor, that such was his intention, and further, that he was willing to enter into mutual restrictions with the complainant and others in the neighborhood which, in his opinion, were suited to the present-day conditions, and would be intended to insure the maintenance of the premises in question and neighboring premises as a high-class residential section. That the complainant, since the commencement of this action, through his solicitor, has offered to agree with the defendant Lenart and the defendant Lentz that two houses may be erected on the 300-foot tract, covered by the conveyance to De Gomme, instead of one. That the defendant Lentz, prior to his purchase of the premises owned by him, employed his solicitors, Hopkins & Herr, of Hoboken, N. J., to search the title of the premises to be purchased, and that, as a result of their examination of the title and the conditions surrounding the premises, advised him in substantially the same manner as stated above in the case of the advice given to Lenart by his solicitors.

18. It is further admitted that the map prepared by Ira T. Redfern & Bro., the Town Engineer of the Village of South Orange, and offered in evidence, represents the present property lines of the property in the vicinity of the premises in question shown in black, with the residences shown on said properties in black circle, and the property lines of the conveyances out of Vose

shown in colored crayon, with the date of conveyance and the restriction imposed by the deed from Vose, as to number of dwellings allowed. These and the other maps referred to herein are furnished for the convenience of the Court, as a graphic representation of the conditions shown by the records and actual building.

19. It is further stipulated that, subject to the consent of the court, this matter shall be submitted on brief; that the complainant shall have three weeks from the date of hearing to file his brief, and shall, within that time, serve a copy of the same to the solicitors for the defendants, and that the defendants shall have two weeks thereafter within which to file their briefs, and that the complainant shall then have one week within which to file his reply, if he so desires.

OSBORNE, CORNISH & SCHECK,
Solicitors and of counsel for
Defendant Andrew Lenart.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors and of counsel for
Complainant.

HOPKINS & HERR,
Solicitors and of counsel for
Defendant William G. Lentz.

EXHIBIT A.

Bill filed June 12, 1914
Decree filed May 15, 1915
Docket No. 38—227
Enrolled V—53—316
Solicitor Francis Lafferty

Stipulation on Facts.

Between

William H. Turrell,
Elise T. Underhill,
Helen E. W. Pearson,
Complts.

and

Carrie A. Dormitzer, Dismissed
Elizabeth Mooney,
Bridget Mooney,
Frank H. Winants,
Benjamin M. Lummis,
John M. Lummis,
Harriet Lummis,
William Lummis,
Graham Scott, Dismissed
Farmers Loan & Trust Co.
Mary Adelaide Morris,
Marguerite T. Doane,
Russell Marston,
Constance Turrell Marston,
Florence S. Fraser
The Security Savings Bank of
The City of Newark, Dismissed
Mary Reichle,
William John Gardner Dismissed
Roberta C. Gardner Dismissed
Trinity Presbyterian Church of
South Orange
Mutual Benefit Life Insurance Co.
William H. Tweddell, Trustee,
Village of South Orange
Henry P. Kirby
The Half-Dime Savings Bank,
Adrian D. Tichenor,
Laurance Tweedy,

Maud F. Gibby,
Bertha E. Feick, Extx.
Eleventh Ward B. & L. Assn. of Newark
Helen B. Gibby
Kate R. Durbrow Dismissed
John F. Fort Dismissed
Josephine Gray Jewett,
Jessie E. Starke
Ernestine Hahn,
Western Slope Association,
Addie F. B. O'Connor
Walter F. Brush
Frederick Pring Dismissed
Orange Savings Bank,
Wallace M. Sinclair, Dismissed
Robert S. Sinclair, Dismissed
Arthur B. Leach Dismissed
John R. Hardin, Tr. Dismissed
Alfred F. Skinner, Tr. Dismissed
Harriet T. Willis
Orange Lawn Tennis Club
Charles F. Watson, Tr.
Kenneth B. Gordon, Tr.
Arthur B. Holden
Sarah H. Holden Dismissed
Savings Investment & Trust Co.
of East Orange,
William A. Barstow,
Lois B. Barstow,
John S. Norton,
John L. Rankin
Mary Langdon Rankin
Franklin Savings Institution
Alfred B. Tacher, Dismissed
Defendants.

Stipulation on Facts.

PREMISES

Situate in Village of South Orange, County of Essex, and State of New Jersey.

BEGINNING at a point in the Southwesterly line of Turrell Avenue at the Easterly corner of lands now or formerly of Jessie E. Starke, which beginning point is five hundred feet Southeasterly from the Southeasterly line of Charlton Avenue, thence running (1) Southeasterly along the said line of Turrell Ave to the Northerly line of Grove Road; thence (2) Westerly and Southwesterly as the said Grove Road runs to the Southerly corner of lands now belonging to Caroline E. Kirby; thence (3) along the Easterly line of her lands North thirty-one degrees four minutes East two hundred feet; thence (4) still along her lands North fifty-seven degrees fifteen minutes West seventy-five feet to lands now or lately belonging to Adrian D. Tichenor; thence (5) along the Southeasterly line of said Tichenor's land North thirty-five degrees thirty-eight minutes East thirty feet more or less to the Southwesterly line of said Starke's land; thence (6) along the line of said Starke's land South fifty-five degrees twenty-four minutes East eight feet and sixty hundedths of a foot to the Southerly corner of said Starke's land; thence (7) along the Southeasterly line of said Starke's land North thirty-eight degrees and forty-five minutes East two hundred sixteen feet and thirty-five one-hundredths of a foot to said line of Turrell Avenue and place of BEGINNING.

Bill to Quiet Title
Filed June 12, 1914

It appears by the bill filed herein that the

complts are in peaceable possession of and the owners in fee simple of the above described lands.

That complts. acquired title to same under the will of George B. Turrell, dated May 14, 1894, probated Essex County, April 10, 1905 in Book S-3 of Wills, page 258.

George B. Turrell acquired title from William H. Turrell and Minnie L., his wife, by deed dated April 7, 1893, recorded in Book N-27, p. 415. That said deed contained no restrictions as to the use of the premises or as to the manner in which same should be used.

Title to said premises was derived by mesne conveyances from one John G. Vose.

The deed from said John G. Vose to Louis L. Coudert conveying the above lands which deed is dated October 22, 1868, and was recorded in Book C-14, p. 343, contained restrictions as to the use of said lands and the right of others to enforce such restrictions as follows:

"And the said party of the second part for himself, his heirs and assigns, doth hereby covenant to and with the said party of the first part, his heirs, executors, administrators and assigns, that the said premises hereinbefore described shall not at any time hereafter be used or occupied for the erection or maintenance of any slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory or any manufactory of gun powder, glue, varnish, vitriol, ink, soap, candles, starch or turpentine, or for the tanning, dressing or

preparing of skins, hides or leather, or for any brewery, distillery, laboratory, livery stable, race course, theatre, circus or place for the exhibition of wild animals, or gymnastic feats, cabinet makers, or carpenter shops, hat shop, bar room, lager beer saloon or any other erection known as nuisances, or any other noxious or dangerous trade, business or establishment, or for any other purpose whatsoever which can or may be unwholsome or offensive to the neighboring inhabitants, or for the erection of any buildings of any kind or description excepting one dwelling house with appropriate gardeners cottages, porters lodges, private billiard rooms or private bowling alleys, private gas works, arbors, well houses, summer houses, ice houses, tool houses, barns, stables, carriage houses, reservoirs, ornamental lakes, water works, sheds, hennerys, cow houses, piggeries, and other buildings and office appropriate for a gentlemen's country residence. It being expressly understood, covenanted and agreed by and on behalf of the said party of the second part, his heirs, executors, administrators and assigns, that the covenant aforesaid shall be attached to the said premises and run with the land and shall be inserted in any and all future conveyances and mortgages and other instruments whereby the title of the said land can or may be transferred or affected and that the said covenant shall forever hereafter be recognized, sustained and upheld, and that it shall be lawful not only for the said party of the first part, their legal representatives,

or assigns, but also for the owner or owners of any of the property mentioned in the deeds hereinbefore recited, to institute and prosecute any suit, proceeding or injunction at law or in equity against any person or persons violating or threatening or attempting to violate the covenant and agreement aforesaid. It being understood that the covenant and agreement aforesaid is not to be enforced personally against the said party of the second part, his heirs or assigns unless he or they shall be the owner or owners of the premises herein described at the time or times when any violation of the said covenant or agreement, shall or may be made, committed, threatened or attempted."

That the above lands were conveyed to John G. Vose by the following deeds:

Book F-12 p. 261; Book
Book N-12 p. 428;
Book Z-12 p. 431;
Book B-13 p. 240;
Book B-13 p. 411;
Book A-13 p. 544;
Book D-13 p. 256;
Book D-13 p. 265;
Book E-13 p. 318;
Deed Dated Sept. 28th, 1866; (No Record)

That the lands conveyed to complts. predecessor in title, comprise about 210 acres.

No uniformity of restriction was followed and therefore the restrictions, if enforceable at all, cannot be enforced by anyone who or whose prede-

cessor in title, acquired title, prior to the record of deed from Vose to orators, predecessor in title, Nov. 7, 1868.

That the defts. herein named have permitted without objection, violations of the restriction in the deeds from said Vose, so far as limiting the number of buildings to be erected on certain parts of the above described land.

That the restrictions inserted in the deed to complts. predecessor in title restrict the use of said lands to the erection of one house thereon, but complts. charge that said restrictions have been violated.

That the character of the land has so changed that it is impossible to use the lands in accordance with the attempted restrictions heretofore imposed.

That the only persons who or whose predecessor in title acquired lands from said Vose within 2000 feet of complts lands are made partiesdeft. That all persons who acquired title from said Vose at a greater distance than 2000 feet from complts land could not be injured or damaged by any violation of the aforementioned restrictions. That no suit is pending to enforce the validity of the covenants etc. contained in the deed from Vose to Caudert, complts predecessor in title.

Prayer for answer.

Prayer for subpoena, directed to the above named defendants.

That said defendants set forth and specify their claim etc., in such covenants or restrictions as hereinbefore recited.

That by the determination of this court the rights of all parties to this suit may be fixed and settled.

That complainants may be decreed to have a perfect title to the above lands free from all restrictions as above recited.

The bill is signed Francis Lafferty, Solr and Counsel.

Stipulation on Facts.

Subpas-ad-resp Tested June 19, Sept. 3, 1914 Ret'ble July 3, Sept. 12, 1914 Duly served and returned non resident. (See Page 1)

Decree Pro Con Filed Nov. 4, 1914 Bill taken as confessed as aaginst certain defts. (See Page 1)

Order of Publication Filed Jan. 30, 1915 Ret'ble April 2, 1915 Directed to non resident defts (Usual Form)

Decree Pro Confesso Filed May 3, 1915
Bill taken as confessed against certain defts.

Proofs, publication and Mailing
Filed May 3, 1915.

Duly published,
Notices mailed to non resident defts.

Order Dismissing Certain Defts.
Filed May 12, 1915.

(See Page 1)

Final Decree
Filed May 15, 1915

Ordered that the Chancellor by the virtue of the power and authority of this court, decrees that the restriction contained in the deed from John G. Vose to Louis L. Coudert, bearing date the 22nd day of October, Eighteen hundred and Sixty-eight in Book C 14 of Deeds for said County, pages 343-346, which deed conveyed the premises described in paragraph 1 of the Complainant's Bill of complaint, is void in so far as it purports to limit the number of dwelling houses to be erected upon said premises, and that said defendants and each of them have no right

to enforce said restrictions against the present or any subsequent owner of said lands or any part thereof.

Costs $156.60
Filed May 18, 1915

10

.....

I have examined the foregoing proceedings and report the same regular in form.

Charles Jones

EXHIBIT B.

AGREEMENT made this 18th day of December, Nineteen hundred and fourteen, between JOHN
20 R, HARDIN and ALFRED SKINNER (as Trustees under the Will of J. Newton Van Ness, deceased, JOHN F. FORT, FREDERICK PRING, WALLACE M. SINCLAIR, ROBERT S. SINCLAIR, ARTHUR B. LEACH, ALFRED B. THACHER, ADDIE F. B. O'CONNOR, WALTER F. BRUSH, ERNESTINE HAHN, KATE R. DURBROW, KENNETH B. GORDON, MAUD F. GIBBY, GRAHAM SCOTT, SECURITY SAVINGS BANK, CARRIE A. DORMITZER,
30 SARAH H. HOLDEN, WILLIAM JOHN GARDNER and ROBERTA C. GARDNER, herein called First Parties; and WILLIAM H. TURRELL, ELISE T. UNDERHILL and HELEN E. W. PEARSON, herein called Second Parties; and WILLIAM H. TURRELL, EDGAR T. WEED and HARVEY I. UNDERHILL, executors under the will of George B. Turrell, deceased, herein called Third Parties:

WHEREAS, John G. Vose, and wife, conveyed
40 to Louis L. Coudert, by deed dated the twenty-

second day of October, Eighteen hundred and sixty-eight, and recorded in the Register's Office of the County of Essex, State of New Jersey, in Book C-14 of Deeds for Said County, at page 343, lands in the Village of South Orange, County of Essex and State of New Jersey, therein described as

> "Commencing at the northeasterly corner of the land of George B. Turrell, the division line between his land and land of Charles Coudert, and running thence in continuance of the said division line and along the southerly line of land coveyed to said Charles Coudert by the parties of the first part by deed dated 22nd of December, 1866, south 54 degrees twenty minutes east 554.7 feet to the center line of Grove Road; thence along the center line of said Road in a winding course as the same runs 810 feet to a point where the center line of Raymond Avenue is intersected by a continuation of the westerly line of the said Grove Road; and thence north 35 degrees 38 minutes east and partly along the easterly line of the land of the said George B. Turrell 521.1 feet to the point or place of beginning; containing 4.369 acres of land, including one-half of Grove Road."

and

WHEREAS, said deed contained covenants restricting the use of said land and the erection or maintenance of buildings or structures thereon, and provided that said covenants should be enforcible by the owner or owners of any of the lands which were conveyed to said John G. Vose by cer-

tain deeds specified in said deed of Vose to Coudert; and

WHEREAS, George B. Turrell, as the successor in title to said Coudert under said deed of Vose to Coudert, became the owner of said land above described; and by the death of said George B. Turrell and by his last will the title to said land was vested in Second Parties, excepting a parcel thereof at the southwesterly corner thereof which was conveyed by said George B. Turrell and his wife to Henry P. Kirby by deed dated June 1, 1895, and recorded in said Register's Office in Book Z-28, at page 398, and excepting such rights or title in or to the portion thereof included in Turrell Avenue as were taken by or in connection with the opening of said avenue, but by said will of George B. Turrell a power to sell said lands was given to Third Parties; and

WHEREAS, the First Parties respectively own lands or interests in lands which were part of the lands conveyed to said John G. Vose by the deeds specified as above stated in the above mentioned deed of Vose to Coudert; and

WHEREAS, Second Parties desire to subdivide their said lands into seven lots as shown on the diagram hereto annexed and made part hereof and signed for identification by said William H. Turrell and said John R. Hardin; and

WHEREAS, the Second and Third Parties have requested the First Parties to consent and agree as hereinafter provided, and said First Parties are willing so to consent and agree on condition that the Second and Third Parties execute the covenants and agreements on their parts hereinafter contained.

Stipulation on Facts.

NOW, THEREFORE, in consideration of the premises and of the provisions hereof, and of One Dollar to each of them paid, receipt whereof is hereby acknowledged, the parties hereto agree and provide as follows:

(1) The First Parties respectively consent that the said lands of the Second Parties to be subdivided into seven lots, as shown on said diagram hereto annexed and that (subject to the restrictions specified in the covenants of the Second Parties hereinafter contained) there may be one dwelling house, with appropriate out-buildings, whether already or hereafter built, on said lot sold by said George B. Turrell to Kirby, and on each of said seven lots, and said First Parties respectively for themselves and their respective heirs, successors and assigns, agree with the Second and Third Parties and their heirs, successors and assigns, that so far as the respective rights of said First Parties are concerned said restrictive covenants in said deed from Vose to Coudert be and they hereby are modified so that there may be one such dwelling house and such out-buildings on each such lot.

(2) The Second Parties, for themselves, their heirs, successors and assigns, covenant to and with the respective First Parties, their heirs, successors and assign, as follows: No building or part of building shall at any time be built, maintained or permitted on any one of said seven lots shown on said annexed diagram other than one dwelling house of the character hereinafter specified and the out-buildings appropriate thereto. No such dwelling house shall be built, maintained or permitted whose cost of erection (including the fixtures thereto annexed, but not including the out-

buildings) is less than $7,500, or which is not an entirely separate building, or which is a hotel, apartment house, or so-called two family house or house constructed to accommodate separately two or more families. This covenant of the Second Parties shall run with the land, binding the said lands of the said Second Parties and the successive owners thereof, in favor, respectively, of all lands in said Village of South Orange of the respective First Parties, the title to which is derived from said John G. Vose, and in favor of the successive owners of said lands. This covenant is not to be enforced individually against any one who is not at the time of a breach or threatened breach thereof the owner or one of the owners of the lot or of an interest in the lot with respect to which the breach is made and threatened.

(3) The Third Parties consent to the foregoing covenant of the Second Parties, and the Second and Third Parties, for themselves, their heirs, successors and assigns, hereby covenant to and with the respective First Parties, their heirs, successors and assigns, that any conveyance, contract of sale, or other instrument made by them or any of them, affecting any of said lands of the Second Parties, shall expressly refer to the foregoing covenant of the Second Parties and be expressly subject thereto.

(4) Except as herein provided, the said covenants contained in said deed from Vose to Coudert shall remain in full force.

IN WITNESS WHEREOF, the parties hereto have to this instrument (executed in duplicate) set their hands and seals the day and year first hereinabove written.

JOHN R. HARDIN (S)
ALFRED F. SKINNER (S)
Trustees under the Will of
J. Newton Van Ness, Dec'd
Mtgees.

Witness as to
Alfred N. Thacher
Robert S. Sinclair
A. B. Leach
Andrew M. Underhill

JOHN FRANKLIN FORT (S)
ALFRED B. THACHER (S)
ROBERT S. SINCLAIR (S)
A. B. LEACH (S)

Witness as to
Frederick Pring
Carrie A. Dormitzer
Roberta C. Gardner
Wm. J. Gardner
George B. Turrell

FREDERICK PRING (S)
CARRIE A. DORMITZER (S)
ROBERTA C. GARDNER (S)
WM. J. GARDNER (S)
KATE R. DURBROW (S)
MAUD F. GIBBY (S)
WALLACE M. SINCLAIR (S)
GRAHAM SCOTT (S)
SARAH H. HOLDEN (S)

(Seal of Bank)
ATTEST
J. W. PLUME
Secty

SECURITY SAVINGS BANK
per John A. Gifford,
president

ELISE T. UNDERHILL (S)
WILLIAM H. TURRELL (S)
HELEN E. WEED PEARSON (S)
WILLIAM H. TURRELL, Exec. (S)
EDGAR F. WEED (Execr.) (S)
HARVEL I. UNDERHILL, Exec. (S)

Stipulation.

(Filed February 21, 1923.)

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants,

consolidated with case of

RUSSELL MARSTON,
Complainant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants.

On Bill, etc.

It is hereby stipulated between complainant Lentz and defendants Lenart and Munther that the facts set forth below are, for the purposes of this cause, admitted to be true, and that the statement of facts so set forth, shall be offered and received in evidence in the trial of the cause without objection (subject, however, to the motion of defendants Lenart and Munther to dismiss the bill), as sufficient proof of every fact contained in said statement, with leave, however, to each of the parties to introduce such other evidence as he may wish. The admitted facts are as follows:

The complainant, William G. Lentz, contracted with John D. Munther, on or about the 11th day of April, 1922, for the purchase of the premises

mentioned in the bill of complaint (a copy of said contract is attached hereto as "Exhibit A").

In pursuance of the agreement, the premises were conveyed by the said Munther to the said Lentz by deed dated May 1, 1922, and recorded May 2, 1922, in Book Q 66 of Deeds for Essex County, page 120. (An abstract of said deed, setting forth the parts thereof appurtenant to this cause, is attached hereto and marked "Exhibit B.")

Thereafter, by deed dated September 15, 1922, and recorded in the Essex County Register's Office on September 20, 1922, in Book C 67 of Deeds, pages 3 and 4, the said John D. Munther conveyed to Andrew Lenart the remaining portion of the premises purchased by De Gomme from Vose, as set forth in the bill of complaint in the cause of *Marston* v. *Lentz et als.* (An abstract of the said deed containing the portions appurtenant to this cause is attached hereto as "Exhibit C.")

No building was commenced on any portion of the said premises so conveyed to De Gomme until after November 1, 1922, and until after the bill of complaint was filed in this cause.

HOPKINS & HERR,
Solicitors of Complainant.

OSBORNE, CORNISH & SCHECK,
Solicitors of Defendant Andrew Lenart.

OSBORNE, CORNISH & SCHECK,
Solicitors of Defendant John D. Munther.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors of Defendant Russell Marston.

Exhibit A, Annexed to Stipulation.

EXHIBIT A.

ARTICLES OF AGREEMENT made and entered into this eleventh day of April, Nineteen Hundred and Twenty-two, between JOHN D. MUNTHER, of the Village of South Orange, County of Essex and State of New Jersey, party of the first part and WILLIAM G. LENTZ, of the Village of South Orange, County of Essex and State of New Jersey, party of the second part, in manner following:

The said party of the first part, in consideration of the sum of Five Hundred Dollars, to him duly paid on or before the ensealing and delivery of these presents, hereby agrees to sell unto the said party of the second part, his heirs and assigns, all that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Village of South Orange in the County of Essex and State of New Jersey, beginning in the southerly line of Raymond Avenue South fifty-seven degrees fifteen minutes East eight hundred and thirteen and eight tenths (S. 57 degrees 15 minutes E. 813.8) feet from the easterly line of Scotland Road, thence South thirty-two degrees forty-five minutes West two hundred (S. 32 degrees 45 minutes W. 200) feet to the point or place of beginning, and from said beginning point running thence South thirty-two degrees forty-five minutes West one hundred (S. 32 degrees 45 minutes W. 100) feet to a point; thence South fifty-seven degrees fifteen minutes East one hundred forty-five and two tenths (S. 57 degrees 15 minutes E. 145.2) feet to Charlton Avenue; thence along Charlton Avenue North thirty-two degrees forty-five minutes East one hundred (N. 32 degrees 45 minutes E. 100) feet; thence North fifty-

seven degrees fifteen minutes West one hundred forty-five and two tenths (N. 57 degrees 15 minutes W. 145.2) feet to the point or place of beginning; together with all the right, title and interest of the party of the first part in the Road or Avenue lying in front of and adjacent to the premises above described; for the sum of Eight Thousand Dollars, which the said party of the second part agrees to pay to the said party of the first part as follows:

Five Hundred Dollars is paid on delivery of this agreement, being the consideration above mentioned,.....	$ 500.00
Seventy-five Hundred Dollars is to be paid in lawful money of the United States on the first day of May, Nineteen Hundred and Twenty-two, at ten o'clock in the forenoon, at the office of Smith, Mabon & Herr, Counsellors at Law, 51 Newark Street, Hoboken, New Jersey, at which time and place the deed hereinafter mentioned shall be delivered.	7,500.00
	$8,000.00

And the said party of the first part, on receiving such payments at the time and in the manner above mentioned, shall at his own proper cost and expense, execute, acknowledge, stamp and deliver to the said party of the second part, or to his heirs or assigns, a proper deed for the conveying and assuring to him or them the fee simple of the said premises free from all encumbrances except as hereinafter stated, which deed shall be the usual New Jersey full covenant and warranty deed

and which said deed shall contain the following covenants by the party of the second part, viz:

Not to erect upon the said premises any building nearer than thirty-eight (38) feet from the line of the flagstones as now laid forming the sidewalk of Charlton Avenue nearest the above described premises and said building must face Charlton Avenue; that any garage erected upon said premises shall be located within a square fifty by fifty (50x50) feet in the northwesterly corner thereof.

The premises above described are part of a certain tract of land conveyed by Samuel F. Wilson, Sheriff of the County of Essex to the party of the first part hereto by deed dated May 23, 1921 and recorded in Book G 65 of Deeds for Essex County, page 335 etc., which are described as follows:

Beginning in the southerly line of Raymond Avenue south fifty-seven degrees fifteen minutes east eight hundred thirteen and eight tenths (S. 57 degrees 15 minutes E. 813.8) feet from the easterly line of Scotland Road; thence along said southerly line of said avenue South fifty-seven degrees fifteen minutes east one hundred forty-five and two tenths (S. 57 degrees 15 minutes E. 145.2) feet to other land now or formerly belonging to John C. Vose; thence at right angles to said Raymond Avenue South thirty-two degrees forty-five minutes West three hundred (S. 32 degrees 45 minutes W. 300) feet to the northerly line of land conveyed by John G. Vose and wife to George E. Brewer May 14, 1867; thence along the same North fifty-seven degrees fifteen minutes West one hundred forty-five and two tenths (N. 57 degrees 15 minutes W. 145.2) feet to the easterly line of land conveyed by John G. Vose to Henry M.

Matthews July 28, 1868; thence along the same North thirty-two degrees forty-five minutes East three hundred (N. 32 degrees 45 minutes E. 300) feet to the place of beginning.

And the party of the first part hereto covenants and agrees to and with the party of the second part hereto that the balance or remainder of said lands shall be restricted by the party of the first part as follows:

That the party of the first part hereto will subdivide said tract into two plots with a frontage of one hundred (100) feet each, on Charlton Avenue; that no more than one dwelling house shall be erected upon each of said plots; that no more than one garage shall be erected on each of said plots and that any garage erected thereon shall be located within a square fifty by fifty (50x50) feet feet in the southwesterly corner thereof; that any dwelling erected on said plots shall face Charlton Avenue and shall not be nearer than thirty-eight (38) feet from the line of the flagstones as now laid forming the sidewalk of Charlton Avenue nearest the said property; that the erection of no building shall be commenced on either of said plots until after November 1, 1922.

In the event that the party of the first part hereto or his grantees or assigns shall desire to erect any building upon the tract of land retained by him as above described before November 1, 1922, then in that event the party of the second part hereto agrees to release the party of the first part hereto from said covenant upon the party of the first part hereto furnishing to the party of the second part hereto a satisfactory bond in the penal sum of Five Thousand Dollars, conditioned for the payment of any damages, costs and expenses which

may be caused to the party of the second part hereto by reason of being held up in the construction of his house by an injunction or other legal proceedings by any of the owners of any other property in the same vicinity who may assert old restrictions to prevent the erection of said building, and in and about the defense of any such suit.

Taxes to be adjusted as of the time of passing title.

The party of the first part hereto further covenants and agrees to and with the party of the second part hereto that each of the foregoing covenants is of the essence of this agreement, and that in the event that said covenants, or any of them shall be broken, or in the event that the title to the premises as above described shall be defective, or the party of the first part hereto shall refuse to convey said premises, that then in either of such events, the party of the second part hereto may rescind this contract, and in such event, the party of the first part hereto will repay to the party of the second part hereto the aforesaid deposit of Five Hundred Dollars and also the reasonable expenses of examining title, making survey, cost of plans, and architect's fees, expended, or for which he may be liable.

The above premises are to the conveyed subject to the restrictions, so far as the same are now effective, contained in the deed from John G. Vose and wife to Charles de Gomme, recorded in the Essex County Register's Office in Book 213 (Z13) page 539, as the same are modified by the agreement between John G. Vose and Charles de Gomme, dated May 5, 1873, and recorded in the Essex County Register's Office in Book of Miscellaneous F, pages 49, etc.

Exhibit A, Annexed to Stipulation.

It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties, and the grantees of the party of the first part.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered; in the presence of

HENRY PLATE.

JOHN D. MUNTHER, L.S.
WILLIAM G. LENTZ, L.S.

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

BE IT REMEMBERED, that on this eleventh day of April, Nineteen Hundred and Twenty-two, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared John D. Munther and William G. Lentz, who I am satisfied are the persons mentioned in and who executed the foregoing instrument, and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

HENRY PLATE,
Master in Chancery of New Jersey.

Exhibit B, Annexed to Stipulation.

EXHIBIT B.

JOHN D. MUNTHER, unmarried, to WILLIAM G. LENTZ.	Deed.	
	Dated:	May 1, 1922.
	Ack:	May 1, 1922.
	Rec:	Essex Co. Register's office, May 2, 1922, Book Q66 of Deeds, Pages 120 and 121.
	Cons:	$1.00 and other valuable consideration.
	U. S. Revenue stamps	$8.00.

All that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Village of South Orange, in the County of Essex and State of New Jersey.

BEGINNING at a point in the westerly line of Charlton Avenue distant southerly measured along the same two hundred (200) feet from the intersection of said line with the southerly line of Raymond Avenue; thence parallel with Raymond Avenue north fifty-seven degrees fifteen minutes West one hundred forty-five feet and two-tenths of a foot (145.2) to the westerly line of a lot conveyed by John G. Vose and wife to Charles de Gomme by deed dated September 19, 1868, and recorded in the Essex County Register's Office in Book Z13 of Deeds, pages 539, etc., the point of intersection with said line being two hundred (200) feet distant on a course of South thirty-two degrees forty-five minutes West from the beginning point in said deed Vose to de Gomme; thence along the westerly boundary of that lot South thirty-two

degrees forty-five minutes west one hundred (100) feet to the southwesterly corner of the same; thence along the southerly boundary of the same south fifty-seven degrees fifteen minutes east one hundred forty-five feet and two tenths of a foot (145.2) to the westerly line of Charlton Avenue aforesaid; thence along the same north thirty-two degrees forty-five minutes east one hundred (100) feet to the place of BEGINNING; together with all the right, title and interest of the party of the first part in and to Charlton Avenue adjoining said premises.

Being the southerly one hundred feet of the premises conveyed to the party of the first part herein by deed of Samuel F. Wilson, Sheriff, dated May 23, 1921, and recorded in Essex County Register's Office in Book G 65 of Deeds, pages 335, etc.

These premises are conveyed subject to the restrictions contained in the deed from John G. Vose to Charles de Gomme referred to above, as the same are modified by an agreement between said Vose and said de Gomme, dated May 5, 1873, and recorded in said Register's Office in Book F of Miscellaneous on page 49, in so far as the said restrictions are now in force.

And the party of the second part covenants with the party of the first part, as part of the consideration for this conveyance, not to erect upon the said premises any building nearer than thirty-eight (38) feet to the line of the flagstones as now laid forming the sidewalk of Charlton Avenue nearest the above described premises and said building must face Charlton Avenue; that any garage erected upon said premises shall be located within a square fifty by fifty (50x50) feet in the northwesterly corner thereof.

Exhibit B, Annexed to Stipulation.

And the party of the first part hereto covenants and agrees to and with the party of the second part hereto that the balance or remainder of said lands conveyed by Wilson, Sheriff, as aforesaid, shall be restricted by the party of the first part as follows:

That the party of the first part hereto will subdivide said tract into two plots with a frontage of one hundred (100) feet each, on Charlton Avenue; that no more than one dwelling house shall be erected upon each of said plots; that no more than one garage shall be erected on each of said plots; and that any garage erected thereon shall be located within a square fifty by fifty (50x50) feet in the southwesterly corner thereof; that any dwelling erected on said plots shall face Charlton Avenue and shall not be nearer than thirty-eight (38) feet to the line of the flagstones as now laid forming the sidewalk of Charlton Avenue nearest the said property; that the erection of no building shall be commenced on either of said plots until after November 1, 1922 without the consent of the party of the second part.

Properly signed, sealed and acknowledged before Henry Plate, Master in Chancery.

Exhibit C, Annexed to Stipulation.

EXHIBIT C.

WARRANTY DEED.

JOHN D. MUNTHER,	Dated,	Sept.	15,	1922.
unmarried,	Ack'd.	"	"	"
to	Rec'd.	"	20,	"
ANDREW LENART.	Cons.	$1. *et al.*		

Grant and Hab. in fee

Conveys premises in Village of South Orange.

BEGINNING at a point in the Southerly line of Raymond Avenue, South fifty-seven degrees (57) fifteen minutes (15) East eight hundred and thirteen feet and eight-tenths of a foot (813.8) from the Easterly line of Scotland Road; thence along said Southerly line of said Avenue South Fifty-seven degrees (57) fifteen minutes (15′) east one hundred and forty-five feet and two tenths of a foot (145.2) to the Westerly line of Charlton Avenue; thence along the same South thirty-two degrees (32) forty-five minutes (45′) West two hundred (200) feet to the Northerly line of the land recently conveyed by the said John D. Munther to William G. Lentz; thence along the said northerly line of the said Lentz' land North fifty-seven degrees (57) fifteen minutes (15′) West one hundred and forty-five feet and two tenths of a foot (145.2); and thence North thirty-two degrees forty-five minutes (32 deg. 45′) East two hundred feet (200) to the place of BEGINNING.

Recites: Being part of the land conveyed to the said John D. Munther by Samuel F. Wilson, Sheriff of the County of Essex by deed dated May 23d, 1921, and recorded in Book G 65 of Deeds for Essex County, page 335.

Exhibit C, Annexed to Stipulation.

Recites: And the said party of the second part, for himself, his heirs and assigns, doth covenant and agree to and with the said John D. Munther, his heirs, executors, administrators and assigns, as follows: that he will subdivide the said premises into two plots, each having a frontage on Charlton Avenue of one hundred (100) feet; that not more than one dwelling house shall be erected upon each of said plots; that each of said dwellings shall face Charlton Avenue, and shall not be nearer than thirty-eight (38) feet from the line of the flag stones as now laid, forming the sidewalk of Charlton Avenue, nearest the said property, that no more than one garage shall be erected on each of said plots and that any garage so erected shall be located within a square 50x50 feet in the southwesterly corner thereof; that no erection of any building on said premises shall be commenced until after November 1, 1922.

Recites: The said premises are conveyed also subject to the restrictions, so far as the same are now effective, contained in the deed from John G. Vose and wife to Charles de Gomme, recorded in Essex County Register's Office in Book Z13, page 539, as the same are modified by the agreement between John G. Vose and Charles de Gomme, dated May 5, 1873, and recorded in the Register's Office in Book F. Misc., page 49, etc.

Notice.

(Filed February 21, 1923)

IN CHANCERY OF NEW JERSEY.

Between RUSSELL MARSTON, Complainant, and WILLIAM G. LENTZ and ANDREW LENART, Defendants.	On Bill, etc.

TO WALL, HAIGHT, CAREY & HARTPENCE, ESQS., SOLICITORS for COMPLAINANT.

TAKE NOTICE, that at the time set for the trial of this cause, we shall apply to the Court for leave to amend the answer of Andrew Lenart, heretofore filed, in the following particulars:

First.—By striking out the following words on pages 9 and 10 of said answer:

> "Defendant charges, therefore, that the lands comprising the tract of 210 acres was not conveyed with any uniformity as to restrictions in the number of buildings and without any general plan or scheme other than to create a neighborhood of country estates with a frontage of a size as hereinbefore set forth; that such plan is no longer practicable, equitable or possible and cannot be carried out or performed in justice to the defendant, or any other property owner whose title has been acquired through

the said John G. Vose, or for whose benefit said restrictions as to number of dwellings were made.

Second.—By striking out the word "Northwest" in paragraph "d" on page 10 of said answer.

Respectfully yours,

OSBORNE, CORNISH & SCHECK
Solicitors and of Counsel
with Defendant, Andrew Lenart.

Dated February 8, 1923.

Order Consolidating Causes.

(Filed November 28, 1922)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM G. LENTZ,
Complainant,
and
ANDREW LENART, *et al.*,
Defendants.
} On Bill, etc.

This matter coming on to be heard on notice to the defendant, acknowledged by their respective solicitors and the bill of complaint herein having been amended by an order of even date herewith by setting forth that the defendant Russell Marston in furtherance of his claims mentioned in the tenth paragraph of said bill, did on or about the 13th day of November, 1922, file a bill of complaint in this Court agaist this complainant and the said

Andrew Lenart as defendants, more particularly setting forth and specifying his said claims and the grounds thereof.

IT IS THEREUPON on this 28th day of November, 1922, on motion of Hopkins & Herr, solicitors of complainant, and in the presence of Emanuel P. Scheck of the firm of Osborne, Cornish & Scheck, solicitors of the defendants, Andrew Lenart and John D. Munther, ORDERED that this cause be and the same is hereby consolidated with the suit instituted by the said Russell Marston as aforesaid, and that the bill of complaint herein stand as an answer by the said William G. Lentz to the said bill of complaint of the said Russell Marston and that the said suits as consolidated proceed under the caption and title of the said suit instituted by the said Russell Marston.

Respectfully advised,

E. R. WALKER, C.

John H. Backes, V. C.

Answer.

Filed December 15, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

RUSSELL MARSTON,
Complainant,

and

WILLIAM G. LENTZ,

and

ANDREW LENART,
Defendants.

On Bill, &c.

The answer of the defendant, Andrew Lenart.

This defendant, Andrew Lenart, answering the bill of complaint, says that:

1. He has no knowledge as to the truth of the allegations of paragraph 1 and 2 of the bill of complaint but believes them to be true.

2. Paragraphs 3 and 4 are admitted, but subject to correction as to description by production of the original deed of conveyance.

3. The statements and allegations of paragraph 6 are denied, except as hereinafter admitted.

4. Paragraphs 7, 8 and 9 are admitted, but subject to correction by production of the original deeds of conveyance, or the record thereof.

5. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 10.

6. Paragraph 11 is admitted.

7. The allegations of paragraph 12 are denied.

Further answering the bill of complaint, this defendant says:

8. That the premises set forth in paragraphs 3 and 4 of the bill of complaint were conveyed by John G. Vose to Charles de Gomme, as set forth in paragraph 7 in the bill of complaint; that the premises so conveyed were shown as the easterly portion of lot "S" on a map of Montrose, dated January 1, 1867, which map was filed in the office of the Register of Essex County. A copy of a portion of which map, showing the premises conveyed to the said de Gomme and the general scheme of division into lots of the portion of said map in the vicinity of the premises so conveyed to de Gomme, is attached hereto as Exhibit "A." That on said map the lots fronting on both sides of Ralston Avenue between Grove Road and Scotland Road, and on both sides of Raymond Avenue between Grove Road and Scotland Road, were numbered alphabetically; that Charlton Avenue is not shown on said map, nor was it then laid out; that the said map shows adjoining the easterly half of lot "S," on the east, lot "T" consisting of three and ninety hundredths acres (3.90), and in the rear of lot "T," fronting on Ralston Avenue, is lot "U" consisting of three and fifty-eight hundredths acres (3.58), and in the rear of the lot conveyed to de Gomme, fronting on Ralston Avenue, is lot "V" having a frontage of two hundred and fifty-three (253) feet on Ralston Avenue and depth of three hundred (300) feet; opposite lot "T," on Raymond Avenue, are lots "M" having an area of two acres and lot "L" having a frontage of approximately two hundred and eighty-six (286) feet on Ray-

mond Avenue and a depth of approximately three hundred (300) feet; that lot "N," fronting on Raymond Avenue and opposite the premises conveyed to de Gomme, has a frontage of two hundred and fifty-three feet and four hundredths of a foot (253.04) and a depth of three hundred and thirty-five (335) feet; that lots "O," "P," "Q," "R," the easterly half of "S" and lots "W," "X" and "A" and "B," fronting on Raymond Avenue and Ralston Avenue, were all in the block between Scotland Road and Grove Road and in the immediate vicinity of the premises conveyed to de Gomme, and were of the dimensions set forth on said map. And that the remaining portion of the said map, a copy of which is on file in the office of the Register of Essex County, and to which this defendant begs leave to refer when necessary for further particulars as to the contents thereof, shows lots of varying size, but each of such size as would be suited to the general purpose of a gentleman's country place at that time.

9. That the scheme of development, as shown on the map above referred to, was abandoned by the said John G. Vose subsequent to the conveyance of the said de Gomme, and prior to the conveyance by the said John G. Vose of the premises which the complainant now claims to own, and a new scheme of development was adopted by him, with the consent of the said de Gomme, by which a new street was laid out running from Ralston Avenue northerly over lots "U," "T," and "M' and adjoining the easterly side of lots "V," "S" and "N," and extending still northerly to Irving Avenue, which street is the street now known as

Charlton Avenue, and which was shown on a modified map of Montrose, which is dated May, 1873, and filed in the office of the Register of Essex County, November 8, 1873. That by the new scheme of development adopted by said Vose, and shown by said map, lots "T" and "U," above referred to, were cut up into lots fornting on Grove Road and on Charlton Avenue, each having a frontage of one hundred (100) feet; that lot "V," above referred to, was cut up into three lots—one of which adjoined the said premises of de Gomme, fronting on Charlton Avenue, and had a frontage of one hundred (100) feet; another portion of lot "V," on the corner of Charlton Avenue and Ralston Avenue, had a frontage of two hundred (200) feet on Charlton Avenue and one hundred and forty-five (145) feet on Ralston Avenue; and that another portion of lot "V" was set off into a lot having a frontage of one hundred and eight (108) feet on Ralston Avenue. Lots "L" and "M," being lots fronting on Raymond Avenue, opposite lot "T," were cut up into four lots—one, on the corner of Charlton Avenue and Raymond Avenue diagonally opposite the de Gomme premises, being a lot two hundred (200) feet on Raymond Avenue and two hundred and fifty (250) feet on Charlton Avenue—and the remaining lots on Raymond Avenue each having a frontage of ninety (90) feet; and that the premises conveyed to said de Gomme were shown on said map as three lots, each having a frontage on Raymond Avenue of one hundred (100) feet, and as a part of such new scheme of development, the said John G. Vose gave to the said Charles de Gomme, then owning the premises before referred to as having been conveyed to him, a modification of the restrictions,

which was dated May 5, 1873, and which read as follows:

"WHEREAS, in and by a certain conveyance made by John G. Vose to Charles de Gomme, dated September 19, 1868, and recorded in the Register's Office of the County of Essex, New Jersey, in Book Z13 of Deeds for said County on pages 539, 540, 541 and 542, the said grantee was among restrictions limited to the erection of only one dwelling house upon the whole plot of one acre of land and certain out-buildings as in said conveyance will more fully appear. And whereas Charles De Gomme, the grantee of the lot of land, has applied for the privilege of erecting more than one dwelling house upon the said lot, Know all men by these presents, that in consideration of the agreement hereby made by said grantee that all the dwelling houses and outbuildings which may be erected upon the said plot shall be such as are appropriate for a gentleman's country residence, the said grantor agrees that the limitation as to the number of dwelling houses so to be erected on the said plot shall be opened so as to permit the erection of three such houses and appurtenances. All the other covenants and restrictions in the said deed, excepting only as to the number of dwelling houses and appurtenances to remain in full force. Mr. De Gomme is to have access to Charlton Avenue.

In Witness whereof the parties have here-

unto set their hands and seals this fifth day of May, A. D. 1873.

JOHN G. VOSE, L.S.
CHARLES L. DE GOMME, L.S."

A copy of a portion of the last mentioned map, showing the lots fronting on Raymond Avenue and Ralston Avenue between Scotland Road and Grove Road, is attached hereto as "Exhibit B."

10. That the premises contained in lots "M," "L," "T," "U" and "V," as shown on the first mentioned map, were conveyed by said John G. Vose subsequent to the conveyance to de Gomme aforementioned, in accordance with the lay-out as shown on the second map. That that portion of the premises in lots "T" and "U" which fronted on the new street called Charlton Avenue, including the premises now claimed to be owned by the complainant, was sold by the said John G. Vose in lots having one hundred (100) feet front on Charlton Avenue, and the purchasers of the same purchased said lots with full knowledge of the modification of the scheme of development made by the said John G. Vose, namely, a change from a lot with one hundred and forty-five (145) feet front on Raymond Avenue to three lots having one hundred (100) feet front on Charlton Avenue. That any rights which the said John G. Vose had at the time of the conveyance to de Gomme, as aforesaid, by reason of the covenants in said conveyance to restrict the premises so conveyed to de Gomme to one dwelling house, were lost and abandoned by him by the abandonment of his scheme of restrictions in his original development and the adoption of his new scheme of develop-

ment, and that the purchaser of the said John G. Vose, of the premises now claimed to be owned by the complainant, and all subsequent owners took title with full knowledge of the same.

11. That the land described in the deeds referred to in the deed from the said John G. Vose to the said de Gomme comprised about two hundred and ten (210) acres in the Village of South Orange belonging to the said John G. Vose, and which he originally planned to develop so that the various tracts therein should be used only for the purpose of gentlemen's country residences, and that he did lay out the said premises into lots and plots suited to such purpose upon a map (being the first map above referred to) which he caused to be filed in the office of the Register of Essex County on November 3, 1869, a copy of which map is still on file in the said Register's office, and that the said Vose sold certain of the plots shown on said tract, but that thereafter, and after the sale of the premises to Charles de Gomme, as set forth in the seventh paragraph of the bill of complaint, he, the said John G. Vose, abandoned the original scheme of development and adopted a new scheme of development, in which the plots were divided differently and were smaller in extent, which new scheme of development was shown on a map of Montrose, filed by him in the Office of the Register of Essex County on November 3, 1873, (being the second map above referred to) a copy of which map is still on file in the Register's Office, and thereafter sold plots in accordance with the scheme of development shown on the second map. The premises shown on the original map, and on the second map, were sold—some being restricted with limitation as to time, some being restricted

without limitation as to time, and some being unrestricted. That the restrictions as to the land comprising the above mentioned tract of two hundred and ten (210) acres were made, as created in the conveyances by the said Vose, without any uniformity as to the number of buildings to be contained in the said plots, as is specifically shown by his conveyances for the following plots:

(a) The lot situate at the southeast corner of Scotland Street and Ralston Avenue being 267 feet front on Scotland Street by 714 feet on Ralston Avenue, without restrictions; (b) premises situate at the southwest corner of Grove Road fronting 629 feet on Ralston Avenue and extending along Grove Road to South Orange Avenue with restrictions limited as to time, which restrictions have since expired; (c) premises situate at the northeast corner of Ralston Avenue and Scotland Street having a frontage of 302 feet on Scotland Street and extending along Ralston Avenue 455 feet, with a restriction limiting the number of dwellings erected thereon to *one;* (d) the lot adjoining the last preceding lot on the North, being 303 feet on Scotland Street by 452 feet on Raymond Avenue was restricted to the erection of three dwellings therein; (e) the lot adjoining the second preceding lot, having a frontage of 145 feet on Ralston Avenue by a depth of 300 feet was restricted to one building; (f) the lot adjoining the last preceding lot having a frontage of 108 feet on Ralston Avenue and being 300 feet in depth was restricted to one building; (g) the lot adjoining the last described lot having a frontage of 253 feet on Ralston Avenue by a depth of 300 feet was restricted to two buildings for twenty-five years; (h) the lot at the southwest corner of Charlton and Raymond Ave-

nues, being 145 feet on Raymond Avenue by 300 feet in depth was restricted to the erection of one house thereon; (i) the adjoining lot on the West being 108 feet front by three hundred feet in depth was restricted to one house thereon; (j) the next adjoining lot on the West being 108 feet front by 300 feet in depth was restricted to one building thereon; (k) the next adjoining lot on the West being 145 feet front by 300 feet in depth was restricted to one building; (l) the lot at the Northeast corner of Scotland Road and Raymond Avenue, having a frontage of 350 feet on Scotland Road and a depth of 450 feet on Raymond Avenue was restricted to the erection of four dwellings therein; (m) the lot adjoining the last mentioned lot on the East, having a frontage of 253 feet on Raymond Avenue and a depth of 340 feet front was restricted to one dwelling; (n) the lot adjoining the last mentioned lot on the East, having a frontage of 253 feet and a depth of 340 feet was restricted to two dwellings; (o) the tract between Charlton Avenue, Raymond Avenue, Grove Road and Ralston Avenue was conveyed in 100 foot lots restricted each to one dwelling house; the property on the Northeast corner of Charlton and Raymond Avenues, being 250 feet on Charlton Avenue and 200 feet on Raymond Avenue, was restricted to one dwelling house; (p) a large tract in Block bounded by Turrill Avenue, Charlton Avenue, Grove Road and Irving Avenue, was conveyed without restrictions as to number of dwelling houses; (q) a large tract in the block bounded by Charlton Avenue, Montrose Avenue, Grove Road and Irving Avenue was conveyed without restrictions as to number of dwellings; (r) the lots fronting on Montrose Avenue, Berkeley Avenue and the Easterly side of

Scotland Street were restricted apparently to the erection of one house to two acres of land, with the exception of what was known as the Vose Homestead, which comprised several acres of land and was sold without restrictions. All of the properties described in this paragraph are in the immediate neighborhood of the property here in question, to wit, property mentioned in paragraph (o) being immediately opposite, while all the properties mentioned are within a distance of 400 yards from the property in question. The property situated on the south side of Warwick Avenue distant 863.30 feet westerly from the westerly side of Centre Street, having a frontage of 200 feet on Warwick Avenue and a depth of approximately 230 feet, was to one dwelling house. Defendant charges, therefore, that the lands comprising the tract of 210 acres was not conveyed with any uniformity as to restrictions in the number of buildings and without any general plan or scheme other than to create a neighborhood of country estates with a frontage of a size as hereinbefore set forth; that such plan is no longer practicable, equitable or possible and cannot be carried out or performed in justice to the defendant, or any other property owner whose title has been acquired through the said John G. Vose, or for whose benefit said restrictions as to number of dwellings were made.

12. Defendant says that

(a) The premises on the Northeasterly corner of Charlton Avenue and Raymond Avenue was sold by John G. Vose in a lot having a frontage of 200 feet on Raymond Avenue and 250 feet on Charlton Avenue, and was restricted to one dwelling; that there is now, and has been for several

years, located on this tract two houses and a cellar for a third houses, which violation of the said restrictions has been to the knowledge of the complainant, and such violation of the restrictions has been acquisced in by him for a long period of time, as have also the following violations of restrictions of premises in the neighborhood, to wit:

(b) By the erection of four dwelling houses on lands situate on the northwest corner of Charlton and Ralston Avenues, which lands were restricted to the erection of two dwellings.

(c) By the erection of three dwellings on lands situate on the northeast corner of Scotland Street and Ralston Avenue, which were restricted to one dwelling.

(d) By the erection of seven dwelling on lands situate on the northwest corner of Charlton and Montrose Avenues, which were restricted to six dwellings thereon.

(e) That a large tract of land bounded by the southwesterly line of Turrell Avenue and Grove Road, containing 3.25 acres more or less was restricted to one dwelling house, but that there are now seven dwelling houses on said property, the tract having been divided into seven or eight lots, and the restrictions as to limitation of the number of buildings to be built on said tract having been removed by consent of many of the property owners entitled to the enforcement of the restrictions against said lot, and also by decree of this Court made and entered in the case of William H. Turrell *et als.*, complainants, and Carrie A. Dormitzer, *et als.*, defendants, made and entered on the 14th day of July, 1915.

(f) By the erection of two dwelling houses on property on the south side of Warwick Avenue distant 863.30 feet westerly from the westerly line of Centre Street, having a frontage of 200 feet on Warwick Avenue by a depth of approximately 230 feet, which property was restricted to one dwelling house. Defendant says that there are many other violations of the restrictions as to the number of dwelling houses permitted to be erected as contained in said Vose deed, all of which violations have been acquiesced in by complainant and all parties who were entitled to enforce the same, and no one has ever attempted or brought a suit in this court for the purpose of specifically performing the covenant and restrictions as to the limitation of the number of dwelling houses which might be built on any one tract of land as contained in the said Vose deed, or to interfere with the erection of more than the number of dwellings to which any particular tract was limited; and defendant charges that there has been an abandonment of the restrictions as to the limitations of buildings on said properties by mutual consent and acquiescence of all parties for whose benefit said restrictions as to the number of dwellings was originally made by the said Vose in the deeds referred to herein.

Defendant says that the character of the neighborhood has changed in the Village of South Orange, and the population has greatly increased since the restriction as to the limitation of buildings was placed upon the property, the said 210 acres of land, by the various deeds to the said John G. Vose mentioned in the bill of complaint; that the housing conditions have become very much congested, so that houses built within the

residential section of the Village of South Orange are almost entirely built upon lots having a frontage of 100 feet or less; that this is the uniform and general size of properties within the said residential section and embraced within the properties named and mentioned in the said Vose deed; and that some tracts are much less in frontage than 100 feet; for example, in the immediate neighborhood of defendant's property, the following situation appears; on the northerly side of Raymond Avenue, between Charlton Avenue and Grove Road there are four houses on lots of 100 feet front or less; on the southerly side there are four houses on lots of 100 feet or less; on the southerly side of Turrell Avenue, between Grove Road and Charlton Avenue, there are seven houses on lots of 100 feet front or less, and on the northerly side of said Avenue there are ten houses on lots of 100 feet front or less; on the northerly side of Turrill Avenue, between Scotland Road and Charlton Avenue, there are six houses standing on lots with 100 feet front or less, and the same number on the southerly side; that on Ralston Avenue, on the northerly side, between Grove Road and Scotland Road, there are six houses on lots with 100 feet front or less, and eight houses on the southerly side on lots differing in frontage between 75 and 150 feet; that on Irving Avenue, on the southerly side, between Scotland Road and Charlton Avenue, there are seven houses on lots of 100 feet or less, and on the same side of the same Avenue, between Charlton Avenue and Grove Road there are nine houses of 100 feet front or less; that on the northerly side of Irving Avenue, between Scotland Road and Charlton Avenue, there are four houses on lots with frontages not

greater than 150 feet; that on both sides of Scotland Road, between Irving Avenue and Ralston Avenue, the frontage of most of the lots is 100 feet; and none of the lots are greater than 150 feet front; that on the easterly side of Charlton Avenue, between Montrose Avenue and Irving Avenue, there are four houses on lots with 90 feet front, and one house on a lot of 197 feet front; and on the Westerly side there are three houses on lots of 100 feet front; the premises in question in this suit having a frontage of 125 feet on Charlton Avenue.

Defendant therefore charges that the restriction limiting the property described in the deed Vose to de Gomme to the erection of one dwelling house is no longer applicable or enforceable, for the following reasons:

(1) Because the character of the neighborhood in the Village of South Orange has so changed and the population has so greatly increased since the Vose restrictions were imposed in 1868 that the original plan or scheme of the said John G. Vose cannot be carried out or performed.

(2) Because it would be against public policy and in restraint of trade to enforce said restrictions as to limitation of buildings.

(3) Because it would be inequitable and unjust to enforce the restrictions and prevent defendant or his assignees or purchasers from erecting two dwelling houses upon his said property, and would be of no advantage to the complainant, or other property owners for whose benefit said restrictions were originally made.

(4) Because all parties and owners of properties deriving title through the Vose deeds, as men-

tioned in the bill of complaint and in this answer, have indicated that there was no intention or purpose of enforcing the restriction as to the limitation of the building of dwellings on tracts of land as set forth in the said Vose deeds, and have permitted violations of said restrictions with full knowledge of the same and have acquiesced in violations of said restriction and consented to such violation.

(5) Because the said John G. Vose, through whom the complainant derives his title and through whom he claims a right against this defendant, lost and abandoned the said restriction as to the number of dwellings, in the manner set forth above, prior to his coveyance of complainant's property, and complainant has no greater rights than the said John G. Vose had when he parted with title to complainant's property.

OSBORNE, CORNISH & SCHECK,
Solicitors and of Counsel with
Defendant, Andrew Lenart.

Bill of Complaint.

(Filed November 8, 1922.)

Marston V. Lentz.

IN CHANCERY OF NEW JERSEY.

To his Honor, Edwin Robert Walker,
Chancellor of the State of New Jersey.

Your orator, RUSSELL MARSTON, reciding in the Village of South Orange, State of New Jersey, respectfully shows:

1. He is the owner in fee simple of premises in

the Village of South Orange, State of New Jersey, on the easterly side of Charlton Avenue, 100 feet south of Raymond Avenue and more particularly described in paragraph 9 of this bill of complaint.

2. Said premises are used and occupied as part of the lawn and gardens appurtenant to the residence of your orator which residence is erected upon a plot of the same dimensions adjoining the above described plot on the north and owned in fee simple by your orator's wife. Said house and grounds including your orator's said premises are kept improved and used in all respects as a country residence.

3. William G. Lentz is the owner in fee simple of a plot of land in said Village of South Orange bounded and described as follows:

> BEGINNING on the Westerly side of Charlton Avenue at a point distant 200 feet southerly from the southerly side of Raymond Avenue, running thence Southerly along the westerly side of Charlton Avenue 100 feet; thence westerly at right angles to Charlton Avenue and parallel with Raymond Avenue 145.2 feet; thence Northerly parallel with Charlton Avenue 100 feet; thence Easterly parallel with Raymond Avenue at right angles to Charlton Avenue 145.2 feet to the point or place of beginning.

4. Andrew Lenart is the owner in fee simple of all that plot of land in said Village bounded and described as follows:

> BEGINNING at the Southwesterly corner of Raymond Avenue and Charlton Avenue; running thence Southerly along the wester-

ly side of Charlton Avenue 200 feet; thence Westerly at right angles to Charlton Avenue and parallel with Raymond Avenue 145.2 feet; thence Northerly parallel with Charlton Avenue at right angles to Raymond Avenue 200 feet to the southerly side of Raymond Avenue; thence Easterly along the southerly side of Raymond Avenue 145.2 feet to the point or place of beginning.

5. The premises so owned by the said Lentz and Lenart respectively are hereafter for convenience mentioned and referred to together as "defendants' plot" and are and always have been vacant and unimproved.

6. Before September 19th, 1868, John G. Vose acquired, by deed to him from Ebenezer Deas and wife dated September 20, 1866 (which conveyed lands embracing all of the lands above mentioned) and by sundry other deeds to him, title in fee to upwards of 200 acres in said village; gave to the same the name "Montrose"; adopted a plan to sell the same in plots each restricted, for the benefit of all others and of the remaining portions of said tract, so that the same should be used only for the purpose of gentlemen's country residences; and by deeds duly recorded in the office of the Register of Essex County before said date, conveyed many plots or parcels of various sizes restricted, in accordance with said plan, by covenants contained in such deeds, substantially identical in language with the covenant below set forth except as to the number of houses that might be erected on such plots respectively and except that in case of certain plots at or near the borders of said tract the restrictions were limited in duration to a term of years.

7. By deed dated September 19th, 1868, and recorded in the office of said Register on September 28th, 1868, the said John G. Vose and his wife conveyed the defendants' plot to Charles de Gomme by description as follows:

ALL that certain lot, piece or parcel of land, situate, lying and being in the Town of South Orange in the County of Essex and State of New Jersey, being part of the estate called Montrose, the different portions of which were conveyed to John G. Vose by sundry deeds now of record in the office of the Register of said County of Essex, one of which bearing date the 9th day of June, A. D. 1864, was executed by Henry M. Graham and wife, another of which bearing date the 17th day of March, A. D. 1865, was executed by Lydia Freeman, another of which bearing date the 23rd day of May, A. D. 1866, was executed by Henry A. Page and wife, another of which bearing date the 30th day of July, A. D. 1866, was executed by Benjamin E. Baldwin and wife, another of which bearing date the 18th day of August, 1866, was executed by Alexander G. Crane and wife, another of which bearing date the 20th day of September, A. D. 1866, was executed by Ebenezer Deas and wife, another of which bearing date the 24th day of September, A. D. 1866, was executed by Benjamin E. Baldwin and wife, another of which bearing date the 28th day of September, A. D. 1866, was executed by Daniel J. Sprague and wife, another of which bearing date the 12th day of November, A. D. 1866, was executed by Samuel B. Smith and wife, another of which bearing date the 13th day of November, A. D. 1866, was executed by Abijah F. Tillon, administrator, &c.; the said premises

intended to be conveyed being more particularly described as follows:

COMMENCING at a point in the Southerly line of Raymond Avenue distant South 57 degrees, 15 minutes East 813.8 feet from the easterly line of Scotland Road, running thence along said southerly line of Raymond Avenue South 57 degrees, 15 minutes East 145.2 feet to other land of the parties of the first part; thence at right angles to Raymond Avenue South 32 degrees, 45 minutes West 300 feet to the Northerly line of land conveyed by parties of the first part to George H. Brewer by deed dated May 14th 1867, thence along the same North 47 degrees, 15 minutes West 145.2 feet to the Easterly line of land conveyed by the parties of the first part to Henry M. Matthews by deed dated July 28, 1868; thence along the same North 32 degrees, 45 minutes East 300 feet to the point or place of beginning. Containing one acre of land including one-half of Raymond Avenue. The premises hereby intended to be conveyed being shown on the Map of Montrose dated January 1, 1867, which is filed in said Register's office and constitute the Easterly portion of Lot S on said map.

Said deed contained a covenant as follows:

"And the said party of the second part for himself, his heirs and assigns, doth hereby covenant to and with the said party of the first part, his heirs, executors, administrators and assigns, that the said premises hereinbefore described shall not at any time

hereinafter be used or occupied for the erection or maintenance of any slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory or any manufactory of gun powder, glue, varnish, vitriol, (ink, soap, candles, starch or turpentine, or for the tanning, dressing or preparing of skins, hides or leather, or for any brewery, distillery, laboratory, livery stable, race course, theatre, circus or place for the exhibition of wild animals, or gymnastic feats, cabinet makers, or carpenters shops, hat shop, barroom, larger beer saloon or any other erection known as nuisances, or any other noxious or dangerous trade, business or establishment, or for any other purpose whatsoever which can or may be unwholesome or offensive to the neighboring inhabitants, or for the erection of any buildings of any kind or description excepting one dwelling house with appropriate gardeners cottages, porters lodges, private billard rooms or private bowling alleys, private gas works, arbors, wall houses, summer houses, ice houses, tool houses, barns, stables, carriage houses, reservoirs, ornamental lakes, water works, sheds, hennerys, cow houses, piggeries and other buildings and offices appropriate for a gentleman's country residence. It being expressly understood, covenanted and agreed by and on behalf of the said party of the second part, his heirs, executors, administrators and assigns, that the covenant aforesaid shall be attached to the said premises and run with the land and shall be inserted

in any and all future conveyances and mortgages and other instruments whereby the title to the said land can or may be transferred or affected and that the said covenant shall forever hereafter be recognized, sustained and upheld. And that it shall be lawful not only for the said party of the first part, their legal representatives, or assigns, but also for the owner or owners of any of the property mentioned in the deeds hereinbefore recited, to institute and prosecute any suit, proceeding or injunction at law or in equity against any person or persons violating or threatening or attempting to violate the covenant and agreement aforesaid. It being understood that the covenant and agreement aforesaid is not to be enforced personally against the said party of the second part, his heirs or assigns, unless he or they shall be the owner or owners of the premises herein described at the time or times when any violation of the said covenant or agreement, shall or may be made, committed, threatened or attempted."

8. Prior to May 1st, 1922, one John D. Munther had become the owner in fee simple of said defendants' plot by *mesne* conveyances from the said Charles de Gomme. By deed dated May 1st, 1922, and recorded May 2nd, 1922, in the office of said Register of Essex County, the said John D. Munther conveyed to the said William G. Lentz the premises described in paragraph 3 of this bill of complaint, and by deed dated September 15th, 1922, and recorded September 20th, 1922, the said John D. Munther conveyed to Andrew Lenart the

premises described in paragraph 4 of this bill of complaint.

9. Your orator's plot mentioned in paragraph 1. of this bill of complaint was conveyed by John G. Vose and wife to Theodore H. Freeland by deed dated December 31st, 1872, and recorded in the office of said Register of the County of Essex on January 4th, 1873, by description as follows:

ALL that certain lot, piece or parcel of land situate, lying and being in the Town of South Orange in the County of Essex and State of New Jersey, being part of the estate called Montrose, the different portions of which were conveyed to John G. Vose by sundry deeds now of record in the office of the Register of said County of Essex, one of which bearing date the 9th day ofJune, A. D. 1864, was executed by Henry M. Graham and wife, another of which bearing date the 17th day of March, A. D. 1865, was executed by Lydia Freeman, another of which bearing date the 23rd day of May, A. D. 1866, was executed by Henry A. Page and wife, another of which bearing date the 30th day of July, A. D. 1866, was executed by Benjamin E. Baldwin and wife, another of which bearing date the 18th day of August, 1866, was executed by Alexander G. Crane and wife, another of which bearing date the 20th day of September, A. D. 1866, was executed by Ebenezer Deas and wife, another of which bearing date the 24th day of September, A. D. 1866, was executed by Benjamin E. Baldwin and wife, another of which bearing date the 28th day of September, A. D. 1866, was executed by Daniel J. Sprague and wife, another of which bearing date the 12th day of November, A. D. 1866, was executed by Samuel B. Smith and wife, another

of which bearing date the 13th day of November, A. D. 1866, was executed by Abijah F. Tillon, administrator, &c.; another of which bearing date the day of May, 1870, was executed by Benjamin E. Baldwin and wife, the said premises intended to be conveyed being more particularly described as follows:

> COMMENCING at a point on the Easterly line of Charlton Avenue distant 100 feet southerly from the corner formed by the intersection of the southerly line of Raymond Avenue with the easterly line of Charlton Avenue, running thence southerly along said easterly line of Charlton Avenue 100 feet; thence Easterly at right angles with Charlton Avenue and parallel with Raymond Avenue 200 feet; thence Northerly parallel with Charlton Avenue 100 feet; thence Westerly parallel with Raymond Avenue and at right angles with Charlton Avenue 200 feet to the point or place of beginning.

Said deed contained a covenant restricting said premises to one dwelling with appurtenances in the same language as the covenant contained in the deed from the said Vose to said de Gomme as said covenant is set forth in paragraph 7 of this bill of complaint.

10. Your orator acquired title to the whole of the said premises so conveyed by Vose to Freeland by mesne conveyances from the said Freeland.

11. The said William G. Lentz is intending and threatening to build upon the premises described in paragraph 3 of this bill of complaint a dwelling

house with appurtenant outbuildings and the said Andrew Lenart intends and is threatening to build upon the premises described in paragraph 4 of this bill of complaint two dwelling houses with appurtenant outbuildings.

12. The building of more than one dwelling house with such appurtenant outbuildings as are suitable to a gentleman's country residence upon the defendants' plot will be detrimental to the use and enjoyment by your orator of his above mentioned property and to the value thereof and a violation of said covenant contained in said deed made by the said Vose to de Gomme., and of your orator's right appurtenant to his said plot to the observance of said covenant.

13. Your orator is without adequate remedy in the law and therefore prays that the said William G. Lentz and Andrew Lenart as defendants answer to this bill of complaint and each statement herein made and that it be determined and adjudged which of the defendants, if either, is entitled as against the other to build upon the said plot so conveyed by Vose to de Gomme a dwelling house with the necessary outbuildings suitable to a gentleman's country residence, and that the other of said defendants be enjoined from erecting upon any part of said plot any building or structures whatever, or that such other appropriate injunction issue as may enjoin and restrain the erection upon said plot of any building whatever other than one dwelling house with the necessary appurtenant buildings and structures suitable for a gentleman's country residence; and may it please your Honor the premises considered to grant unto your orator a writ or writs of supoena issuing out of and under the seal of this Honorable Court, to be directed to

the said defendants, commanding them and each of them on a certain day and under a certain penalty therein to be specified, personally to be and appear before your Honor, in this honorable Court, then and there full, true, direct and perfect answer to make to all and singular the premises, and further to stand to, abide by and perform said order, direction and decree as to your Honor shall seem meet and as shall be agreeable to equity and good conscience;

And your orators as in duty bound will ever pray, &c.

WALL, HAIGHT, CAREY & HARTPENCE.
Solictor for and of Counsel with Complainant.

State of New York, }
County of New York, } ss.:

RUSSELL MARSTON, being duly sworn, deposes and says: I am the complainant named in the above bill of complaint. I have read said bill of complaint and the allegations therein contained, so far as they are within my personal knowledge, are true, and so far as they are not within my personal knowledge I am credibly informed and verily believe that they are true.

(Sgd.) RUSSELL MARSTON.

Sworn to before me this 4th day of November, 1922.
Catharine A. Connolly,
Notary Public,
Bronx Co. No. 60.
Cert. filed in N. Y. Co. No. 409.
N. Y. County Register's No. 3316.
Commission expires March 30, 1923.

(County Clerk's certificate as to authority of notary public attached.)

Order Amending Complaint.

(Filed November 28th, 1922.)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM G. LENTZ,
Complainant,
and
ANDREW LENART, *et al.*,
Defendants.
} On Bill, &c.

It appearing that since the filing of the bill of complaint in this cause and on or about the 13th day of November, 1922, a bill of complaint was filed in this Court by Russell Marston (one of the defendants herein) as complainant against William G. Lentz (the complainant herein) and Andrew Lenart (one of the defendants herein) as defendants, wherein the said Russell Marston, complainant, amongst other things, charges that the said Lenart intends and is threatening to build upon the premises described in the bill of complaint herein two dwelling houses, with appurtenant outbuildings, and that the building thereon will constitute a violation of a certain covenant contained in a certain deed of conveyance made by one Voss to one deGomme, which deed of conveyance is referred to in the bill of complaint filed herein; and it appearing that said charge so made by the said Marston is an assertion of the claim set forth in the tenth paragraph of the bill of complaint filed herein,

IT IS THEREUPON on this 28th day of November, 1922, on motion of Hopkins & Herr, solicitors

of complainant, ORDERED that the bill of complaint herein be and the same is hereby amended and supplemented as follows, to wit:

1. By adding thereto, at the end of paragraph 10 of said bill, the following:

> "The said Russell Marston, in furtherance of his said claims, did, on or about the 13th day of November, 1922, file his bill of complaint in this Court against the complainant herein and the defendant Andrew Lenart, more particularly specifying and setting forth his said claims and the grounds thereof."

E. R. WALKER,
C.

Respectfully advised,
JOHN H. BACKES, V. C.

Answer.

(Filed December 29, 1922.)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM G. LENTZ,
Complainant,
and
ANDREW LENART, *et als*,
Defendants.
} On Bill, &c.

The answer of the defendants, Andrew Lenart and John D. Munther. These defendants, answering the bill of complaint, say that:

1. They admit paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9, but subject to corrections by production of the original instruments or the record thereof.

2. They have no knowledge or information sufficient to form a belief as to whether Russell Marston is seized of the lands mentioned in paragraph 10.

3. They admit that Russell Marston filed a bill of complaint in this court against William G. Lentz and Andrew Lenart, but ask leave to refer to the said bill of complaint as to the contents thereof.

4. They admit that Andrew Lenart claims the right to erect two dwelling houses on the lands purchased by him from John D. Munther.

5. They admit that no neighborhood settlement scheme exists and that it is legal and unobjectionable that three dwelling houses be erected upon

the lands conveyed to Munther by said Sheriff's deed, one by the complainant and two by the defendant, Andrew Lenart.

6. They deny the balance of paragraph 12.

7. These defendants, further answering, say: that on or about April 11, 1922, and prior to the delivery of the deed mentioned in paragraph 2 of the bill of complaint, the defendant John D. Munther and the complainant William G. Lentz entered into a contract for the purchase by said Lentz from said Munther of the premises mentioned in paragraph 1 of the bill of complaint; that said agreement contained the following clauses:

> "And the party of the first part hereto covenants and agrees to and with the party of the second part hereto that the balance or remainder of said lands shall be restricted by the party of the first part as follows:
>
> "That the party of the first part hereto will subdivide said tract into two plots with a frontage of one hundred (100) feet each, on Charlton Avenue; that no more than one dwelling house shall be erected upon each of said plots; that no more than one garage shall be erected on each of said plots and that any garage erected thereon shall be located within a square fifty by fifty (50x50) feet in the southwesterly corner thereof; that any dwelling erected on said plots shall face Charlton Avenue and shall not be nearer than thirty-eight (38) feet from the line of the flagstones as now laid forming the sidewalk of Charlton Avenue nearest the

said property; that the erection of no building shall be commenced on either of said plots until after November 1, 1922."

That the deed mentioned in paragraph 2 of the bill of complaint was given in conformity with the provisions of said agreement.

8. That on or about September 20, 1922, the defendant John D. Munther conveyed the balance or remainder of said land mentioned in paragraph 7 to Andrew Lenart by deed dated September 15, 1922, and recorded in C 67 of Deeds for Essex County on pages 3 and 4; that the said last mentioned deed contained the following covenant:

"And the said party of the second part, for himself, his heirs and assigns, doth covenant and agree to and with the said John D. Munther, his heirs, executors, administrators and assigns, as follows: that he will sub-divide the said premises into two plots, each having a frontage on Charlton Avenue of one hundred (100) feet; that not more than one dwelling house shall be erected upon each of said plots; that each of said dwellings shall face Charlton Avenue, and shall not be nearer than thirty-eight (38) feet from the line of the flag stones as now laid, forming the sidewalk of Charlton Avenue, nearest the said property; that not more than one garage shall be erected on each of said plots, and that any garage so erected shall be located within a square 50x50 feet in the southwesterly corner thereof; that no erection of any building on said premises shall be commenced until after November 1, 1922."

Answer of Defts. Lenart and Munther.

9. That no building was erected on the balance or remainder of the lands mentioned in paragraph 7, conveyed as set forth in paragraph 8, until after November 1, 1922.

10. That the rights between the complainant Wm. G. Lentz and the defendants John D. Munther and Andrew Lenart, in so far as the erection of any houses on the premises conveyed, as mentioned in paragraph 8, are concerned, were settled by the agreement mentioned in paragraph 7 and are to be determined by construction of the terms of that instrument.

11. That the complainant William G. Lentz is not entitled to any decree of this court in the premises as against the defendants Andrew Lenart and John D. Munther.

OSBORNE, CORNISH & SCHECK,
Solicitors for and of counsel with defendants Andrew Lenart and John D. Munther.

We hereby consent to the filing of the above answer as of proper time.

HOPKINS & HERR,
Solicitors for and of counsel with complainant.

Bill of Complaint, Lentz v. Lenart.

(Filed November 3, 1922.)

IN CHANCERY OF NEW JERSEY.

TO HIS HONOR, EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

The complainant, William G. Lentz, of the City of South Orange, County of Essex and State of New Jersey, respectfully shows:

1. Complainant is the owner in fee simple of all that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Village of South Orange in the County of Essex and State of New Jersey, beginning at a point in the Westerly line of Charlton Avenue distant southerly measured along the same two hundred (200) feet from the intersection of said line with the Southerly line of Raymond Avenue; thence parallel with Raymond Avenue north fifty-seven degrees fifteen minutes west one hundred forty-five feet and two tenths of a foot (145.2) to the westerly line of a lot conveyed by John G. Vose and wife to Charles de Gomme by deed dated September 19, 1868, and recorded in the Essex County Register's Office in Book Z13 of Deeds, pages 539, etc.; the point of intersection with said line being two hundred (200) feet distant on a course of south thirty-two degrees forty-five minutes west from the beginning point in said deed Vose to de Gomme; thence along the westerly boundary of that lot south thirty-two degrees forty-five minutes west one hundred (100) feet to the southwesterly corner of the same; thence along the southerly boundary of the same south fifty-seven degrees fif-

teen minutes east one hundred forty-five feet and two tenths of a foot (145.2) to the westerly line of Charlton Avenue aforesaid; thence along the same north thirty-two degrees forty-five minutes east one hundred (100) feet to the place of beginning.

2. Complainant purchased said land from John D. Munther, unmarried, by deed dated May 1, 1922, and recorded on May 2, 1922, on Book Q 66 of Deeds for Essex County at pages 120, etc.

3. Said premises were conveyed to complainant subject to the restrictions contained in a certain deed from John G. Vose to Charles de Gomme, referred to above, as the same were modified by an agreement between said Vose and said de Gomme dated May 5th, 1873, and recorded in said Register's Office of Essex County in Book F of Miscellaneous Records at page 49, in so far as the said restrictions remained in force at the time of said conveyance to said complainant.

4. The restrictions contained in the said deed of conveyance from Vose to de Gomme were as follows, to wit: "No slaughter house, smith shop, forge furnace, steam engine, brass foundry, nail or other iron factory, or manufactory of gunpowder, glue, varnish, vitriol, ink, soap, candles, starch or turpentine, or for the tanning, dressing or preparing of skins, hides or leather, or for any brewery, distillery, laboratory, livery-stable, race-course, theatre, circus, or place for the exhibition of wild animals or gymnastic feats, cabinet makers' or carpenters' shops, hat-shop, bar room, larger-beer saloon, or any other erection known as nuisances, or any other noxious or dangerous trade, business or establishment, or for any purpose whatsoever which can or may be unwholesome or offensive to the neighboring inhabitants,

or for the erection of any buildings of any kind or description, excepting one dwelling house, with the appropriate gardener's cottage, porter's lodge, private billiard room or private bowling alley, private gasworks, arbors, well house, summer house, ice house, tool house, barn, stable, carriage house, reservoirs, ornamental lakes, water works, shed, hennery, cow house, piggery, and other buildings and offices appropriate for a country gentleman's residence."

5. The said agreement between Vose and de Gomme was as follows, to wit:

"In consideration of the agreement hereby made by said grantee that all the dwelling houses and outbuildings which may be erected upon the said plot shall be such as are appropriate for a gentleman's country residence, the grantor agrees that the limitation as to the number of dwelling houses so to be erected upon the said plot shall be opened so as to permit the erection of three such houses and appurtenances—all other restrictions to remain in full force."

6. In and by said deed of conveyance from said Munther to complainant, the said Munther covenanted and agreed, amongst other things, as follows, to wit: that the balance or remainder of the lands conveyed to said Munther by Wilson, Sheriff (of which the lands conveyed to complainant as aforesaid form a part) would be restricted by the said Munther as follows, to wit: that the said Munther would sub-divide said tract into two plots with a frontage of one hundred feet each on Charlton Avenue; that no more than one dwelling house should be erected upon each of said plots; that no more than one garage should be erected on each of

said plots and that any garage erected thereon should be located within a square fifty by fifty feet in the southwesterly corner thereof; that any dwelling erected on said plots should face Charlton Avenue and should not be nearer than thirty-eight feet to the line of the flagstones as now laid forming the sidewalk of Charlton Avenue nearest the said property; that the erection of no building should be commenced on either of the said plots until after November 1, 1922, without the consent of the said Lentz.

7. The lands and premises affected by said last mentioned covenant, which are the lands and premises conveyed by Wilson, Sheriff to the said Munther (except that part of said premises which was conveyed to the complainant as aforesaid) are described in the conveyance from said Wilson, Sheriff to the said Munther as follows, to wit: "Beginning in the southerly line of Raymond Avenue South fifty-seven degrees fifteen minutes East eight hundred and thirteen feet and eight tenths of a foot from the Easterly line of Scotland Road; thence along said southerly line of said Avenue South fifty-seven degrees fifteen minutes East one hundred and forty-five feet and two tenths of a foot to other lands now or formerly belonging to John G. Vose; thence at right angles to said Raymond Avenue South thirty-two degrees forty-five minutes West three hundred feet to Northerly line of lands conveyed by John G. Vose and wife to George H. Brewer, May 14th, 1867; thence along the same North fifty-seven degrees fifteen minutes West one hundred and forty-five feet and two tenths of a foot to the Easterly line of land conveyed by John G. Vose to Henry M. Matthews, July 28th, 1868; thence along the same North thirty-

two degrees forty-five minutes East three hundred feet to the place of beginning."

8. On the 15th day of September, 1922, the said John D. Munther conveyed to one Andrew Lenart all of said lands and premises conveyed to the said Munther by said Wilson, Sheriff, except what had been previously conveyed by him as aforesaid to complainant, by deed dated September 15, 1922, recorded in Book C 67 of Deeds, at page 3, etc. containing restrictions according to the covenant referred to in paragraph seven hereof.

9. Said Andrew Lenart on the said 15th day of September, 1922, executed a purchase money bond and mortgage to the said John D. Munther in the sum of Five Thousand Dollars ($5,000.00) covering said premises, which was recorded in Book O 46 of Mortgages for said county, at page 569, etc.

10. One Russell Marston is seized of lands and premises in said Village of South Orange located immediately opposite to complainant's said land, across Charlton Avenue, and claims that by virtue of the original restrictions in the said deed from Vose as aforesaid and other restrictions contained in other deeds for surrounding property made by the said Vose, a neighborhood settlement scheme was created by the said Vose and still exists under and by virtue of which said scheme no more than one dwelling house can be erected upon any of the lands conveyed as aforesaid by Wilson, Sheriff, to said Munther, and the said Russell Marston further claims that the said agreement between the said Vose and the said de Gomme does not relieve any of the lands in question from the effect of the original restrictions as aforesaid.

11. The said Andrew Lenart claims the right to erect two dwelling houses on the lands so purchased by him pursuant to the provisions of the covenant contained as aforesaid in the deed or conveyance to the complaint, and in the deed to said Lenart.

12. Complainant claims that no neighborhood settlement scheme exists in accordance with the original restrictions and that it is legal and unobjectionable that three dwelling houses be erected upon the lands conveyed by said Sheriff's deed to said Munther, one of which houses may unobjectionably be erected by complainant on his said land, the other two on the balance or remainder of said lands in accordance with the provisions of said covenant. Complainant further claims that if said original restrictions still obtain and if this Court should determine that only one dwelling house may be erected on any of said lands conveyed by the said Sheriff as aforesaid, that then the complaint has the right to erect such dwelling house on the lands so purchased by him.

Complainant therefore prays as follows :

1. That Andrew Lenart, John D. Munther and Russell Marston, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

2. That this Court may determine whether or not the lands so owned by complainant and the other lands conveyed by said Wilson, Sheriff to Munther are affected by said original restrictions, whether said agreement between Vose and de Gomme operates to modify said original restrictions, whether any neighborhood settlement

scheme exists and if so, what dwelling house or dwelling houses may be erected upon said lands unobjectionably to said scheme and on what portion of said property said dwelling house or dwelling houses may be properly erected and may, by its decree, declare the rights of the parties in the premises.

3. That this Court may enjoin and restrain the said Lenart, his agents, servants and contractors from erecting any dwelling house or other building whatsoever upon the said lands until the determination of this Court by its decree as to the right of the said Lenart to erect such building.

4. That a writ of subpoena may issue commanding said defendants to answer said bill of complaint and to order all such decrees as the Court may make in the premises.

HOPKINS and HERR,

Solocitors for and of counsel with complainants.

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

WILLIAM G. LENTZ, of full age, being duly sworn according to law on his oath deposes and says:

I am the complainant in the foregoing bill mentioned. The facts therein contained are true. The said Andrew Lenart, as I am informed and believe, intends to commence to erect at least one dwelling house on the property conveyed to him immediately and I am informed and believe that it is claimed that a neighborhood settlement scheme exists whereby not more than one dwelling house may be erected on the whole of the lands originally owned by Munther, as described in the bill.

WILLIAM G. LENTZ.

Subscribed and sworn to before me this 31st day of October, 1922, at Hoboken, N. J.

Esther C. Nelson,
Notary Public
of New Jersey.

Certificate of Engineers.

IRA T. REDFERN JOHN H. REDFERN

IRA T. REDFERN & BRO.
MUNICIPAL ENGINEERING AND SURVEYING
South Orange, N. J.

February 19th 1923

The map to which this certificate is annexed is an accurate copy of a section of the Tax Map of the Village of South Orange of which this map shows. The property lines in black on the map show the present property lines as they are now constituted according to the records filed in the office of the Register of Essex County. The houses and outbuildings are shown by large and small circles respectively. The fact that these houses and outbuildings are in the places shown on said map and that the property lines are accurately shown is known to us from personal observation and is also checked from the official tax and building records of the Village.

The plots outlined in various colors show the several plots conveyed by John G. Vose and the inscription in each of the same show the book and page of the deed, the date of the deed and also the restrictions so far as they relate to the number of dwelling houses permitted to be erected and maintained on each of said plots. This information was obtained by us from certain abstracts of deeds furnished to us by Osborne Cornish and Scheck who represented that the said abstracts were compared with the record of deeds in the office of the Register of the County of Essex.

IRA T. REDFERN AND BROTHER
by JOHN H. REDFERN

Notice to Dismiss Appeal.

New Jersey Court of Errors and Appeals.

Between:

RUSSELL MARSTON,

Complainant-Appellant,

and

WILLIAM G. LENTZ and ANDREW LENART,

Defendants-Respondents,

and

WILLIAM G. LENTZ

Complainant,

and

ANDREW G. LENART, JOHN D. MUNTHER and RUSSELL MARSTON,

Defendants.

On Appeal, etc.

To Messrs. Wall, Haight, Carey & Hartpence, Solicitors of Appellant:

TAKE NOTICE that on the opening day of the November, 1923 term of the Court of Errors and Appeals at the State House in Trenton, on Tuesday, November 20th, 1923, at 10:30 o'clock in the forenoon or as soon thereafter as the Court may hear the same, we shall apply for a rule dismissing the appeal herein on the following grounds:

1. That the decree appealed from was entered in the consolidated causes in one of which a no-

tice of *lis pendens* was filed prior to the consolidation, whereby the decree should be considered as made in a cause wherein a notice of *lis pendens* was filed, from which the time to appeal is limited to three months by the statute; that the decree appealed from adjudicates, against appellant's contention, that respondents may build three dwelling houses on a certain parcel of land in East Orange, Essex County, in spite of certain ancient restrictions; that the appeal if successful would result in the denial of the right to build more than one such dwelling house on said parcel; that two such houses are now nearing completion thereon, one being built by each respondent; that no notice of the taking of this appeal was given to the respondent Lentz, nor did he have any knowledge of the same, for more than four months after the decree was entered, and for more than three months after the notice of appeal was filed; that the respondent Lentz relied on the protection of the decree, after the lapse of three months without knowledge of the appeal, in proceeding to erect his dwelling house; and that it will be impossible to restore him to his former status if the appeal should result in a reversal of the decree. The respondent Lentz being placed in this position through the fault and neglect of the appellant, it would be inequitable to allow the appeal to be maintained.

2. That for the reasons aforesaid, the subject matter of the appeal no longer exists.

3. The appellant has been guilty of laches in pressing his claim on appeal which, in view of the character of the claim and of the irrevocable loss to which the respondent Lentz may be sub-

jected, should estop him from prosecuting his claim here on appeal on the same grounds whereby he would be estopped by such laches in asserting his claim below.

4. That no appeal was taken within the time limited by statute.

5. That the petition of appeal was not filed within twenty days after filing the notice of appeal, as provided by Rule 21 of this Court. The notice of appeal was filed June 15, 1923, the petition on September 5, 1923.

6. That a copy of the notice of appeal was not served on the solicitors of the respondent Lentz within a reasonable time as contemplated by Chancery Rule 161. A paper purporting to be such a copy, but not certified, was served on October 8, 1923.

7. That no copy of the notice of appeal was served at any time, Chancery Rule 161 not contemplating the service of an unauthenticated copy.

8. That a copy of the petition of appeal was not served on the solicitors of the respondent Lentz within five days after filing the same pursuant to Rule 21 of this Court. A paper purporting to be such a copy, but not certified, was served on October 8, 1923.

9. That no copy of the petition of appeal was served at any time, Rule 21 of this Court not contemplating the service of an unauthenticated copy.

10. That Russell Marston, the complainant-appellant, has no further interest in the subject matter of the suit.

And take notice that in aid of this motion,

affidavits will be read, of which true copies are herewith attached.

Respectfully yours,
OSBORNE, CORNISH & SCHECK.
Solicitors of respondent,
Andrew Lenart.

HOPKINS & HERR,
Solicitors of respondent,
William G. Lentz.

An additional ground upon which the application to dismiss the appeal will be made is as follows:

11. Copies of the points on which the appellant means to rely, as contemplated by Rule 20, have not been served within the time limited by Rule 20, or at any other time, on the solicitors of the respondent Lentz.

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

WILLIAM G. LENTZ, of full age, being duly sworn according to law, on his oath deposes and says:

I am one of the defendants below in the suit brought by Russell Marston, the appellant in this Court, against Andrew Lenart and myself. I have never been served with any copies of notice of appeal or petition of appeal or any other papers in connection with this appeal. I had no knowledge of the pendency of the appeal until some time in October, 1923, when I learned of it quite accidentally from a real estate agent in East Orange.

Meantime, I proceeded to erect the dwelling house on the premises which is described in the

stipulation of facts contained in the state of the case on this appeal and the house is now nearing completion. I was advised by counsel that inasmuch as a notice of *lis pendens* had been filed in connection with the suit bropght by me below, which was consolidated with the suit brought by Russell Marston below, that Marston's time to take his appeal was limited to three months. After the lapse of three months from and after the final decree, to wit: September 10, 1923, not knowing that any appeal had been taken, I assumed that the time to appeal had elapsed without such appeal, and from that time until I learned of the pendency of the appeal, I relied upon the fact, as I supposed, that no appeal had been taken in proceeding to complete the dwelling house.

WILLIAM G. LENTZ.

Subscribed and sworn to before me this 25th day of October, 1923.

John E. Davis,
Notary Public of New Jersey.

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

DOUGAL HERR, of full age, being duly sworn according to law, on his oath deposes and says:

I am a member of the law firm of Hopkins and Herr and I had actual charge of the proceedings below from which the present appeal has been taken, representing Mr. William G. Lentz, one of the parties. The proceedings below were instituted by a bill filed by me on behalf of Mr. Lentz, making Russell Marston and Andrew Lenart parties defendant. A few days thereafter, Marston filed his bill and the two actions were

thereupon consolidated and treated from thence forward as one suit.

Immediately after filing the bill for Mr. Lentz, I duly filed a notice of lis pendens in Essex County, where the land is situated.

The decree was entered below on June 9th, 1923. I advised Mr. Lentz that any appeal from the final decree would have to be taken within three months because of the filing of the notice of lis pendens. No copies of any notice of appeal or other appeal papers were served on me up to September 10, 1923, and I thereupon advised Mr. Lentz that in my opinion the time to appeal had elapsed and that he might safely proceed with the erection of his building.

I did not learn of the pendency of the appeal until October, 1923, when I was informed by Mr. Cornish, one of the solicitors in the case, that such an appeal had been taken.

On October 8th, 1923, I was served with what purports to be copies of a notice and of a petition of appeal. These copies were not certified. I was requested to acknowledge service of them and refused, at the same time saying I would move on the opening day to dismiss the appeal.

DOUGAL HERR,

Subscribed and sworn to before me this 31st day of October, 1923.

Harriet S. Hagen,
Notary Public of New Jersey.

Affidavit of Isidore V. Davis.

STATE OF NEW JERSEY, }
County of Essex, } ss.:

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

I am an Attorney at Law of the State of New Jersey. I have examined the indices of the record of deeds in the office of the Register of the County of Essex from November 8, 1922, to May 3, 1923, and find recorded on May 2, 1923, in Book M 68 of the record of deeds in said office, on page 101, etc., a deed from Russell Marston and Constance Turrell Marston, his wife, to Guaranty Mortgage & Investment Co., describing the premises located on the easterly side of Charlton Avenue and the southerly side of Raymond Avenue in the Village of South Orange, New Jersey; the southerly one hundred feet of said described premises being the same premises described in paragraph 1 of the bill of complaint, filed in the Court of Chancery of New Jersey on November 8, 1922, in a cause in which said Russell Marston is complainant and William G. Lentz and Andrew Lenart are defendants. This deed also covers the lot adjoining the lot above referred to on the north, having one hundred feet frontage on Charlton Avenue and about two hundred feet frontage on Raymond Avenue. The last mentioned lot being the lot referred to in paragraph 2 of the said bill of complaint. A certified copy of this said deed is attached to this affidavit, and is marked "Exhibit A."

I have also searched the indices to the records of deeds and mortgages in said Register's Office in the name of Guaranty Mortgage & Investment Co. from April 29, 1923, to this date,

and do not find indexed any deed for the said premises given by the said Guaranty Mortgage & Investment Co., nor any mortgage given to the said Russell Marston.

ISADOR V. DAVIS.

Sworn and subscribed to before me this 1st day of November, 1923.
Harry E. Young,
Notary Public of New Jersey.

EXHIBIT A.

Russell Marston et ux
To
Guaranty Mortgage and Investment Co.

THIS INDENTURE, Made the thirtieth day of April, in the year of our Lord One Thousand nine hundred and twenty-three: Between

Russell Marston and Constance Turrell Marston, his wife, of the Village of South Orange in the County of Essex and State of New Jersey, party of the first part; AND Guaranty Mortgage and Investment Co., a corporation of the City of Newark in the County of Essex and State of New Jersey, party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of One Dollar and other valuable consideration, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and

($41.00)

Exhibit A.

confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to its successors and assigns, forever, ALL those two certain tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the Village of South Orange in the County of Essex and State of New Jersey.

BEGINNING at the corner formed by the intersection of the southerly line of Raymond Avenue with the easterly line of Charlton Avenue, running thence southerly along the said easterly line of Charlton Avenue one hundred feet; thence easterly at right angles to Charlton Avenue and parallel with Raymond Avenue two hundred feet; thence northerly parallel with Charlton Avenue one hundred feet to the southerly line of Raymond Avenue; and thence along the same westerly two hundred feet to the point or place of beginning. Being the same premises conveyed to Constance Turrell Marston by Joseph S. Parry and Sarah W. Parry, his wife, by deed dated January 10th, 1906 and recorded in the Register's Office of Essex County on January 11th, 1906, in Book I. 39 of Deeds of said County, page 600.

COMMENCING at a point in the easterly line of Charlton Avenue distant one hundred feet southerly from the corner formed by the intersection of the Southerly line of Raymond Avenue with the said easterly line of Charlton Avenue, running thence southerly along said easterly line of Charlton Avenue one hundred feet; thence easterly at right angles to Charlton Avenue and parallel with Raymond Avenue two hundred feet;

thence northerly and parallel with Charlton Avenue one hundred feet; thence westerly and parallel with Raymond Avenue and at right angles to Charlton Avenue two hundred feet to the point or place of beginning. Being the same premises conveyed to Russell Marston by Henry Schlittenhart by deed dated October 17th, 1906, and recorded in the Office of the Register of Essex County on October 22nd, 1906 in Book Y. 40 of Deeds for said County on page 361. This conveyance is made subject to all restrictions of record affecting the use of the same and particularly those contained in deeds as follows: John G. Vose to Emiline H. Griffin, wife of Jacob Jay Griffin, recorded in Book W. 16 of Deeds, page 320; Lewis R. Hurlbutt, widower, to Dora Louise Bingham, wife of James W. Bingham, Book O. 25 of Deeds, page 528; John G. Vose to Theodore H. Freeland, Book W. 16 of Deeds, page 317; Dora Louise Bingham and James W. Bingham, her husband, to Joseph S. Parry, Book T. 28. page 150; and the deeds from Parry to Marston and Schlittenhart to Marston, above referred to, all of said references being to the place of record, in the Register's Office of Essex County, New Jersey.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining; ALSO all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof, TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto

Exhibit A.

the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever; AND the said Russell Martson and Constance Turrell Marston do for themselves, their heirs, executors and administrators covenant and agree to and with the said party of the second part, its successors and assigns, that the said Russell Marston and Constance Turrell Marston are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made for the above described land and premises can or may be changed, charged, altered or defeated in anyway whatsoever; AND ALSO, that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. AND ALSO, that Russell Marston and Constance Turrell Marston will WARRANT, secure and forever defend the said land and premises unto the said Guaranty Mortgage and Investment Co., its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

IN WITNESS WHEREOF, the said party of the

first part have hereunto set their hands and seals the day and year first above written.

RUSSELL MARSTON (Seal.)

CONSTANCE TURRELL MARSTON. (Seal.)

Signed, sealed and delivered
in the presence of:
CATHERINE A. CONNOLLY,
as to both parties.

—o—

STATE OF NEW YORK,
County of New York. } ss.:

BE IT REMEMBERED, that on this thirtieth day of April in the year of our Lord One thousand nine hundred and twenty-three, before me, the subscriber, a Notary Public, personally appeared Russell Marston and Constance Turrell Marston, his wife, who, I am satisfied, are the grantors mentioned in the within Deed 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 Constance Turrell Marston being by me privately examined separate and apart from her said husband further 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.

CATHERINE A. CONNOLLY,
Notary Public,
Bronx County No. 58
Cert. filed in N.Y.Co., No. 357
N.Y. County Register's No. 5327
Commission expires March
30, 1925.

Catherine
A. Connolly
Notary
Public.
Bronx
County
N. Y.

—o—

Clerk's Certificate.

STATE OF NEW YORK,
County of New York. } ss.:

No. 44405 Series B.

I, JAMES A. DONEGAN, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said County, DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that Catherine A. Connolly, whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said County, duly commissioned and sworn and qualified to act as such; that *he* has filed in the Clerk's Office of the County of New York a certified copy of *his* appointment and qualification as Notary Public for the County of Bronx with *his* autograph signature; that as such Notary Public *he* was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements, and hereditaments, to be read in evidence or recorded in this State; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that *his* signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the City of New York, in the County of New York, this 30 day of Apl. 1923.

JAS. A. DONEGAN, Clerk.

NEW YORK SEAL.

Received in the Office
May 2nd, A. D., 1923,
at 10:42 A. M.
No. 43.

Affidavit of Raymond J. Bauer.

OFFICE OF REGISTER
OF DEEDS AND MORTGAGES,
Essex County, New Jersey.

STATE OF NEW JERSEY,
County of Essex. } ss.:

I, HOWARD S. DODD, Register of the County of Essex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by Russell Marston, et ux, to Guaranty Mortgage and Investment Co. and also of the certificate of acknowledgment thereto annexed as the same may be found recorded in my office in Book M-68 of Deeds for said County on pages 101-103.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 1st day of November, A. D., 1923.

(SEAL)

HOWARD S. DODD,
Register.

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

RAYMOND J. BAUER, being duly sworn on his oath deposes and says; that on the 10th day of November, 1923, he served the within notice to dismiss on Wall, Haight, Carey & Hartpence, solicitors of the appellant, by exhibiting the original and leaving a copy thereof with a clerk in their office, 15 Exchange Pl., Jersey City.

RAYMOND J. BAUER.

Subscribed and sworn to before me
this 10th day of November, 1923.

Harriet S. Hagen,
Notary Public of New Jersey.

Notice of Motion.

New Jersey Court of Errors and Appeals

Between

RUSSELL MARSTON,
Complainant-Appellant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,

and

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

To

Osborne, Cornish & Scheck, Esqs.,
Solicitors for Andrew Lenart and
John D. Munther.

Hopkins & Herr, Esqs.,
Solicitors for William G. Lentz.

PLEASE TAKE NOTICE, That on Tuesday, November 20th, 1923, at 11 o'clock in the forenoon, or as soon thereafter as the court may hear the same, we will make application to the New Jersey Court of Errors and Appeals, at the State House,

Trenton, New Jersey, to have the Guaranty Mortgage & Investment Company substituted on the record as Complainant-Appellant in the first of the above mentioned causes, and as a Defendant in the second of the above mentioned causes, in the place and stead of Russell Marston, on the ground that the said Guaranty Mortgage & Investment Company is now the real party in interest in said causes, the said Russell Marston having disposed of his interest in said causes by conveying his property to the Guaranty Mortgage & Investment Company, or for such order or relief as to the Court shall seem expedient.

Upon said motion we shall present to the Court a certified copy of the deed from Russell Marston, *et ux* to the Guaranty Mortgage & Investment Company, and the annexed affidavit of E. W. A. Schumann.

Dated November 7th, 1923.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors of Russell Marston,
Complainant-Appellant.

Affidavit.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

RUSSELL MARSTON,
Complainant-Appellant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,

and

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

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

E. W. A. SCHUMANN, of full age, being duly sworn according to law upon his oath, deposes and says:

That he is an Attorney-at-Law of the State of New Jersey and employed in the office of Wall, Haight, Carey and Hartpence, Solicitors of Russell Marston, Complainant-Appellant in the first above mentioned cause and Defendant in the second above mentioned cause; that on the 18th day of October, 1923, he searched the records in the office of the Register of Deeds for Essex County, New Jersey, and found title to the following described premises to stand in the name of Guaranty

Mortgage & Investment Company, by deed from Russell Marston and wife, dated April 30th, 1923, recorded May 2nd, 1923, at 10:42 A. M.:

"Beginning at the corner formed by intersection of the southerly line of Raymond Avenue with the Easterly line of Charlton Avenue; running thence Southerly along the said Easterly line of Charlton Avenue One Hundred (100) feet; thence Easterly at right angles to Charlton Avenue and parallel with Raymond Avenue two hundred feet; thence northerly parallel with Charlton Avenue one hundred feet to the southerly line of Raymond Avenue; and thence along the same westerly two hundred feet to the point or place of beginning. Being the same premises conveyed to Constance Turrell Marston by Joseph S. Parry and Sarah W. Parry, his wife, by deed dated January 10th, 1906 and recorded in the Register's Office of Essex County on January 11th, 1906 in Book I.39 of deeds of said County, page 600.

"COMMENCING at a point in the easterly line of Charlton Avenue distant one hundred feet southerly from the corner formed by the intersection of the southerly line of Raymond Avenue with the said easterly line of Charlton Avenue; running thence southerly along said easterly line of Charlton Avenue, one hundred feet; thence easterly at right angles to Charlton Avenue and parallel with Raymond Avenue two hundred feet; thence northerly and parallel with Charlton Avenue one hundred feet; thence

westerly and parallel with Raymond Avenue and at right angles to Charlton Avenue two hundred feet to the point or place of beginning. Being the same premises conveyed to Russell Marston by Henry Schlittenhart by deed dated October 17th, 1906 and recorded in the office of the Register of Essex County on October 22nd, 1906 in Book Y.40 of deeds for said County, on page 361. Said premises are situate in the Village of South Orange, Essex County, New Jersey."

E. W. A. SCHUMANN.

Sworn and subscribed to before me this 9th day of November, 1923.

Alfred F. Conway,
Master in Chancery
of New Jersey.

Service of a copy of within Notice of Motion is hereby acknowledged this 14th day of November, 1923.

OSBORNE, CORNISH & SCHECK,
Solicitors for Andrew Lenart
and John D. Munther.

Affidavit.

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

ALFRED F. CONWAY, of full age, being duly sworn according to law upon his oath, deposes and says:

That he is employed in the office of Wall, Haight, Carey & Hartpence, Solicitors for Russell Marston, Complainant-Appellant in the above stated cause; that on the 13th day of November, 1923, he served a copy of the within Notice of Motion on Messrs. Hopkins & Herr, Solicitors for Defendant-Respondent William G. Lentz, by leaving same with the person in charge of the office of Messrs. Hopkins & Herr, 51 Newark Street, Hoboken, N. J.

ALFRED F. CONWAY.

Sworn and subscribed to before me }
this 14th day of November, 1923. }

Wm. H. Shaw,
Master in Chancery
of New Jersey.

Copy of Deed from Russell Marston to Guaranty Mortgage & Investment Company.

(See Exhibit "A," page 8 of Respondents' papers on motion to dismiss appeal.)

New Jersey Court of Errors and Appeals

RUSSELL MARSTON,
Complainant-Appellant,

against

WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,

and

WILLIAM G. LENTZ,
Complainant,

against

ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

BRIEF FOR APPELLANT.

Statement of the Case and Questions Involved.

This is an appeal from decree dismissing on the merits complainant's bill for enforcement of a restrictive covenant, entered on advice of the Honorable Vice-Chancellor Foster.

Marston's wife owned premises at the southeast corner of Charlton Avenue and Raymond Avenue in South Orange, 100 feet on Charlton Avenue by 200 feet on Raymond Avenue. Marston owned the adjoining lot on Charlton Avenue 100 feet front by 200 feet deep. The two plots were occupied as

one by the Marstons as their residence. The house stands on the wife's plot. Complainant's lot is used as part of the lawn and gardens.

Lenart owns plot southwest corner of Raymond and Charlton Avenues 145 feet on Raymond Avenue by 200 feet on Charlton Avenue on which he proposes to erect two dwellings. Lentz owns the adjoining lot on Charlton Avenue 100 feet by 145 feet, on which he proposes to erect one dwelling. The two parcels were formerly one lot which will be referred to hereafter as the DeGomme lot. John D. Munther having acquired that lot conveyed to Lentz his part in May, 1922, and to Lenart the rest in September, 1922.

The bill asked that defendants be enjoined from erecting more than one house on the DeGomme plot. Lentz filed a cross bill asking that if it be so decreed, it be decreed as between himself and Lenart that Lentz had the right to erect that house on his plot. The cross bill also stands as answer to the bill. The two causes were consolidated. The decree dismissing the bill also dismissed the cross bill.

The matter was tried on stipulated facts, uncontroverted allegations in the bill and four maps mentioned below.

The material facts are as follows:

All parties derive title through mesne conveyances from John G. Vose. The DeGomme lot was conveyed by Vose to Charles DeGomme by deed dated and recorded September, 1868. Marston's lot was conveyed by Vose to one Freeland by deed dated December 31st, 1872, and recorded January 4th, 1873.

Each deed recited that the premises conveyed were part of "the Estate called Montrose" and recited that that estate was conveyed to Vose by ten specified deeds of which the earliest was dated in

1864, and the latest in October, 1866. Each contained a covenant as follows:

> "And the said party of the second part for himself, his heirs and assigns, doth hereby covenant to and with the said party of the first part, his heirs, executors, administrators and assigns, that the said premises hereinbefore described shall not at any time hereafter be used or occupied for the erection or maintenance of any slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory or any manufactory of gun powder, glue, varnish, vitriol, ink, soap, candles, starch or turpentine, or for the tanning, dressing or preparing of skins, hides or leather, or for any brewery, distillery, laboratory, livery stable, race course, theatre, circus or place for the exhibition of wild animals, or gymnastic feats, cabinet makers, or carpenters shops, hat shop, barroom, lager beer saloon or any other erection known as nuisances, or any other noxious or dangerous trade, business or establishment, or for any other purpose whatsoever which can or may be unwholesome or offensive to the neighboring inhabitants, or for the erection of any buildings of any kind or description excepting one dwelling house with appropriate gardeners cottages, porters lodges, private billiard rooms or private bowling alleys, private gas works, arbors, wall houses, summer houses, ice houses, tool houses, barns, stables, carriage houses, reservoirs, ornamental lakes, water works, sheds, hennerys, cow houses, piggeries and other buildings and offices appropriate for a gentleman's country residence. It being expressly understood, covenanted and agreed by and on behalf of the said party of the second part, his heirs, executors, administrators and assigns, that the covenant aforesaid shall be attached to the said premises and run with the land and shall be inserted in any and all future conveyances and mortgages and other instruments whereby the

> title to the said land can or may be transferred or affected and that the said covenant shall forever hereafter be recognized sustained and upheld. And that it shall be lawful not only for the said party of the first part, their legal representatives, or assigns, but also for the owner or owners of any of the property mentioned in the deeds hereinbefore recited, to institute and prosecute any suit, proceeding or injunction at law or in equity against any person or persons violating or threatening or attempting to violate the covenant and agreement aforesaid. It being understood that the covenant and agreement aforesaid is not to be enforced personally against the said party of the second part, his heirs or assigns, unless he or they shall be the owner or owners of the premises herein described at the time or times when any violation of the said covenant or agreement, shall be or may be made, committed, threatened or attempted."

There is no issue of fact. The only questions are: (a) whether the covenants were imposed in pursuance of a neighborhood scheme; (b) if the covenants were imposed in pursuance of a scheme, whether that scheme had been abandoned or otherwise frustrated; and (c) if the covenants were independent and unconditional, has the neighborhood so changed that specific enforcement would be inequitable.

By the ten deeds recited by Vose in his deeds to Freeland and DeGomme, Vose got contiguous parcels which together constituted a sprawling, irregular tract of about 210 acres. It was practically divided into two parcels separated by a relatively narrow neck running north and south and lying along both sides of Grove Road. The DeGomme and Freeland plots lie well within the southernmost parcel.

It would appear by inspection that the northerly parcel was about three times as large as the southerly.

The shape of the tract and location of the DeGomme and Freeland plots is shown on Diagram A.

When the DeGomme deed was made both of said plots lay in one block bounded north by Raymond Avenue, south by Ralston Avenue, east by Grove Road, and west by Scotland Road. Charlton Avenue was laid out between that time and the time of the conveyance to Freeland.

Vose caused three maps to be made.

The first was dated January 1st, 1867. It was never filed. The deed to DeGomme described that plot as the "easterly part of plot S" on said map of January 1st, 1867, but did not recite that it had been or was intended to be filed. This map was not mentioned in the deed to Freeland.

The next was dated and filed in 1869. It is not shown that it was ever referred to by Vose in any deed. This map is in evidence.

The third was dated in May, 1873, and filed in the same year. It is stated in the stipulation of facts that Vose made conveyances according to this map of 1873. But it appears from the other stipulated facts and from Exhibit D mentioned below, that as matter of fact he did so only in the case of the two plots owned by the Marstons; that with the exception of those two plots and a plot at the northeast corner of Raymond and Charlton Avenues ("M" on map of 1871, Diagram B following), which Vose conveyed in April, 1873, all of the property east of Charlton Avenue was lost to Vose by foreclosure of mortgage in 1878. While the plots of Marston and his wife did in fact correspond with two lots shown on this map, the map was not mentioned in the deed to Freeland.

Whether or not it was mentioned in the deed of Mrs. Marston's lot does not appear. This map is in evidence.

The map of 1867 is lost. What was conceded to be a copy from the archives of a surveyor was laid before the Vice-Chancellor, but was not marked in evidence. The differences between the map of 1867 and the map of 1869 are, however, stipulated. Those differences were as follows:

A new street was shown on the map of 1869 running east from Scotland Road through the northerly part of the above-mentioned "neck" to Grove Road. It appears by scale on the map that the south side of this street was about 520 feet north of the north line of Raymond Avenue.

To the northward of this new street certain other new streets were laid out, certain plots which were not numbered or lettered on the map of 1867 were subdivided into numbered lots, and certain of the other plots of the map of 1867 were rearranged and cut into very much smaller plots. The nearest of these changes to the corner of Raymond and Charlton Avenues was by scale on the map over 1,200 feet away.

Plots that Vose had conveyed were shown and marked with owners' names on the map of 1869.

The only change in the southern parcel or pocket in which our plots lie, was that plot "L" on the map of 1867, was divided on the map of 1869 by a north and south line into two plots both marked "L."

A map based on the tax map of the Village of South Orange, and showing the plots conveyed by Vose, and the restrictions on them, the plots sold in foreclosure, and the present subdivisions and buildings, was compiled for the parties to this suit and put in evidence as Exhibit D.

Diagram B following shows the whole of the southernmost parcel or pocket of the Vose tract, and the plots into which it was subdivided on the map of 1867 (as evidenced by stipulation and map of 1869), and indicates the southerly end of the neck by which it was connected with the rest of the tract

Both in that parcel and throughout the tract the plots on the map of 1867 varied widely in size. Diagram B shows plots running from 1.85 acres (R, S, V and W) to 6 acres (E). In the "neck" there was one lot (G) of 9 acres. In other parts of the tract there were plots even larger. There was no uniformity either generally or in any section.

The map of 1873 showed lots T and U (Diagram B) divided into twelve lots each 100 feet broad, six fronting on Charlton Avenue and six fronting Grove Road, and plots D and E divided into twenty-nine lots, and M and the westerly part of "L" divided into six lots.

It appears from the stipulation and Exhibit D that in the southerly parcel of the tract Vose conveyed as next below set forth. Each deed contained substantially the same covenant as in the Freeland and DeGomme deeds except that they differed as noted below as to the number of dwellings permitted, and that in two of them, as noted below, the restriction to dwelling houses was limited to twenty-five years from date of the deed.

Parcel A on map of 1867 southeast corner of Ralston Avenue and Scotland Road, 4.71 acres to Sprague unrestricted, by deed dated September 28th, 1866, recorded October 1st, 1866. This seems to have been an exchange of lands, for one of the

ten deeds recited by Vose in his conveyances was a deed of even date from Sprague to him.

Parcels B and C on map of 1867, 7.41 acres, comprising the rest of the frontage on the south side of Ralston Avenue to Wm. A. Brewer restricted to "dwelling houses" (number not limited) for twenty-five years, by deed dated October 3rd, 1866, recorded December 31st, 1866.

To King plot O over 2 acres on said map, north side of Raymond Avenue restricted to one house by deed dated October 22nd, 1866, recorded November 1st, 1866.

To Woodward westerly 145 feet of plot R on map of 1867 about 1 acre south side of Raymond Avenue restricted to one house. The date and date of record of this deed is not shown, but it is stipulated that the conveyance was made prior to January 1st, 1867.

To Philips, plot N on said map, over 2 acres, north side of Raymond Avenue opposite DeGomme plot, restricted to two houses, by deed dated May 14, 1867, recorded May 27, 1867.

To George K. Brewer, plot V on said map, about 1.85 acres, north side of Ralston Avenue adjoining DeGomme on the south, restricted to two houses for twenty-five years, by deed dated May 14th, 1867, and recorded May 28th, 1867. The fact and date of this conveyance were mentioned in the description in the deed to DeGomme.

To Wm. A. Brewer easterly part of plot W on said map north side of Ralston Avenue by deed dated Sept. 25, 1867.

To P. K. Dickinson, plot P on said map northeast corner of Scotland Road and Raymond Avenue, 4 acres, restricted to four houses by deed dated October 18, 1867, and recorded in 1867.

To Condit plot X on said map, northeast corner of Scotland Road and Ralston Avenue, about

2.82 acres, restricted to one house by deed dated February 14, 1868, recorded March 4th, 1868.

To John B. Dickinson plot Q on said map, southeast corner of Scotland Road and Raymond Avenue, 3.10 acres, restricted to three houses, by deed dated July 14, 1868, and recorded July 22, 1868.

To Matthews the westerly 108 feet of plot S on said map south side of Raymond Avenue adjoining DeGomme on west, about .85 of an acre, restricted to one house, by deed dated July 28, 1868. This deed was not recorded till 1869, but the fact that it had been given and its date were mentioned in the description in the deed to DeGomme.

To Bartlett the easterly 108 feet of plot R on said map south side of Raymond Avenue, about .85 of an acre, restricted to one house, by deed dated August 10, 1868.

To DeGomme, the easterly 145 feet of plot S on said map, about one acre, restricted to one house by deed dated and recorded in September, 1868.

To Matthews the westerly part of plot W, north side of Ralston Avenue, restricted to one house in July, 1869.

The above deeds together cover all of the property on the south side of Ralston Avenue from Scotland Road to Grove Road, the whole block between Raymond Avenue, Scotland Road, Ralston Avenue and Grove Road and all along the north side of Raymond Avenue between Charlton Avenue and Scotland Road.

By deed Dated December 31, 1872, and recorded January 4, 1873, Vose conveyed complainant's lot 100 feet by 200 feet, or about twenty-forty-thirds of an acre, to Freedland, restricted to one house.

In April, 1873, he conveyed to Griffen out of parcel M on said map, a parcel 200 feet by 250 feet, being all of plot M on said map that was left

after laying out Charlton Avenue, restricted to one house.

Exhibit D shows that in October, 1868, Vose conveyed to Coudert about 3.25 acres, being the easterly part of plot L on said map of 1867, and the easterly one of the two plots marked "L" on the map of 1869, restricted to one house, and that in January, 1873, he conveyed the parcel which later came into complainant's wife 100 feet on the east side of Charlton Avenue by 200 feet on Raymond Avenue.

Said Exhibit D shows no other conveyance by Vose in any part of the area shown on Diagram B. It shows that all the rest of said area was sold unrestricted in 1878 in foreclosure of mortgage.

Under date of May 5th, 1873, Vose and DeGomme entered into an agreement by which "in consideration of the agreement hereby made by said grantee" (DeGomme) "that all the dwelling houses and outbuildings which may be erected upon said plot shall be such as are appropriate for a gentleman's country residence, the said grantor" (Vose) "agrees that the limitation as to the number of dwelling houses so to be erected on said plot shall be opened so as to permit the erection of three such houses and appurtenances. All the other covenants and restrictions in said deed" (*i. e.*, the deed from Vose to DeGomme), "excepting only as to the number of dwelling houses and appurtenances, to remain in full force. Mr. DeGomme is to have access to Charlton Avenue."

A subdivision according to this agreement, and as defendants propose, would give three plots each 100 feet by about 145 feet with an area of 14,500 square feet, or about one-third of an acre.

This agreement was not acknowledged or

proven. In January, 1897, it was filed in the office of the Register of Essex County and by him recorded in a book for miscellaneous instruments.

Until the beginning of this suit the DeGomme plot remained vacant, and until Munther conveyed to Lentz, as above set forth, it all remained in one ownership.

The 3.25 acres out of plot L, conveyed to Coudert, restricted to one house as above stated, is now divided into seven. Plot X restricted to one house is now divided into three. The manner in which these subdivisions came about will be stated in detail in the argument. Most of the parcels resulting from the subdivision of these two lots are considerably larger in area than one-third of an acre. The smallest of them in area is about 16,200 square feet, 1,700 square feet larger than the area which DeGomme and Vose agreed as above was suitable for a gentleman's country residence. Only one of these plots has a frontage of less than 100 feet. That is the westernmost of the parcels in the Coudert plot. It has a frontage of about 87.5 feet. Its westerly side is about 500 feet east of Charlton Avenue. It is largely around the curve of Grove Road.

Out of the plot 200 feet by 250 feet conveyed to Griffen, a strip 17 feet wide seems to have been carved and added to the next lot north, but the house does not stand on it. On the rest of the plot there now stand two houses and an old cellar from which one of the said houses was moved and which has been converted into a sunken garden. But there has never been any physical division of the plot and at the time of trial the whole remained in one ownership. On subdivision each existing house might be given frontage of 125 feet on Raymond Avenue or 91 feet on Charlton Ave-

nue. If the division of frontage were made on Raymond Avenue, as from the location of the houses would be natural, the Charlton Avenue frontage would be about 183 feet. If the plot were equally divided as to area each plot would contain about 22,875 square feet.

The map, Exhibit D, shows the following further facts:

On the George K. Brewer plot (V), restricted in 1867 to two houses until 1892, there now stand four houses with plottage as follows: West side of Charlton Avenue adjoining defendant Lentz 100 feet on the avenue by 253 feet deep; corner of Charlton and Ralston Avenues 200 feet on Charlton by 71 feet on Ralston; next 79 feet on Ralston by 200 feet deep; next 103 feet on Ralston Avenue by 200 feet deep. The map of 1873 (*supra*) shows this plot divided into four, but shows only two houses. Whether the other two were built, or actual division of ownership made, before or after the restriction expired in 1892, is not in evidence.

The plots on the north side of Ralston Avenue between the west side of said plot V, and the east side of said plot X, remain and are improved as they were sold and restricted.

Plot X has been subdivided and improved in three parcels as above stated.

Plot Q, next on the north and reaching to Raymond Avenue, restricted to three houses, has three houses on it.

Plot R, which was sold by Vose in two parts as above set forth, has become reunited and has one house.

The westerly part of S, sold to Matthews, has one house.

The above constitute the whole block between

Charlton and Scotland Road and Raymond and Ralston Avenue.

Taking up next the north side of Raymond Avenue from Charlton Avenue to Scotland Road:

Plot N, opposite DeGomme, restricted to two houses, has two houses.

Plot O has become united in ownership with a strip about 150 feet wide of P, to form a tract of 405 feet front on which there is one house.

On the remnant of plot P, which plot was restricted to four houses, there are three.

Taking up next the south side of Ralston Avenue from Scotland Road to Grove Road:

The 4.71 acres conveyed to Sprague in 1866 unrestricted has been divided into eight parcels. Beginning at the southwest corner of the tract on Scotland Road they are as follows: 92 feet front on Scotland Road, area 17,500 square feet; 75 feet front area 14,146 square feet irregular, plus garage plot in rear; 100 feet on Scotland Road, 200 feet on Ralston Avenue, not quite regular in shape, and about 18,600 square feet; 120.51 feet on Ralston Avenue, area 26,000 square feet; 140 feet on Ralston Avenue, 35,400 square feet; 135 feet on Ralston Avenue, 35,500 square feet; 115 feet on Ralston Avenue, 26,700 square feet plus irregular extension at rear.

Taking next the 7.41 acres conveyed to Wm. A. Brewer in 1866, restricted to "houses" for twenty-five years. So much of this as fronted on Ralston Avenue is now divided into six parcels, which, taking them in order beginning at the northwest corner of the plot on the south side of Ralston Avenue are as follows: 100 feet front by 150 feet deep; 100 feet front but broadening out to 200 feet in rear of plot last mentioned, area about 55,000 square feet; 50 feet front by 100 feet deep, vacant shown on map of 1873 as "Charlton Ave-

nue"; 155 feet front, 19,375 square feet; 100 feet front, 15,000 square feet; corner of Grove Road 122.22 feet front 17,400 square feet.

The plots mentioned above together with the Coudert plot, the Griffen plot, and the two Marston plots and plots D and E on map of 1867 cover everything in the area shown on Diagram B, except what was sold in foreclosure in 1878 unrestricted.

Plots D and E on map of 1867, which were divided into 29 lots on the map of 1873, are not shown on Exhibit D as sold in foreclosure; they are in the area marked on that map "Grove Park."

Taking up now the property that was foreclosed:

The block bounded by Charlton, Grove, Raymond and Ralston is divided as follows, beginning on the east side of Charlton Avenue and adjoining Complainant 140 feet front, 31,500 square feet; 60 feet front area 12,000 square feet, vacant; 80 feet front, 16,000 square feet, vacant; 120 feet on Charlton Avenue, 200 feet on Ralston Avenue, 24,000 square feet; corner of Grove Road and Ralston Avenue 101.20 feet on Grove Road 19,690 square feet; same front 21,254 square feet; same front 22,868 square feet; same front 20,961 square feet; corner of Raymond Avenue 120.40 feet on Raymond Avenue, 18,958 square feet; 63 feet front, 12,100 square feet; 100 feet front 20,000 square feet; next is Mrs. Marston's plot 200 feet on Raymond Avenue 100 feet on Charlton Avenue.

The foreclosed property on the north side of Raymond Avenue is all in that part of L on map of 1867 which was not sold to Coudert in 1868, it is shown as the westerly plot L on the map of 1869. It is now divided as follows, beginning on the north side of Raymond Avenue adjoining plot M; 95 feet front area 18,146 square feet (Exhibit D

would seem to indicate that this may include about 7 feet off of M); 100 feet front, area 20,000 square feet; 100 feet front 26,700 square feet.

Many of the plots mentioned above are of irregular shape. Angles between their several sides are not given, nor are all necessary distances given on Exhibit D. In these cases distances were taken by scale on the said Exhibit, and the mean between opposite sides was used as a factor in squaring. On the curved frontages on Grove Road in the Coudert plot, the chord of the curve was used as the frontage. This method does not give mathematical accuracy but it furnishes a very close approximation.

In all of the area covered by Diagram D, comprising now some 56 actual plots, there are only ten which fall short in frontage or area or both, of the 100 feet by 145 feet which Vose and DeGomme by their agreement of 1873 approved as sufficient ground for a gentleman's country residence. Two of them are in the Sprague tract which was sold before DeGomme bought, unrestricted. One of them is still vacant and was shown on the map of 1873 as the bed of Charlton Avenue. This is in the Brewer tract, which was sold before DeGomme bought, on which the restriction as to plottage has expired. Two of them were in the George K. Brewer plot which Vose sold before DeGomme bought subject to restrictions which have expired.

That leaves five. Of these only two are in the immediate vicinity of the DeGomme plot. They are adjacent, both still vacant and one of them has an area of 16,000 square feet.

The other three are as follows: 63 feet front, 12,100 square feet, south side of Raymond Avenue next to the corner of Grove Road, 320 feet east from the east side of Charlton Avenue; 95 feet front, 18,146 square feet, north side of Raymond

Avenue about 200 feet east of Charlton; 87 feet front, 16,200 square feet area on Grove Road about 500 feet east of Charlton Avenue.

Of the five, therefore, there are only two which fall short in both area and frontage. The greatest shortage in area is 2,500 square feet, or about sixteen per cent.

The stipulation mentions other breaches of restrictions in the Vose tract but the nearest of them, that on Montrose Avenue and Charlton Avenue, was, by scale on the map, nearly 1,500 feet north of Raymond Avenue at its nearest point.

Diagram A

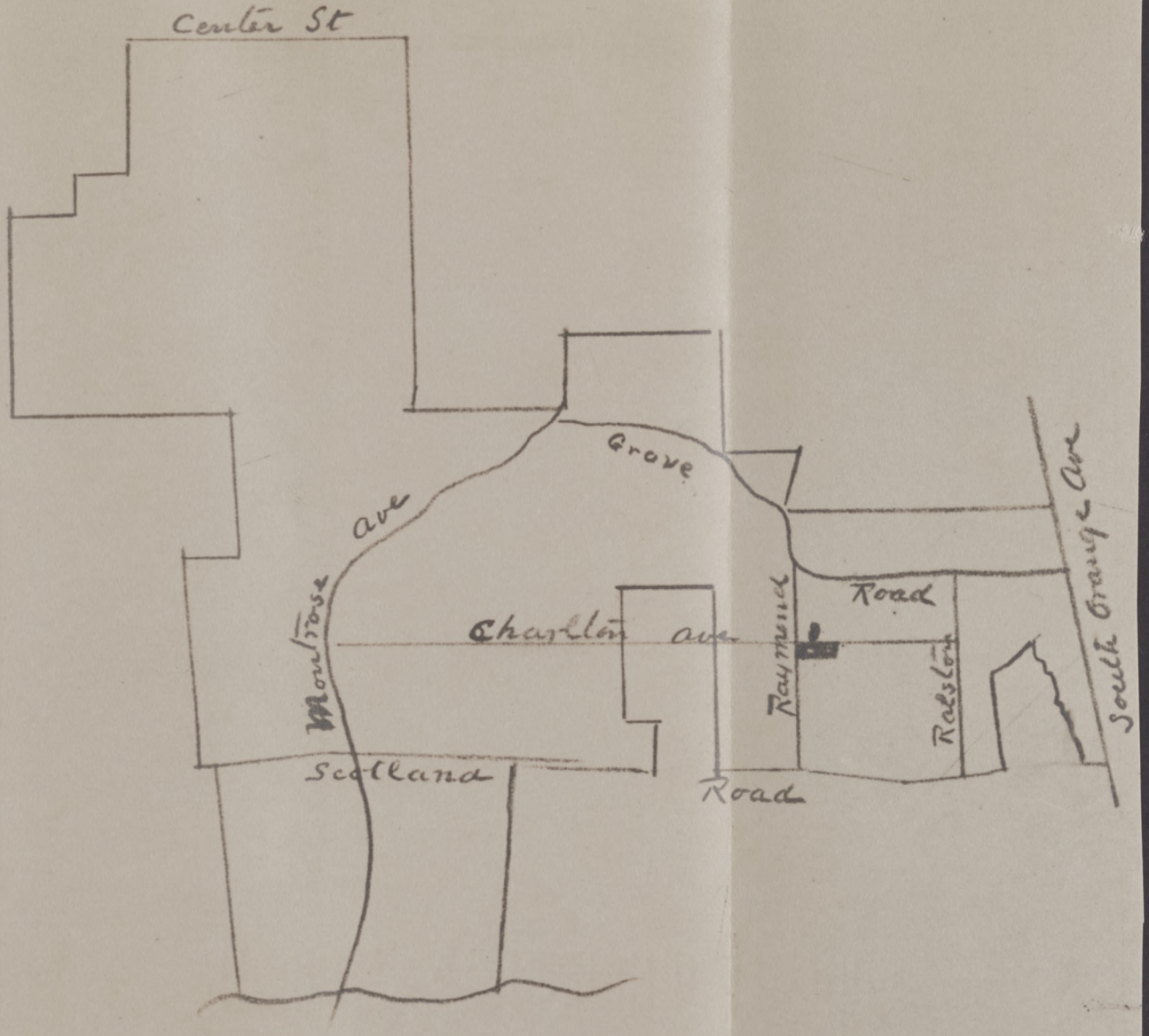
Center St
Grove
Monroe ave
Road
Charlton ave
Raymond
Ralston
South Orange Ave
Scotland
Road

Diagram B


Not owned by Vose
G
9 Acres
Not owned by Vose
F
Grove
J
K
E
6 acres
D
4.20 Acres
Road
L
7 Acres ±
T
3.90 Acres
300'
U
3.58 acres
300'
M
2 Acres
255'
N
2 Acres
340'
258'
Raymond Ave
253'
S
1.85 acres
V
1.85 acres
258'
Ralston Ave
Brewer 1866
one house for 25 years
9.41 acres
C
B
O
2. Acres
346'
253'
R
1.85 acres
W
1.85 acres
253'
Sprague 1866
unrestricted
300'
300'
P
4. Acres
450'
370'
452'
Q
3.10 acres
X
2.82 acres
411'
A
4.17a
Not owned by Vose
Not owned by Vose
Avenue
South Orange
Scotland
Road
Not
owned
by
Vose

ARGUMENT.

POINT I.

If there was any understanding between Vose and DeGomme that the restriction was imposed upon the DeGomme lot in pursuance of a scheme of neighborhood development for mutual benefit of all plot owners there has not been any such abandonment of or departure from that scheme as to afford a defense to suit to enforce the restriction.

DeGomme's plot was the easterly 145 feet of plot S on the map of 1871. The laying out of Charlton Avenue gave it a frontage of 300 feet on that Avenue. By agreement dated May 5th, 1873, made between the said Vose and DeGomme it was agreed that:

> "In consideration of the agreement hereby made by said grantee that all the dwelling houses and outbuildings which may be erected upon the said plot shall be such as are appropriate for a gentleman's country residence"

three dwellings with their appurtenances might be erected on said plot and that all the other covenants except only as to the number of dwelling houses and appurtenances should remain in full force.

Vose never at any time before or after conveyed a plot as small as 100 feet front by 145 feet deep or so restricted any plot that he did convey that it could be cut up into parcels averaging as small as that.

This agreement was not intended as in itself an abandonment of scheme or plan. It furnishes the parties' own interpretation of what was consistent with the scheme or plan, if there was any.

DeGomme could not have bought in the faith that Vose had a plan which contemplated the restriction of each plot on the map of 1871 to one house, for his own plot was but the easterly 145 feet of plot S on that map. The westerly 108 feet of that plot had already been sold with permission to erect one dwelling. Plot M directly across Raymond Avenue had been sold with permission to erect two dwellings. Plot V, adjoining DeGomme directly on the south, had been sold with permission to erect two dwellings. Plot Q, southeast corner of Raymond Avenue and Scotland Road, had been sold with permission to erect three dwellings and Plot P, northeast corner of Raymond Avenue and Scotland Road had been sold with permission to erect four dwellings.

These facts advertised to DeGomme that "Vose would not in his future conveyances pay the slightest regard to the map of plottage" (*Coudert* v. *Sayre,* 46 Equity, 386-399).

Nor had Vose done anything from which DeGomme could assume the substitution of any other definite scheme as to plottage.

Vose had sold Plot X, northeast corner of Scotland Road and Ralston Avenue 2.82 acres restricted to one house; plot Q was 3.10 acres, three houses on that plot would average 1.03 acres per house. Four houses on plot P would average 1 acre apiece. Two houses on plot N would average about an acre apiece. DeGomme's plot was exactly an acre. Two houses on plot V would average 92/100ths of an acre, and the westerly part of plot S sold to Matthews was only a shade over 74/100ths of an acre.

The only thing that was common to all covenants besides the familiar covenant against nuisances was the provision that the plot conveyed should be restricted to a dwelling house or dwell-

ing houses with appropriate "gardeners cottages, porters lodges, private billiard rooms or bowling alleys, private gas works, arbors, wall houses, summer houses, ice houses, tool houses, barns, stables, carriage houses, reservoirs, ornamental lakes, water works, sheds, hennerys, cow houses, piggeries and other buildings and offices appropriate for a gentleman's country residence."

Defendants have argued that this language implied a covenant that the tract should be developed in large plots upon a scale of considerable grandeur, but the answer to that is that neither the Matthews plot nor the DeGomme plot itself was of sufficient size to accommodate anything on a grand scale. Neither were plots V and N when each divided into two, plot Q when divided into three, or plot P when divided into four. All that anybody could be reasonably expected to put upon any of those plots as an accessory to the dwelling or dwellings that might be erected upon them would be a stable, and that would be accommodated with comfort on a much smaller plot.

Neither do the words "gentleman's country residence" of themselves have any definite meaning. The man accustomed to a certain scale of living believes that that implies a farm. To other men of lesser means but still gentlemen of taste and culture they imply nothing more than rural or semi-rural surroundings and a plot sufficiently large to afford room for a lawn and flowers.

There is, therefore, no criterion furnished either by the language or acts of either party by which this Court can say that DeGomme bought in reliance upon a scheme which excluded the erection of a dwelling house upon any plot less than any particular minimum, so long as development was not in city lots and town houses.

If there was any scheme or plan agreed to be-

tween Vose and DeGomme that the neighborhood should be developed for gentlemen's country residences, the agreement of 1873 between them is the express declaration of both of them that a plot 100 feet front by 145 feet deep was not too small to be suitable for a "gentleman's country residence," for they expressly agreed that nothing else should be erected thereon. Vose never conveyed a plot smaller either in area or frontage.

There was nothing smaller shown on the map filed in 1873 west of Grove Road. On that map the plot east of Grove Road constituting lots C and D on the map of 1871 (diagram B) was divided into very much smaller lots. But the filing of that of itself obviously had no effect. It would be the conveyance of lots according to that map which, if anything, would be a breach of obligation by Vose. The map at most merely advertised an intention. That intention was never carried out. It is not shown that he ever conveyed any of those lots east of Grove Road, or that he ever in any of his conveyances made any reference to the map of 1873. Map, Exhibit D, shows that the area covered by those small lots is now in Grove Park.

The compiled map, Exhibit D, which is in evidence in this suit, shows that that part of the Vose tract shown on diagram B is now divided into 56 actual plots.

It appears from this exhibit that in all of those 56 plots, there are but ten which have a frontage of less than 100 feet. Two of these are on the east side of Scotland Road south of Ralston Avenue in the tract sold to Sprague in 1866 unrestricted. Two of them, 71 and 79 feet respectively, constitute a part of the Ralston Avenue frontage of plot V sold prior to the DeGomme sale, to George K. Brewer restricted as to plottage until 1892 only,

and the subdivision is not shown to have been made prior to the expiration of the restriction. One of them is a strip 50 feet wide on the south side of Ralston Avenue opposite the bed of Charlton Avenue. It is shown on the map of 1873 as Charlton Avenue and is a part of the tract conveyed to William H. Brewer prior to the sale to DeGomme, never restricted as to plottage at all and on which the gentleman's country residence restriction expired in 1891.

Two of them, respectively 60 feet by 200 and 80 feet by 200 feet, are vacant, adjacent to each other on the east side of Charlton Avenue, about opposite the easterly side of the Lentz parcel. They were never sold by Vose, but were sold in 1878 unrestricted in foreclosure of a mortgage made by Vose.

One of them, 63 feet front with a total area of 12,100 square feet, is on the south side of Raymond Avenue next to the corner of Grove Road. It is nearly 400 feet away from defendants' plot and cannot be seen from it. This also was never conveyed by Vose, but was sold in foreclosure unrestricted.

Another 95 feet front with an area of 18,146 square feet was on the north side of Raymond Avenue about midway of the block between Charlton Avenue and Grove Road. It also was sold unrestricted in the foreclosure, never having been conveyed by Vose.

The other 87 feet front is in the Coudert parcel, 500 feet east of Charlton Avenue. Said exhibit shows one other parcel, 88.69 feet front, with an area of 11,000 square feet, but that is an arbitrary subdivision; it is a part of plot M, the present Fort property, which will be discussed below.

One other parcel of less than 100 feet front is shown on said schedule. That is parcel 88.03 feet

front on the east side of Charlton Avenue, north of Raymond Avenue. Of this parcel only a strip 17 feet in breadth was ever part of the Vose tract. That strip was part of plot M conveyed to Griffen below mentioned. Exhibit D would seem to indicate that no part of the building stands on that strip.

There are but five actual parcels in this area which have an area of less than 14,500 square feet.

One of them is on the east side of Scotland Road south of Ralston Avenue in the Sprague tract.

One of them is the Charlton Avenue piece, 5,000 square feet in the William H. Brewer tract.

One of them is 14,200 square feet on the north side of Ralston Avenue in the George K. Brewer tract, on which restrictions expired in 1892. It is not shown to have been carved out or improved before that date.

One of them is the foreclosed piece, 60 feet by 200 feet, on the east side of Charlton Avenue, opposite Lentz parcel, mentioned above.

One of them, 12,100 square feet, is the 63-foot lot on the south side of Raymond Avenue near Grove Road, mentioned above.

Said exhibit shows one more, 11,000 square feet, the 88.69-foot front piece, part of the Fort tract, mentioned above.

Said exhibit shows the actual plottage immediately surrounding the defendants' property as follows:

Fort plot diagonally opposite (arbitrarily divided into three), 188.69 by 233, with two houses.

Northwest corner of Charlton Avenue and Raymond Avenue 253 feet by 65,100 square feet in area.

West side of Charlton Avenue immediately adjoining that in the rear, 112 feet front by 20,160 square feet in area.

The balance of north side of Charlton Avenue to Scotland Road, two places, one of which is 401 feet on Raymond Avenue, with 134,700 square feet, the other 156 feet on Raymond Avenue by 45,900 square feet in area.

On the south side of Raymond Avenue immediately adjoining defendants to the west 108 feet front by 32,400 square feet in area.

Next lot, 253 feet front by 76,020 square feet in area.

Next lot, 150 feet front by 45,000 square feet in area.

Southeast corner of Scotland Road and Raymond Avenue 150 feet front by 45,750 square feet in area.

Next lot south on Scotland Road the same size.

Next lot south on Scotland Road 150.96 feet front by 48,600 square feet in area.

Northeast corner of Scotland Road and Raymond Avenue 150.96 feet front by 46,350 square feet in area, plus an extension at the rear corner.

Next lot east, north side of Raymond Avenue, 109.75 feet front, 31,255 square feet.

Next east 145.20 feet front, 43,560 square feet.

Next lot east, 108.20 feet front, 32,460 square feet.

Next lot east, 103.40 feet front, 20,680 square feet.

Next east, 79 feet front, 15,800 square feet.

Next east corner of Charlton Avenue, 71 feet front, 14,200 square feet.

Next north, west side of Charlton Avenue, immediately adjoining Lentz, 100 feet front, 25,340 square feet.

Northeast corner of Ralston Avenue and Charlton Avenue, 120 feet front, 2,400 square feet.

Then come, completing the circle, two vacant properties mentioned above of 80 feet front by

16,000 square feet, and 60 feet front by 12,000 square feet, and the two Marston plots, each 100 feet on Charlton Avenue, by 200 deep.

So far, therefore, as actual development is concerned, the claim that a scheme for gentlemen's country houses of such character that one of them might be erected on 100 feet front by 145 feet deep, has been abandoned and defendants' property left isolated, rests upon the fact that immediately opposite there are two vacant parcels in separate ownership, one 60 feet front and 12,000 square feet in area, the other 80 feet front and 16,000 square feet in area; that diagonally across Raymond Avenue and Charlton Avenue lot M has been divided on the tax map into three parcels, a corner parcel 100 feet front by 12,500 square feet, one adjoining it on the south 88 feet front, 11,000 square feet, and one adjoining it on the east 125 feet front, 20,769 square feet, these three constituting the Fort parcel discussed below; and that on the north side of Raymond Avenue midway to Grove Road there is one parcel 95 feet front, 18,146 square feet in area; and on the south side of Raymond Avenue next to the corner of Grove Road there is one parcel 63 feet front, 12,100 square feet in area.

It may be claimed that entirely irrespective of actual development the fact that the major part of the block between Charlton Avenue, Ralston Avenue, Grove Road and Raymond Avenue, and a portion of lot L on the north side of Raymond Avenue were sold in foreclosure unrestricted is itself, and entirely irrespective of subsequent improvement thereon, such a violation of some implied covenant by Vose with DeGomme as to excuse the performance of DeGomme's covenant.

But the right to enforce the DeGomme covenant attached to Marston's lot when it was con-

veyed in December, 1872, to Freeland. No breach by Vose after that date of any covenant between himself and DeGomme could operate of itself to impair the right of Freeland and his successors in title to enforce the DeGomme covenant. When Vose parted with the Freeland lot he parted with all power to affect by either his acts or omissions any of the rights appurtenant to that lot. *Coudert* v. *Sayre*, 46 Equity, 386-396; *Bowen* v. *Smith*, 76 Equity, 456-462; *Brigham* v. *Mulock*, 74 Equity, 287-289.

It is equally obvious that Freeland and his successors in title were under no obligation to adjoining owners to pay off Vose's mortgages in order to preserve their right to enforce restrictions. Therefore, the foreclosure of these mortgages did not operate of itself to deprive our lot of its appurtenant rights in the nature of equitable easements in the DeGomme lot.

If, as the result of that accident, property so near DeGomme as to substantially affect the DeGomme lot has come into such condition as to render that lot unsuitable for occupation in accordance with the restriction upon it, that is a separate defense. This question will be discussed below. The point now under discussion is simply whether there has been any such abandonment of scheme of restriction to which Vose stood pledged to DeGomme as to dissolve the DeGomme covenant as between the parties to this suit.

This brings us to the discussion of the Fort plot. In April, 1873, Vose conveyed to Griffen the major part of lot M on the maps of 1867 and 1869 (Diagram B), restricted to one dwelling and appurtenances by the same covenant as contained in the Freeland and DeGomme deeds. Exhibit D shows that a strip of about 17 feet along the easterly side of this parcel has come into common ownership

with the property adjoining on the east, the parcel 88 feet front, but it does not seem to indicate that any part of the building on that parcel stands on this strip.

The balance of the parcel with one dwelling house erected on it came into the ownership of the late ex-Governor Fort. The house stood in the corner parcel into which, according to Exhibit D, the plot has been divided. Governor Fort moved this house so as to sit on the southerly part of the plot and fronting Raymond Avenue. The cellar was left and has ever since been used as a sunken garden. Governor Fort built a house on the northerly portion of the plot fronting on Charlton Avenue. According to Exhibit D, which is copied from the tax maps, this plot is now divided into three, one of them 88.69 feet front on Raymond Avenue with an area of about 11,000 square feet and a house on it, one at the corner 100 feet on Raymond Avenue by 125 feet on Charlton Avenue with the sunken garden cellar on it, and the third with a house on it, 108.30 feet front on Charlton Avenue with 20,769 square feet plus a large irregular shaped extension at the rear. Though so divided all three parcels were at the beginning of this suit in the ownership of the heirs and devisees of Governor Fort. The division on the tax maps was, therefore, purely arbitrary and reflected no actual condition. The actual facts were that on a plot owned by the Forts, having a frontage of 188 feet on Raymond Avenue and 233 feet on Charlton Avenue and a total area of over 44,000 square feet, there were two houses.

Restrictions actually imposed by Vose have been broken in the near neighborhood of this property only three times.

One of these was in the case of the Fort plot above mentioned. The others were in the case of

the Turrell plot part of plot L on the map of 1867 and plot X on that map.

By three agreements, two of which were dated March 1st, 1891, and recorded respectively September 4th, 1891, and May 23rd, 1894, and the third which was dated August 6th, 1896, and recorded August 11th, 1892, eighty-two people, owners, and/or their wives, of parcels in the Vose tract agreed with the owners of plot X that that plot might be divided into three parcels; that on that plot there might be erected three dwellings and no more with outbuildings, etc., appropriate to a "gentleman's country residence." The plot is now divided into three (Exhibit D): a corner plot of 150 feet on Scotland Road by about 300 feet on Ralston Avenue, a plot on Scotland Road 150 feet front by over 300 feet in depth and a plot on Ralston Avenue 109 feet front by 300 feet in depth.

Exhibit D shows that in 1868 Vose conveyed to Coudert the easterly part of plot L shown on the map of 1867 (Diagram B) being the plot shown as the easterly lot L on the map of 1869, restricted to one dwelling house. This conveyed about 3¼ acres.

In 1914 William P. Turrell and others, then the owners of that plot, brought suit against sixty-one defendants alleged to be all the persons deriving title through Vose to any land within 2,000 feet. They alleged in their bill that there was no uniformity in the Vose restrictions; that the character of the land was such that it could no longer be used in accordance with these restrictions and that there had been many violations of restrictions. It prayed for a decree that complainants held their lands freed from the restrictions. None of the defendants answered the bill but fifteen of them entered into an agreement with the complainants that the plot might be divided into seven parcels in

a particular way; that on each there might be erected a dwelling house to cost not less than a specified sum and to be of a specific character and that in all other respects the Vose restrictions remained in full force and effect. The bill was then dismissed as to these fifteen defendants and taken *pro confesso* and decree entered as to the remaining defendants. Governor Fort was one of the defendants who entered into the agreement with the complainants. Marston was one of the defendants who did not answer.

The plots into which the Turrell plot was so divided were of irregular shape. None of them had an area of less than 16,000 square feet. One of them had a frontage less than 100 feet. That one was the westerly plot on Grove Road front with a frontage of 87½ feet. Its westerly edge is about 500 feet east of Charlton Avenue and only a small part of its frontage is visible from defendants' property. All the rest of the Turrell tract is out of view around the curve of Grove Road.

The question whether the acquiescence by Freeland and his successors in title in breach of restrictions actually imposed by Vose was such a waiver as to be of itself a defense will be discused below. We are discussing under this point only the question wehther there has been any departure from or abandonment of any scheme to which DeGomme had the right to hold Vose.

It is quite obvious that these violations of restriction are not violations of such a scheme. It is to be remembered that the one thing that is absolutely certain in this case is that Vose did not imply any promise to DeGomme that he would not permit a dwelling on less than any particular sized lot; that if there was any implied covenant it was simply that nothing would be permitted except

buildings suitable for "gentlemen's country residences," and we have Vose's and DeGomme's express declaration by their agreement of 1873 that a plot so small as 100 feet front by 145 feet deep with an area of 14,500 square feet was within their contemplation suitable to that purpose. This being so, DeGomme could not have complained if Vose had sold the Turrell plot in the seven plots into which it is now divided or plot X in the three plots into which it is now divided or the Fort plot in two plots, and however, if at all, it may be available to defendants that these plots have been subdivided in violation of restriction, it is not available to them as a defense that the plan that the neighborhood should be developed in places suitable for gentlemen's country residence has not been carried out.

Anything which may have happened to the north of the narrow neck which divides the Vose tract into two practically distinct parts could not have affected in any substantial way the suitability of the DeGomme lot to enjoyment in accordance with the covenant.

The smallest frontage of any parcel that exists today anywhere within the area which can affect the DeGomme plot if we exclude the vacant fifty foot dead end of Charlton Avenue mentioned above is in frontage 60 feet and in area 12,000 square feet. The fact that DeGomme obtained from Vose permission to split his own parcel into three plots, each with a frontage of 100 feet and an area of 14,500 square feet, negatives the possibility that DeGomme understood that there was any scheme in which all lot owners had rights from which such reduction from 108 feet front and an area of 30,240 square feet, the smallest parcel theretofore conveyed, would be a departure. How then can DeGomme's successors claim that the presence in

the neighborhood of a parcel 60 feet front by 200 feet deep (the smallest parcel now actually anywhere near DeGomme) is a departure from that scheme? It is quite certain that there is no definition of gentlemen's country residence, of which this Court can take cognizance which would exclude a residence built upon such a plot from that category.

POINT II.

DeGomme was not justified in assuming that there was any scheme of restriction for mutual benefit as between lot owners and in fact did not buy on any such assumption.

By his conveyances to DeGomme and prior grantees Vose disclosed an intent to utterly disregard the plottage on his map and that he did not adopt as a substitute any other definite scheme of plottage or quantitative standard.

The smallest parcel upon which a house had theretofore been permitted was 108 feet by 300 feet. DeGomme had no right to assume the existtence of a scheme which would permit nothing smaller and he did not in fact assume it for he entered into an agreement with Vose permitting the subdivision of his own tract into parcels of less than half that area, 100 feet front. His successors in title cannot well ask this Court to presume for their benefit a scheme which DeGomme himself prepared to violate. The Court must rather presume good faith on DeGomme's part and in consequence that he had no understanding that there was any scheme with which the proposed subdivision of his plot would be in conflict.

Hence all idea of implied covenant by Vose with DeGomme for any specific quantitative standard

of plottage is excluded. All that remains is the phrase "gentleman's country residence." But the fact that Vose used that phrase in all of his restrictions is obviously insufficient basis on which to imply a representation that he would use it in all future conveyances.

Where the facts justify a finding that a restriction was imposed in pursuance of a plan of neighborhood development for mutual benefit, there results an implied covenant by the grantor that he will restrict in accordance with that plan. *Lennig* v. *Ocean City Assn.*, 41 Equity, 606; *Bridgewater* v. *Ocean City Railway Co.*, 62 Equity, 276 and 63 Equity, 798. If it appears that a contract was intended, the Court will strive to find standards by which to reduce vague provisions to definite meaning. But they are not astute to discover from vague and meaningless conversations the intent to contract. The very fact that nothing of any definite meaning is agreed upon is of itself almost conclusive evidence that no contractual relation in respect to the matters so left in the air was intended.

The fact that a man has acted along certain lines in the past may raise in the mind of one dealing with him a certain degree of expectation that he will act along more or less similar lines in the future, but it is far from sufficient to charge a grantor with an obligation to so act.

It is not uncommon nor a violation of any rule of justice or fairness for a grantor to restrict land conveyed without imposing like restrictions on his remaining lands. There is neither necessity for such mutuality to support the restriction (*infra*) nor reason for the courts to be astute to discover it.

As a matter of fact we have never found in this or in any other State any case in which it has been

held that the mere fact that restrictions have been imposed which are similar in one feature is of itself evidence that they were all imposed in pursuance of a plan or scheme and for mutual benefit. That it is not sufficient is established by authority.

In *Bowen* v. *Smith*, 76 Equity, 456-457, the rule was stated thus: "It is settled law in this State that when an owner of a tract of land lays it out into streets and lots and adopts a restrictive covenant with reference to the location and use of buildings to be erected on the lots with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme and as an exaction from all purchasers for the benefit of each purchaser, the equitable right to the enforcement of the covenant enures to each purchaser." According to this statement the scheme must be defined. It must be the same in all deeds and there must further be evidence that the restrictions were inserted in the deeds "as part of" the scheme and for the benefit of each purchaser. This statement infers and we have found no general statement of the rule which does not infer the necessity of some further evidence than the bare casual similarity between limited portions of the restriction.

In *DeGray* v. *Monmouth Beach Clubhouse*, 50 Equity, 329, it was said that the intent "must appear by writing or by circumstances." In that case the title to the property had been transferred to trustees for the purpose of selling it restricted. A printed form of deed was adopted. Each deed given contained identical restrictions. Conveyances were made according to the plottage shown on a map, copy of which was displayed in a conspicuous place in a community clubhouse maintained on the property.

In *Sanford* v. *Keer,* 80 Equity, 240, the restrictions differed in different sections of the tract, but there was uniformity in each section and it seems to have been proven as a fact that the map was exhibited to all purchasers and that representations were actually made to them.

In *Lennig* v. *Ocean City Association,* and *Bridgewater* v. *Ocean City Railway Company* (*supra*) grantor had made its sales according to the plottage on its map and had advertised the restriction in the public prints as an inducement to purchasers.

In *Herold* v. *Columbia Investment Co.,* 72 Equity, 856, in this Court, the grantor had filed a map, made conveyances in accordance with that map, each containing a covenant restricting the property to one house per lot. Yet it was held that that was not evidence sufficient to establish a covenant on the part of the grantor.

In the case now at bar there is not the slightest affirmative evidence or probability that either party contemplated that Vose assumed any obligation whatever to DeGomme in respect to future restrictions.

Vose had theretofore obviously been guided by no principle except to market his property in such parcels as he could and DeGomme could have no reasonable justification for assuming that Vose intended to confer upon him any right to interfere with the like practice in the future. On the other hand the words "gentleman's country residence" have so little of defined meaning that no ordinary man desiring to obtain a contractual right in respect to the future development would rest satisfied with it as the foundation of contractual right. In effect they promise nothing definite. The only reasonable presumption is that DeGomme did not understand that as a promise at all.

The very question whether there was any implied covenant between Vose and his several grantees in respect to restrictions to be imposed by Vose in future conveyances was decided in the negative on precisely parallel facts in *Coudert* v. *Sayre* (*supra*). In that case Vose conveyed to Coudert four acres out of one of the plots on the map of 1867, which contained seven acres, by deed referring to that map and containing a covenant in the same form as in the deeds to Freeland and DeGomme restricting the plot conveyed to one house. Afterwards he conveyed to Schoch two adjoining lots on said map containing, respectively 1.75 acres and 1.59 acres, with permission to erect two houses on each lot. Sayre acquired these two plots. Coudert brought suit to have his lot declared freed from the restriction on practically all of the grounds which are urged in defense in this now pending suit. The Vice-Chancellor said that there was not the slightest evidence that Coudert had seen the map or been in any way influenced by it; that the fact that he himself was buying but a part of a lot on the map, "instead of indicating an intention on the part of his grantor to abide by the scheme of division laid down on that map evidenced, on the contrary, a purpose to depart so radically from it as to give the complainant plain notice that he would not in his future conveyances pay the slightest regard to it" (p. 399). The Vice-Chancellor took the view that the covenants were imposed solely for the benefit of the grantor and his remaining lands.

In conclusion, he said that no consideration had been given to the question whether, if Coudert violated the covenant, Sayre would succeed in a suit to enjoin him; that that question would be determined by all the surrounding facts and the conduct of the parties with respect to each other as they

should appear at the time of the trial. But it is obvious that this was not intended to negative his previous very emphatic statement of the flimsiness of the claim that Coudert had bought in reliance upon that scheme. It was merely an observation intended to prevent Coudert from being prejudiced in actual litigation against him, an obviously proper reservation, since there are many possible defenses to a suit to enforce a restrictive covenant other than abandonment of a scheme in pursuance of which it was imposed. Nor were the Vice-Chancellor's opinions in the matter as to the purposes of the covenant obiter. If the covenant had been imposed in pursuance of a scheme which gave Coudert any rights in respect to the restriction of the Sayre property, that fact alone coupled with the abandonment of that plan would have been a sufficient defense to any suit by Sayre, and Coudert would have been entitled to a decree removing from his title the cloud of the covenant.

We think it is thus established by reason and by authority that DeGomme acquired no right to the application by Vose of any particular scheme in his subsequent restrictions; that his covenant was exacted solely for the benefit of Vose and his subsequent grantees and was independent and unconditional.

But we are not left to presumption. The agreement of 1873 between Vose and DeGomme for the modification of the restrictions on DeGomme's lot proves that DeGomme did not in fact buy in reliance upon any representation or presumption that Vose was obligating himself in respect to his remaining lands. DeGomme, though ignorant of the law, must as matter of common sense have recognized that if he was acquiring rights in respect to Vose's future conveyances, then by the same token Vose's prior grantees had rights in the covenant imposed on his land, and that any at-

tempt by Vose to modify that covenant would be ineffectual. Defendants cannot well ask the Court to presume that this agreement was intended as a pure matter of form or to pave the way to a violation by DeGomme of moral or equitable rights of the neighbors who surrounded him on three sides. It must be taken as made in good faith and because DeGomme had not bought in reliance upon any idea that purchasers in the tract were acquiring mutual rights. It may be asked why in that case DeGomme did not get an agreement from Freeland and the grantee of the adjoining land, who at the date of the agreement were the only persons in the vicinity to whom Vose had conveyed since he conveyed to DeGomme. A possible answer is that he may not have searched the record or known in any other way of those conveyances. The one thing that seems certain is that if DeGomme had any thought that he was participant with his neighbors in a scheme for mutual rights and mutual obligations, Vose was about the last man to whom he would have gone for signature to such an agreement, and failing to get consent from his immediate neighbors he would hardly have troubled to get an agreement from Vose.

POINT III.

The fact that the restriction on the DeGomme lot was not imposed in pursuance of a neighborhood plan is no defense to this suit.

It was expressly provided in the covenant that any owner of any part of the lands conveyed to Vose by the ten deeds mentioned above could enforce the covenant. If this covenant was not imposed in pursuance of a neighborhood scheme,

and, therefore, in performance of an obligation to prior grantees so much of this provision, if any, as was actually intended to benefit prior grantees was futile. *Roberts* v. *Scull,* 58 Equity, 396, 401, 402.

If there had been a neighborhood plan subsequent abandonment of that plan would have discharged DeGomme's obligation, but if the covenants were independent and unconditional the mere fact that they provided for enforcement by persons on whom no such right could be conferred would not prevent this provision from operating to confer those rights upon subsequent grantees upon whom it could be conferred. DeGomme could not be prejudiced by the fact that his obligations were limited to extend to fewer people than he intended to become obligated to. Vose would not be deprived of the benefit for which he had expressly stipulated for his remaining lands simply because he evinced benevolent intentions toward other people which were ineffectual.

It seems highly probable if not obvious on all the facts in evidence that this form of covenant was adopted at a time when Vose had in mind to restrict according to a neighborhood plan and for benefit of all grantees but that he subsequently found that he could not market his lands in accordance with that plan, but he must subdivide to suit the means or tastes of purchasers and that he simply continued to use that form because the provision therein for enforcement was sufficiently broad to confer on his remaining lands the advantages and value accruing from an appurtenant right to enforce the restriction.

However that may be, two things are certain: The provision that any lot owner could enforce against another was not adequate to create or evidence the actual intent to create mutual rights

in the absence of some reasonably certain definition of what as against Vose and his subsequent grantees those rights should be, and both Vose and DeGomme intended that the covenant should be enforcible by subsequent purchasers of the lots then remaining to Vose. These two things being so that provision is operative in favor of subsequent grantees no matter if or how much more widely the right to enforce the covenant was intended to be bestowed. No rule of fairness and hence no technical rule of equity requires that a man in imposing a restriction on the land which he grants must impose like or any restriction on his remaining lands. If the grantee does not like the terms he does not have to buy. If in order to obtain the land he assents to the condition that he covenant as to the way in which it shall be used he cannot afterward excuse himself before a court of equity from specific performance of that covenant on the plea that the bargain was not equal.

It is a familiar and established principle that a man in parting with a part of his lands may impose a restriction for the benefit of his remaining lands without restricting them in like manner or at all and that equity will enforce such restriction unless some part of its subject-matter is contrary to public policy.

Roberts v. *Scull*, 58 Equity, 396;
Hayes v. *Passaic and Waverly Railroad Co.*, 51 Equity, 345;
Coudert v. *Sayre, supra*;
Bowen v. *Smith*, 76 Equity, 456;
Leaver v. *Gorman*, 73 Equity, 129;
Goater v. *Ely*, 80 Equity, 40;
Hemsley v. *Marlborough Hotel Co.*, 65 Equity, 167, and 68 Equity, 896.

In its primary aspect a restrictive covenant like

any other is operative only in favor of the covenantee. If it be claimed that it also creates rights in the nature of easements appurtenant to lands of the covenantee that intent must be made affirmatively to appear. If it be not expressly so provided in the covenant that defect is remedied by proof from circumstances that the covenant was in fact imposed as part of a scheme to restrict for mutual benefit of all owners. *Bowen* v. *Smith, supra; McNichol* v. *Townsend,* 74 Equity, 618.

But when the intent is expressed in the covenant that the benefit shall attach to and follow remaining lands of the grantor, it may be enforced though there be no mutuality. *Hemsley* v. *Marlborough Hotel Co., supra; Leaver* v. *Gorman, supra; Bowen* v. *Smith, supra.*

In our case DeGomme himself expressly covenanted that the covenant could be enforced by any grantee of Vose. Notwithstanding its failure to operate as broadly as it was worded this provision was effectual to annex to Vose's then remaining lands, the right to enforce that covenant. Complainant's lot is part of those remaining lands to which the benefit was so effectually annexed. The restrictive covenant was independent and unconditional. That is a complete and perfect case unless we have waived our right or so acted as to justify defendants in buying on the presumption that we have waived our right or unless by reason of something which has happened which the parties to the covenant could not have contemplated the environment has become such that to enforce the covenant would inflict a great hardship on defendants without conferring any substantial benefit on the complainant.

The agreement of 1873 between Vose and DeGomme is of course no defense. It was made in May 1873. Vose conveyed complainant's lot by

deed dated December 1872 and recorded January 1873. The right to enforce the covenant followed the lot into Freeland's hands. Vose could not thereafter relinquish or impair that right. This proposition needs no judicial authority to support it. A similar agreement between Vose and Coudert was propounded in *Coudert* against *Sayre* and held to be ineffectual as against Sayre because it was made after Vose had parted with title to his lands.

POINT IV.

Neither Freeland nor any successor in his title has waived any rights against the DeGomme lot or so acted as to mislead defendants or any of their predecessors or has in fact misled them.

The only ground on which such a claim could be founded is that Marston and/or his predecessors in title have acquiesced in breaches of the restrictions imposed on the Turrell plot, the Fort plot and the plot X on the northeast corner of Scotland Road and Ralston Avenue.

It has also been urged against us that we acquiesced in breach of covenant on the George K. Brewer plot (V) northwest corner of Charlton Avenue and Ralston Avenue. That lot was restricted to two houses but only until 1892. There are now four houses, but it is not shown that all or any of them were erected prior to the expiration of the restriction and, therefore, not shown that there was acquiescence in breach of the restriction.

Our acquiescence in the breach of covenant in the three cases where breach is proven does not operate to waive our rights in the DeGomme lot.

Generally speaking a man is not required to treat in the same way all persons who owe him a

like obligation. He may grind one and forgive the other unless by so doing he imposes on the one a heavier burden than he ought to bear or diverts from him some security to which he is entitled to be subrogated or otherwise violates some specific duty arising out of his relation to the parties or their relation to each other.

We had no specific duty to defendants or their predecessors in title to resist any of these breaches. They had equal right with us to litigate. It was their own failure to litigate and not ours that deprived them of rights. Our relations to the owners of the DeGomme and other lots respectively and theirs to each other in respect to our rights were precisely analogous to what they would have been if our right had been to pass over the lots instead of to have a considerable part of their area remain open. If in such case we surrendered a right of way over one lot no learned counsel would urge that in so doing we had destroyed our right of way over the other lots. If the purpose of this restriction had been solely to give light and air for our building and only over a specific part of adjacent lands instead of to give us that and other enjoyment generally from the larger part of the lands, it would not have been claimed that in surrendering our right to light and air for our north windows we had lost our right to light and air for our west windows.

If the effect of these breaches of restrictions were to render our lot unsuitable for the purposes to which the covenant was intended to be beneficial or if the covenants had been imposed in pursuance of a neighborhood scheme and the breaches rendered our lot unsuitable for occupation in substantial accordance with that claim, our acquiescence in the breaches would have destroyed our right by in effect destroying our ability to use

it to the purposes for which it was conferred. But they had no such effect. Our plot was just as suitable for a residence of the character to which it was originally restricted after plot X was divided into two and the Turrell plot divided into seven and two houses were erected on the Fort plot, as it was before.

We have demonstrated above that if these covenants were imposed in pursuance of a scheme for neighborhood development, DeGomme could not possibly have understood and apparently did not in fact understand that that scheme called for or assured to him a subdivision into plots larger in area than those into which the Turrell plot, Fort plot and plot X are respectively now subdivided. Therefore, we could not have objected if Vose had originally sold them or either of them in separate parcels into which they are now divided. How, therefore, can the fact that that subdivision took place after Vose had conveyed render either our plot or defendants' plot unsuitable for occupation in accordance with the plan or deprive either of us of any substantial benefit which was in contemplation when our respective covenants were made. The plan, if plan there was, contemplated the possibility of such plottage. The realization of that contemplation is not an abandonment of the plan.

If the covenant which we seek to enforce was, as we contend, an unconditional independent covenant not colored by any plan, it still does not lie very well in the mouth of DeGomme's successors in title to urge that the terms of our covenant imply as one of the purposes for which the benefit was conferred on our lot that it should be surrounded by plots of no smaller area and/or frontage, for the very most that defendants can claim is that the advantage intended to be conferred on

us was that we should be surrounded by "gentleman's country residence," while our lot was used and suitable for the like purpose. DeGomme, their predecessor in title, by his agreement with Vose of 1873, declared that there was nothing in the meaning of that term which was inapplicable to a plot of 100 feet front by 14,500 square feet in area. Disregarding the purely theoretical subdivision of the Fort plot on the tax map, none of the three above-mentioned plots is subdivided so that any plot in the tract has as small an area as 14,500 square feet; there is only one plot which has a frontage of less than 100 feet and that is 500 feet away from the defendants, practically out of their sight and completely cut off from each of them by unrestricted property which was sold in foreclosure.

If it be claimed that the mere fact that the one plot which, though but 87 feet in front, has an area of 16,200 square feet, is not suited to a residence which, under any possible reasonable definition of the term, can be a gentleman's country residence, the answer is that it is so remote from both defendants that a mere shortage of 13 feet in frontage could not by any possibility substantially affect the character or enjoyment of either complainant's or defendants' plots.

It were repugnant to one of the most fundamental of the principles of equity to require that a man in order to protect his vital rights should make a pest of himself by dragging his neighbors into court on any and every occasion to prevent an infraction of the strict letter of this right, though the threatened infraction would affect him in no substantial way, either in the value of his lot or in its enjoyment.

It follows that even where covenants are imposed in pursuance of a neighborhood plan a lot

owner has no obligation to resent each and every breach of covenant. In such case the common grantor who has imposed the covenants is held to stand in a *quasi trust* position to his grantees. He is bound to enforce his restriction to the letter everywhere for the benefit of his grantees. If he shirks that duty where its performance would be of substantial benefit to a grantee he cannot thereafter, for his own purposes, casually enforce it against that grantee. But the individual lot owner owes no such duty. The settled rule is in accordance with the dictates of reason and public policy, to wit, that all he need do in order to preserve his rights in the scheme is to resist such violations as because of their character and their nearness to him deprive him of some substantial part of the benefits of the plan as originally defined.

Ocean City Assn. v. *Schurch,* 57 Equity, 268;
Chelsea Land & Improvement Co. v. *Adams,* 71 Equity, 771;
Ocean City Assn. v. *Chalfant,* 65 Equity, 156;
Righter v. *Winters,* 63 Equity, 252;
Ocean City Land Co. v. *Weber,* 83 Equity, 476;
Ocean City and Schneider v. *Headley,* 62 Equity, 322;
Bridgewater v. *Ocean City Railway, etc.* (*supra*);
Morrow v. *Hasselman,* 69 Equity, 612;
Brigham v. *Mulock,* 74 Equity, 287;
Bowen v. *Smith,* 76 Equity, 456-462;
Selman v. *Kaufherr,* 76 Equity, 252;
Meaney v. *Stock,* 80 Equity, 60;
Pearson v. *Stafford,* 88 Equity, 385;
Lattimer v. *Livermore,* 139 N. Y., 93.

In the above cases the distinction between the common grantor and a lot owner is very clearly drawn and the doctrine that the lot owner need act only when the violation is such as to deleteriously affect his own property is iterated and reiterated.

In *Ocean City Assn. and Schneider* v. *Headley* (*supra*) the Association, the common grantor, was held barred by the fact that fifty or sixty buildings in the neighborhood violated the set-back restriction which was sought to be enforced and that from the very inception of the enterprise violations of other restrictions had been common. Co-complainant Schneider, owner of the lot adjoining the complainant, was held barred not on this ground but on the specific ground that he stood by without protest and saw the defendant complete his building.

In *Bridgewater* v. *Ocean City Railway Company,* affirmed in this Court (*supra*) it was held that a lot owner was not barred of his right to enjoin the erection of a railroad station on a plot shown on the map as a park and camp ground by the fact that the common grantor had permitted some permanent buildings to be erected thereon.

In *Morrow* v. *Hasselman* (*supra*) it was held that general violations throughout the tract which did not materially affect the complainant did not indicate a waiver or abandonment on her part of the entire benefit of the covenant when necessary to protect her own house.

In *Brigham* v. *Mulock* (*supra*), where the common grantor had lost its right by acquiescence in violations, it was held that the claim of bar against the complainant must "be measured by the relation of the alleged violation to her lot."

In *Pearson* v. *Stafford* the fact that there were upwards of 100 violations "none of them deleteriously affecting" complainant, did not bar him.

In *Lattimer* v. *Livermore* (*supra*), which has been cited in this State in cases mentioned above, it was held that the fact that plaintiff had acquiesced in the devotion of practically the whole block to business purposes did not bar her right to enjoin the opening of an undertaker's establishment next door to her.

Much is said in most of the cases about the effect upon lot owners' rights of acquiescence in breach of restriction, but as matter of fact the only cases in this State which we have found in which a lot owner has been actually refused injunction because of such acquiescence except *Selman* v. *Kaufherr* (where every lot in the tract had been built on for more than two years and every building violated the restriction sought to be enforced) were cases where the complainant had stood by and allowed the defendant to either complete or go far toward the completion of the structure complained of without protest. It would appear that this element was also necessarily present in *Selman* v. *Kaufherr*.

It would seem, therefore, that there is no warrant either in reason or authority for holding that the acquiescence of complainant and/or of his predecessors in title in any of the breaches of covenant which have occurred automatically operate to destroy our rights in respect to the De-Gomme lot. The only remaining question in respect to the effect of such acquiescence is whether it was calculated to mislead defendants or their predecessors in title into buying on the assumption that our rights had been abandoned. Obviously it was not.

No reasonable man could assume from the fact that we did not go into court to resist the erection of seven houses on the Turrell plot or two houses on the Fort plot or three houses on the plot on

the northeast corner of Scotland Road and Ralston Avenue that we would not object to or resist the erection of seven or three or two houses on the much smaller DeGomme plot.

The evidence shows that defendants were in fact not mislead. That their attention was called to the existence of the restriction and that instead of consulting us as to our intentions they consulted counsel as to our power, and that they bought strictly in reliance on the advice of counsel that we could not enforce the restriction if we wanted to. If their counsel were right they are entitled to their decree. If their counsel were wrong they cannot claim their decree on the plea that our prior conduct had mislead them into a fancied security.

To summarize: If these restrictions are to be deemed to have been imposed in pursuance of a plan, the plan was one which did not preclude such subdivision as now exists, we could not have objected and would have lost no rights if Vose had himself so subdivided them; the fact that the subdivision was made later does not impair any fundamental of the plan which induced DeGomme to buy or for the purpose of which our lot was so restricted and given right to enforce the restrictions, nor render either our lot or defendants' lot unsuitable for such use as was contemplated when the restrictions were imposed, and hence our acquiescence in such subdivision neither destroys automatically nor evidences an intention to abandon the plan. If our covenant was independent and unconditional our release of right in or consent to its violation on, one lot does not operate automatically to destroy our rights in every other, nor did our acquiescence in anything that has been done infer an intent to abandon our rights generally or tend to mislead or in fact mislead defendants in any way.

POINT V.

There is no such change of environment as to excuse defendants from the performance of DeGomme's covenant.

There are few cases in this State which involved the question of change of environment divorced from the question of abandonment of neighborhood scheme.

The only cases that we have found in this State are *Fischer* v. *Griffith Realty Co.*, 80 Equity, 204, and *Page* v. *Murray*, 46 Equity, 325.

The facts in *Page* v. *Murray* are: In 1873 Page and defendant's predecessors in title Ward and Gerbert entered into an agreement by which the latter were permitted to extend a street through the former's land in order to reach their lands in consideration of their agreement imposing on their lands restriction against nuisances and against the erection of any buildings but dwellings to cost not less than $3,000 the restriction to endure for twenty years and to be enforcible by any subsequent owner of any part of Page's land. Later Ward and Gerbert conveyed to Page a part of their tract by warranty deed without restrictions. He built a greenhouse on it. At the time of the suit the restriction had but three years to run. The lands immediately surrounding the Ward and Gerbert tract had been built up to a very large extent with cheaper buildings and except Page's greenhouse nothing had been built on the restricted tract. The court refused injunction on the following grounds: That Page himself had violated the restriction which he had exacted; that it was apparent that if the restrictions were enforced during the three years which they still had to run defendant's lands could not be sold for improvement and that after the expiration of the restric-

tion they would be improved in consonance with their environment and hence that to enforce the restriction during those three years would inflict a great hardship upon defendant and confer no practical benefit on complainant.

In *Fischer* v. *Griffith Realty Co.* the owners of adjoining lands together forming a strip fronting on the west side of Lincoln Avenue in Newark for a distance of over a block with a depth of 200 feet entered into an agreement mutually restricting their several parcels to private residences. The suit was brought to enjoin the erection of an apartment house. It was proven that at the time the restriction was imposed such development as there was in the neighborhood had been fairly high class and expensive residences and indicated the suitability of the vicinity to that class of improvement; that the restricted lands had in fact been improved in that way; that since the agreement was made that whole section of the city had become generally devoted to apartment houses and small one and two family houses of a very cheap type; that on the opposite side of the street such one family houses were built; that in the very near vicinity there were a number of apartment houses and that one of them abutted on the rear of defendant's lands. The court found as a fact as the evidence plainly indicated that the purpose of the restriction was to preserve to the lands of the several parties suitability for high class and fairly expensive residences. It pointed out that because of the narrowness of the strip the accomplishment of that design was peculiarly dependent upon the nature of the development of the surrounding property; that it was obvious from the change in environment that neither defendant's lands nor plaintiff's lands were any longer suitable or marketable for

the purpose to which it was the intent of the restriction that they should be applied. Injunction was accordingly denied.

In New York there have been a very large number of cases on the subject of change of environment. The following are typical.

Perhaps the leading case is *Trustees of Columbia College* v. *Thacher*, 87 N. Y. 311 which has often been cited in the courts of this State. That also was a case of agreement between adjoining owners restricting their lands for mutual benefit reciting that its purpose was "to provide for their better improvement and secure their permanent value." Defendant's land was at the corner of 50th Street and 6th Avenue. The suit was brought to restrain defendant from applying it to business purposes. Since the agreement was made the general current of business had extended along 6th Avenue for blocks below and blocks above defendant's property. The elevated railroad had been built through 6th Avenue and a station erected at the 50th Street corner. The court, after drawing a particularly graphic description of the evil effect of the railroad with its noises and eruptions of steam and cinders and particularly of the erection on a level with defendant's windows of the station platform and stairs on which crowds constantly assembled and passed said:

> "The premises may still be used for dwellings but the occupants are not likely to be those whose conveniences and wishes were to be promoted by the covenant, persons of less pecuniary ability and willing to sacrifice some degree of comfort for economy, transient tenants of another class whose presence would be more offensive to quiet and orderly people who might reside in the neighborhood. Not only large depreciation in rents when occupied, but frequent vacancies have followed the

> construction of the road. * * * It is obvious without further detail that the construction of the road and its management have rendered privacy and quiet in the adjacent buildings impossible and so affected the premises of defendant and all those originally owned by him, who, with the plaintiff, entered into the covenant, that neither their better improvement nor permanent value can be promoted by enforcing its observance. * * * It is true the covenant is without exception or limitation but I think this contingency which has happened was not within the contemplation of the parties. * * * The land in question has become an ill-seat for a dwelling house and it cannot be supposed that the parties to the covenant would now select it for a residence or expect others to prefer it for that purpose." (Pages 319, 320, 321.)

The court said that the mere fact that business had surrounded the defendant's house on 6th Avenue would not be any ground for refusing compliance with the covenant because it was very plain from the covenant itself that that contingency was within the contemplation of the parties.

In *Ammerman* v. *Dean,* 132 N. Y., 355, complainant sought to enjoin the erection of a flat or tenement house on the southeast corner of Tenth Avenue and 64th Street. Plaintiff's lot was on south side of 64th Street, 64 feet east of defendant's rear line. Throughout the whole neighborhood many flats or tenements had been erected. The block of Tenth Avenue opposite defendant was developed with houses all of that character. A flat or tenement stood on the north side of 63rd Street with its rear not far from the rear of complainant's house. There was one on the north side of 64th Street immediately opposite plaintiff. Injunction was refused.

In *McClure* v. *Leaycraft,* 183 N. Y. 36, plaintiff

sought to enjoin the erection of an apartment house on a corner lot. There were apartment houses on each of the three opposite corners and many others in the near vicinity. Injunction was refused.

Deeves v. *Constable,* 87 A. D. 352; *Roth* v. *Jung,* 79 A. D. 3; *Wallach Construction Company* v. *Smallwich Realty Company,* 201 A. D. 133, and *Bachelor* v. *Hinkle,* 210 N. Y. 243, were all cases where it was sought to enforce set back restriction contained in a covenant which also restricted the property to use for private dwellings. In each case the injunction was refused on the ground that the set back was but a part of a restriction which was intended as an entirety to preserve to the neighborhood a particular sort of residential character and that the neighborhood had become a strictly business neighborhood suitable for business purposes only.

In *Schwartz* v. *Dunn,* 118 A. D. 104, plaintiff sought to enjoin defendant from altering his property to a stable. Defendant lived on the property but had long used the ground floor for an oyster shop. The whole neighborhood had changed since the covenant was imposed from a high class residential neighborhood to one of tenement houses of poor class and cheap business. Injunction was refused.

In *Lattimer* v. *Livermore,* supra, on the other hand injunction was granted. Plaintiff resided on her plot. All the rest of the block had been devoted to business uses. She sued to enjoin defendant from conducting an undertaker's establishment next door to her. The court held that the fact that plaintiff had acquiesced in business uses which were not obnoxious to her did not bar her action to prevent the conducting next door to her of a business which from its very nature was particularly disagreeable as next-door neighbor to a residence.

There is no parallelism between any of the above cases, except *Lattimer* v. *Livermore,* and ours. It is neither shown nor claimed that the neighborhood or any part of it except Grove Park is or ever has been used for any but residential purposes or that it is not suitable to or inhabited by gentlemen. It is apparent on inspection that every improved plot which has been specifically exhibited in evidence is suitable to a gentleman's residence and that every vacant plot is suitable to improvement for that purpose.

And all of the improved and vacant plots with the exception of the old dead end of Charlton Avenue south from Ralston Avenue, on which this particular part of the restriction has long since expired, is suitable for a gentleman's country residence within any definition which can be applied in this case to the restriction sought to be enforced.

Disregarding again the purely arbitrary division of the Fort plot into three plots on the tax map, the smallest frontage of any of such plots vacant or improved is 60 feet front with an area of 12,000 square feet. This court cannot say either that as matter of law that plot is not suitable to improvement which could be called a gentleman's country residence or that it is such a plot as was entirely outside the contemplation of Vose and DeGomme.

Such a plot would hold a house of ample dimensions and afford room for appropriate outbuildings and fairly extensive lawns and gardens. Such an establishment would not be called by anybody a city residence. They might naturally call it a suburban residence, but that very term infers in that application the element of rusticity. Thus Webster gives as an illustration a phrase of Cowper's "Suburban villas, high-way side retreats, delight the citizen."

That term would be used only because the Vil-

lage of South Orange is more or less dependent upon the cities of Newark and New York and is largely used for purposes of residence by persons whose occupations lie in one or the other of those cities. Such an establishment as we have imagined on a plot of that size would surely be called by anybody flatly a country residence if it lay encircled by farms.

As we have said above Vose and DeGomme expressly declared by their agreement of 1873 that in the contemplation of each a plot 100 feet front with an area of 14,500 square feet can suitably be used and agreed that it should be occupied by a "gentleman's country residence." It were a purely arbitrary assumption to say that either of them contemplated that there should never be any smaller plottage in the neighborhood either in frontage or area. In fact, their attempt to divide the DeGomme plot into three giving to each eight feet less of frontage than the smallest frontage that Vose had ever permitted and to each less than half the area than the smallest area Vose had ever permitted, shows that they did not consider that the restrictions contemplated any purely quantitative standard by comparison with which what was to be done could be tested. This being so there is nothing left but to say that anything large enough to be susceptible of substantially similar development to that to which plot 100 feet by 145 feet was susceptible was within their contemplation suited for the purposes of a gentleman's country residence. No one would put on 14,500 square feet with a frontage of 100 feet anything but a house and garage or stable, grass and flowers. All of them could be put and equally enjoyed on a plot 60 feet by 200 feet.

It has been argued by defendants that the sale of the major part of the block between Charlton

Avenue, Raymond Avenue, Grove Road and Ralston Avenue in foreclosure free from restrictions has left defendants' lot and complainant's lot isolated in an unrestricted neighborhood and that for that reason it would be unequitable to enforce the restriction on the DeGomme lot.

This statement is not accurate in fact. Defendants are not left isolated in an unrestricted neighborhood. They are at worst merely left opposite on one-third of their front to unrestricted property. On every side and immediately opposite two-thirds of defendants' property they are surrounded and faced by properties which are still restricted and occupied and improved in strict accordance to the restriction.

The defense that neighboring property is unrestricted is not available to a man whose own restriction was independent and unconditional. There is no case that we have ever seen in this or any other State which holds or supports the argument that a man who has not stipulated for the restriction of adjacent properties is excused from the performance of his covenant because of the fact that they are unrestricted. It is not what might possibly happen but what has actually happened or is presently threatened that constitutes a defense in such case. If, as we contend, there was no scheme of mutual obligation DeGomme would not have been excused from his covenant if Vose had voluntarily conveyed neighboring lands unrestricted and that that conveyance was involuntary through a foreclosure of mortgage does not constitute a defense.

If the restriction was imposed in pursuance of a scheme for mutual benefit the argument is still fallacious. It amounts in the last analysis to the contention that if any of the lands remaining to the common grantor are subject to mortgage, each

lot owner is separately and independently bound to all others to pay off that mortgage if the common grantor does not do so, in order to preserve those rights which have already become appurtenant to his land.

Following the argument to its ultimate consequence even more fully demonstrates its fallacy. If the fact that there is unrestricted property on the east side of Charlton Avenue frees the DeGomme lot from restriction, necessarily the fact that the DeGomme lot is so freed from restriction frees the next lot west and that in turn its neighbor west and so clear through to Scotland Road and would do so for a mile beyond that if the tract extended that far. So that in the last analysis the argument means that the foreclosure of a mortgage on a small remnant at the extreme corner of the restricted tract no matter how large the tract instantaneously destroys the right of every man in the tract no matter how remote from the territory affected by the foreclosure.

If it were the fact and were generally understood that any such consequences might ensue no property could be marketed subject to restriction while any portion of it remains subject to the smallest mortgage; which according to common experience would mean that that sort of development would be practically impossible, for it is common knowledge that tracts are not often purchased for such development for all cash; that ordinarily a considerable part of the price is left on mortgage and that lots are released from the mortgages as sold.

Incidentally, it seems to us that, if these restrictions were imposed in pursuance of a plan for mutual benefit, defendants take a good deal for granted in saying that the foreclosed property is freed from restrictions. All that the evidence

shows is that there were mortgages on the property which were foreclosed, and that no restrictions were imposed on the sale. If Vose had put into partial execution by conveyances to divers grantees any such plan, all of his remaining land would in that instant become subject to the same restriction as by operation of an implied covenant on his part (cases *supra*); that restriction would be binding on every subsequent purchaser from Vose taking with actual or constructive notice of the facts whether that purchaser were a mortgagee or purchaser in foreclosure of a mortgage made after the restriction attached. It is, of course, quite within the possibilities that the mortgage or mortgages foreclosed were made before any of Vose's conveyances. It is also quite possible that if made later mortgagee took without knowledge or notice of the existence of the plan and the fact that conveyances had been made in accordance with it; but we hardly think that defendants can ask the court to assume that either thing was true. It is for them to establish by evidence every fact material to any defense which they wish to urge. Also if the mortgage so foreclosed was made prior to the impingement of any implied restrictive covenant it would still be necessary for the mortgagee, if it had notice of that fact, to bring into foreclosure as parties defendant every person having a right under that implied covenant in order to cut off their rights. We should think that on this point there is hardly any probability that they were brought in.

In short it is perfectly obvious that nothing has happened in this neighborhood which renders it impossible in any sense or to any degree to use the DeGomme plot in strict accordance with the restriction upon it; that the only reason that defendants seek to evade that restriction is that their

plot is worth more money in the market for three houses than for one. In support of a purely money making scheme they ask the court to raise implications of conditions to a promise which at best it is highly probable that neither party to the promise actually contemplated and to give to one certain phrase in the restriction the narrowest interpretation which on the facts it will possibly bear in order that that neighborhood which in fact is suitable to use in accordance with the restrictions imposed may by sheer technicality be held to be unsuited for that use.

Again a change of environment in order to operate as an excuse for non-performance of a restrictive covenant must be due to matters which the parties cannot be deemed to have contemplated (cases *supra*). If DeGomme bought knowing or not caring whether any of the neighboring lands were covered by mortgages the freeing of the land from any implied covenant by foreclosure of those mortgages cannot be deemed to have been outside the contemplation of DeGomme.

There is no shadow of ground for inferring that as a fact DeGomme contemplated that there should be no such subdivision of restricted plots as is shown by the evidence. Therefore, the improvement in such subdivision cannot be said to be something which the parties did not contemplate and it is immaterial whether that subdivision was made by Vose or made and assented to by his subsequent grantees.

Defendants cannot complain that the failure of their deliberate speculation as to the enforceability of our rights is a hardship.

The fact that defendants now contemplate building only three houses of a particular type has nothing to do with this case. The covenant is an entirety. It is enforceable as made or not at

all. Courts of equity can say that a literal departure is not a substantial one. They cannot say that they will permit a substantial violation of an existing obligation. If defendants are free to erect the three houses which they now propose, they are free to change their plans and cover the plot with tenement houses.

So, also, complainant is entitled to the full benefit of the covenant or to none at all. He is not affected by the fact that one vacant lot adjoining him and an improved lot at his rear are smaller in frontage and area than his own, unless that fact is a complete defense to the whole of the covenant. The right to enforce the covenant as it was made became appurtenant to his lot. It does not die out by inches. It remains in full until it is entirely gone.

If the covenant is enforceable at all, complainant has "property rights in the restricted space" (*Supplee* v. *Cohen,* 80 Equity, 83-88). He has "the right to have the actual enjoyment of the property *modo et forma* as stipulated. It is no answer to say that the act complained of will inflict no injury on him or will even be beneficial to him. It is for the complainant to judge whether the agreement shall be kept as far as he is concerned or whether he shall permit it to be violated" (*Cornish* v. *Wiesmann,* 56 Equity, 610-614, and cases cited).

It follows that unless this covenant was conditional upon and part of a scheme of neighborhood development which has been abandoned or frustrated, or, if independent and unconditional, unless there has been such change in the neighborhood that on the one hand defendants' plot is no longer susceptible of use in accordance with the covenant and on the other hand that complainant's lot is no longer suitable for uses to which the

enforcement of the covenant would be advantageous, defendants must be restricted to the erection of but one house on the DeGomme plot, even though there be in the vicinity smaller plottages and areas.

POINT VI.

It is respectfully submitted that the decree below should be reversed.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Complainant-Appellant.

Appeal Printing Co., 22 Thames St., N. Y. City

New Jersey Court of Errors and Appeals

Between

RUSSELL MARSTON,
Complainant-Appellant,

and

WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,

and

WILLIAM G. LENTZ,
Complainant,

and

ANDREW LENART, JOHN D. MUNTHER, and RUSSELL MARSTON,
Defendants.

} On Appeal from Chancery.

BRIEF

For Appellant, Russell Marston, on Motion to Substitute New Complainant and on Motion of Respondents to Dismiss the Appeal.

The Appellant moved on the opening day, on notice, to substitute the Guaranty Mortgage & Investment Company in the place and stead of the present Complainant, Russell Marston. The papers on this motion have been printed for distribution with the State of Case. The Respondents moved to dismiss the appeal of the Appellant upon several grounds, set forth in their motion papers, which also have been printed.

Appellant's Motion to Substitute Guaranty Mortgage & Investment Company for Russell Marston as Complainant-Appellant.

The Bill of Complaint in this case was filed on behalf of Russell Marston, on November 8th, 1922 (Case, p. 76). The case was submitted May 11th, 1923, decided May 21st, 1923, and the Order Dismissing Bill and Counterclaim entered on June 5th, 1923 (Case, pp. 6, 9).

The motion papers disclose that Russell Marston, the Complainant-Appellant, conveyed the property under which he acquired his rights in this cause to the Guaranty Mortgage & Investment Company by deed dated April 30th, 1923, and recorded May 2nd, 1923.

The case was presented to the Court of Chancery on a Stipulation of Facts, no testimony being taken.

Counsel for the Appellant did not know that the Appellant had conveyed the property until after the case had been decided and an appeal had been taken to this Court, and therefore no application was made to the Court of Chancery to have the new owner substituted on the record.

The application is made to this Court for the substitution because Counsel for the Appellants were notified by the Respondent Lentz that unless such an application was made he would move to dismiss the appeal on that ground.

Counsel for the Appellant agrees that as a matter of technical practice the record should be remitted to the Court of Chancery and the substitution made there. We respectfully submit, however, that we will agree to any form of remission which would necessitate the application being made to the Court of Chancery in such a way as not to put off the case for the term. If, as a mat-

ter of fact, Respondents desire to set up certain defenses especially addressed to the Guaranty Mortgage & Investment Company there would be more force in their argument on this point. The defenses they speak of are defenses as to knowledge of the pending litigation and the purchase of the land while the litigation was pending. That is a burden which the Appellant would have to bear in any case, because on the record the Appellant bought presumptively with knowledge of the pendency of the litigation and there is no evidence in the cause to rebut this presumption.

Assuming the action abated on the transfer of the property by the Complainant Russell Marston, it would not be necessary, as stated by Counsel for the Respondent Lentz, to file an "Original Bill in the Nature of a Supplemental Bill" as held by the case of *Fulton* v. *Greacen,* 44 N. J. Eq., 443, 448. The proper procedure under the circumstances would be as stated in Rule 61 of the Chancery Court, as follows:

> "61. Upon any suit in the Court of Chancery becoming abated by death, marriage or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit a bill of revivor or supplemental bill to obtain the usual order to revive, or the usual or necessary decree or order to carry on such proceedings; but an order to the effect of the usual order to revive, or of the usual supplemental decree, or the usual or necessary decree or order to carry on such proceedings, may be obtained as of course upon an allegation supported by affidavit, or petition duly verified, of the abatement of such suit or of the same having become defective or of the change or transmission of interest or liability; which affidavit or petition shall also state the grounds upon which the right is claimed. An order so obtained, when served upon the party or

> parties who, according to the existing practice, would be defendant or defendants to a bill of revivor or supplemental bill, shall from the time of such service, be binding on such party or parties in the same manner, in every respect, as if such order had been regularly obtained according to the existing practice. And such party or parties will thenceforth become a party or parties to the suit in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill; provided, however, that he or they may, within fifteen days after such service, apply to the Chancellor to discharge such order; provided, also, that if any party so served is under any disability, other than coverture, such order shall be of no force or effect as against such party until four days shall have elapsed after a guardian *ad litem* shall have been duly appointed for such party."

We do not see how the Respondents can be deprived of any substantial rights by the record being remitted to the Court of Chancery and the substitution made. The new owner succeeded to all the equities in the property that the original owner had. If the change in ownership had been set up at the time the Chancery Court would have allowed the new owner to carry on the proceedings as started, upon complying with the rules of the court. The result would have been no different. The decree in the Court of Chancery dismisses the bill of complaint. The decision is in favor of the Respondents. How will their rights be affected if the present owner is substituted on the record and the decree entered against him and in favor of Respondents?

In the case of *Bull* v. *International Power Co.*, 84 Eq., at page 217, the Court said:

> "The power of the Court of Chancery to take appropriate proceedings in a cause, pend-

> ing an appeal is recognized by the Court of Errors and Appeals in the late case of Robinson *v.* Robinson, 92 Atl. Rep., 923, wherein it was held that, pending an appeal alimony *pendente lite* might be awarded in that court, or the parties remitted to the Court of Chancery to make application there."

In *Jacob Apgar's Administrators* v. *Philip Hiler*, 24 N. J. Eq., 808 (cited in *Bull* v. *International Power Co.*), this Court held:

> (Head-note.) "A Court of errors will upon motion amend the record sent up, in mere matters of form or clerical mistakes, but not in matters of substance. But it will permit the court below to amend the record in matters of substance, and will, for that purpose, upon allegation of diminution, call upon the court below to certify as to the matters alleged, by certiorari for that purpose, with which the court below will send up the amended record. This will be done even after argument."

The restrictions which form the subject-matter of the suit run with the land and the present Appellant is entitled to enforce them. The rule quoted above (Rule 61) shows that such applications are granted as a matter of course.

Even though it should be determined that the present Complainant's interest has ceased by the transfer of the property, still that is no reason why the parties should necessarily be changed on appeal, because whatever the rights of the parties might be determined to be the Complainant on the record would take the benefits conferred as trustee for and transmit to the real party in interest who has succeeded him.

Respondents' Motion to Dismiss the Appeal.

Respondent Lentz's motion to dismiss the appeal on the first ground, viz., that the *lis pendens* filed in

the cause wherein Lentz was Complainant, through the consolidation of that cause with the cause wherein the Appellant was Complainant, made the statute of limitations as against Appellant three months, instead of one year, is unsound. The Order Consolidating the Causes (p. 60 of the Case) ordered that the *Lentz* v. *Lenart* case be consolidated with the *Marston* v. *Lentz and Lenart,* and that the Lentz bill of complaint stand as an answer by Lentz to Marston's bill of complaint. The order appealed from, viz., the Order Dismissing the Bill and Counterclaim (p. 6 of Case) expressly provided (Case, p. 7) as follows:

> "and it further appearing that, because the complainant is not entitled to the relief prayed for, it becomes unnecessary to determine whether the defendant, William G. Lentz, is entitled to the relief sought and prayed for in his bill of complaint and counterclaim in the consolidated cause * * *
>
> "Decreed that the bill of complaint of the complainant, Russell Marston, be and the same is hereby dismissed; * * *
>
> "Further ordered that the bill of complaint and counterclaim of the said William G. Lentz be and the same is hereby dismissed."

It thus appears that the Court did not pass on the Lentz bill of complaint and counterclaim in the consolidated cause, and if an examination of the Petition of Appeal be made it appears that the only thing the Appellant appealed from is that part of the decree which adjudged that the Marston bill was dismissed and that Marston should pay costs to the defendants Lentz and Lenart.

Lentz's proposition apparently is that his bill of complaint, which was transformed into an answer and counterclaim in the consolidated cause governs the period of limitation in the Marston

case where no *lis pendens* was filed. He cites no authority to uphold so novel a proposition.

The two causes have no relation except by the order of consolidation and by reason of the fact that one and the same paper stands as an original bill in one cause and as an answer in the other. The distinction between a consolidation and a merger is well established. In a merger it is as if the contents of one pitcher should be poured into another; in a consolidation the two pitchers are tied together. The practical effect of the distinction was recognized by the Court, which, after the order of consolidation, stated that it was not necessary to pass on the rights of Lentz, and dismissed Lentz's bill and counterclaim.

In equity consolidated causes do not lose their distinct identity. *1 Corpus Juris,* p. 1137, Sec. 353. Generally, as in this case, one of the bills looks to the settlement of rights as between co-defendants and raises issues which do not affect the complainant in the other bill. Hence to completely merge the two causes into one would entangle one or more of the parties with issues and litigation in which they have no interest. Causes are consolidated only to avoid duplicating inquiry into the same state of facts and because the rights asserted in one cause are so related to the rights asserted in the other that all rights ought to be adjudicated at the same time.

We do not see how any proceeding in our suit can in any way be affected by the fact that a notice of *lis pendens* was filed in the Lentz suit. The three months' limitation has no application to a cause in which such a notice has not been filed, whether or not such cause has been consolidated with another.

We are not aggrieved by the dismissal of the Lentz bill and are only obligated to appeal in our suit from the dismissal of our bill.

In the consolidated causes two distinct controversies are involved, one between Marston on the one side and Lentz and Lenart on the other, as to whether the restriction should be enforced, and the other strictly as between Lentz and Lenart as to which of them, if either, has priority of right. The two are related only because if the first be determined against Marston there will be no occasion to determine the second. There is but one controversy in which we are interested or to which we could be made a party and that is whether the Vose restriction is still enforcible in equity. That controversy was adjudicated by the dismissal of our bill and not by the dismissal of the Lentz bill. If these causes had not been consolidated our appeal would have lain only in our suit. We would not have been aggrieved in the Lentz suit. So also in that case Lentz could have appealed in his own suit from the dismissal of his bill. He would not have had to appeal in that suit in order to bring up for review an adjudication against him in our suit. Or he could have awaited the determination of our appeal and then have brought a new suit against Lenart if we succeeded, for even if the dismissal of his bill had been on the merits so far as the enforcibility of the Vose restriction is concerned, the reversal of the dismissal of our bill and the consequent injunction against Lentz and Lenart would have presented a new state of facts on which a new suit would lie unprejudiced by the prior decree.

In passing it should be noted that, as to the third ground for dismissal set up by the Respondent Lentz, the decree was signed June 5th, 1923, and the matter is now brought on at the next term of court, in November.

The Notice and Petition of Appeal were served on Lentz's Solicitor on October 8th, 1923. The

fifth ground for dismissal in the notice now before the Court, served by Lentz, arrives at the conclusion that the Petition of Appeal was not served in time by computing the time from the day when the notice was served on Defendant Lenart, and the time when the Petition was served on the Defendant Lentz.

The sixth, seventh, eight and ninth grounds of the Respondent Lentz's motion to dismiss the appeal are that the copies of the Notice and Petition of Appeal served on him were not certified copies. There is nothing in Rule 161 of the Court of Chancery, and Rule 21 of the Court of Errors and Appeals, which requires that such copies shall be certified. It is not the practice to serve certified copies.

It is respectfully submitted that appellant's motion to substitute new complainant should be granted, and that respondents' motion to dismiss the appeal be denied.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Appellant.

Appeal Printing Co., 22 Thames St., N. Y. City

New Jersey Court of Errors and Appeals

Between

RUSSELL MARSTON,
Complainant-Appellant,
and
WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,
and
WILLIAM G. LENTZ,
Complainant,
and
ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

BRIEF FOR RESPONDENT WILLIAM G. LENTZ.

On motion of appellant to substitute new complainant and on motion of the respondents to dismiss the appeal.

The respondents moved on the opening day, on notice, to dismiss the appeal in this cause, upon several grounds set forth in the moving papers, which have been printed for distribution with the state of the case. The appellant moved at the same time, on notice, to substitute as complainant-appellant Guarantee Mortgage and Investment Company in the place and stead of the present complainant-appellant, Russell Marston. Both motions were by consent ordered to be postponed for consideration at the same time as the main case, and to be argued in the briefs to be filed.

These motions should therefore be considered before the merits of the appeal itself. Taking up first the ap-

pellant's motion for substitution it is respectfully submitted that:

Appellant's motion to substitute Guarantee Mortgage and Investment Company for Russell Marston as complainant-appellant should be denied.

The application is "to have the Guarantee Mortgage and Investment Company substituted on the record as complainant-appellant in the first of the above-mentioned causes *(Marston* v. *Lentz),* in the place and stead of Russell Marston, on the ground that the said Guarantee Mortgage and Investment Company is now the real party in interest in said causes, the said Russell Marston having disposed of his interest in said causes by conveying his property to the Guarantee Mortgage and Investment Company, or for such order or relief as to the Court shall seem expedient."

Attached to the moving papers is an affidavit disclosing that Marston conveyed his property to Guarantee Mortgage and Investment Company, by deed dated April 30, 1923, recorded May 2, 1923.

The final decree from which this appeal is taken (entitled "Order Dismissing Bill and Counter-claim") was entered June 5, 1923. The opinion was filed May 24, 1923, and is endorsed by the Vice-Chancellor: "Submitted May 11, 1923; decided May 21, 1923" (Case, pp. 6. 9).

It thus appears that Marston, the complainant-appellant, had ceased to have any interest whatsoever in the controversy before the suit was brought to final hearing before the Vice-Chancellor.

Hence it is clear that he cannot prosecute this appeal, for "the principle is elementary, that a complainant, suing in his own right, and alone, cannot, after he has parted with his whole interest in the subject matter of the litigation, further prosecute the action."

Fulton v. *Greacen,* 44 N. J. Eq. 443, 446 (citing authorities).

And it is equally clear that had the facts been known he could not have proceeded to final hearing below. We understand that Marston's counsel were themselves ignorant of the fact, and proceeded in all good faith.

But ignorance of the facts cannot validate what otherwise would be invalid. The suit had none the less abated upon Marston's conveyance of the land, and the Court's consideration and determination of the merits of the controversy.

But the decree dismissing the bill is not for that reason void or improper, for had the Court been aware that the suit was abated it should (and therefore presumably would) have dismissed the bill on defendants' application on that ground. It would have had no power to make a substitution of parties, or to permit the filing of a supplemental bill or bill of revivor, for to have done either of these things would have denied to defendants the right to urge any equities or defenses which they might have urged against the new party and which did not exist against the original complainant. The new party would have been forced to file an original bill in the nature of a supplemental bill.

Fulton v. *Greacen,* 44 N. J. Eq. 443, 448.

Therefore the decree dismissing the bill is entirely proper on the ground of the abatement of the suit, and is now unassailable on that ground, regardless of the merits of the controversy.

The motion primarily is that this Court by its order make the substitution. But this Court is powerless to make such an order, being a Court strictly of appellate jurisdiction.

Bull v. *International Power Co.,* 84 N. J. Eq. 209;
Ashby v. *Yetter,* 78 N. J. Eq. 187.

The motion is secondarily "for such order or relief as to the Court shall seem expedient." The most this Court can do is to remit the record in order that the Court of Chancery may be applied to for some relief.

But this Court should not remit the record for that purpose if it is clear that no relief could be afforded below. There are two reasons why such relief is beyond the Court of Chancery to give:

1. That Chancery is without power, because of the removal of the cause by appeal, to do more than correct such errors in the record as will make it reflect the true state of facts. It cannot make an order affecting the substantial rights of the parties.

Bull v. *International Power Co.*, 84 N. J. Eq. 209.

2. That, as before stated, the new party cannot be substituted for the old, and must file an original bill. It is obvious that the respondents have equities to urge against the new party which they could not urge against the old, for the new party purchased pending the suit and presumably with notice of it; certainly with such notice of respondents' claims as would have been disclosed by an inspection of their land.

But whether such special equities do or do not exist it is respondents' right to plead and to litigate them.

This can only be done by the filing of an original bill below, which the new party is at liberty to file at any time. The decree in the present suit would not be *res adjudicata* as to either party to the new suit.

Fulton v. *Greacen*, 44 N. J. Eq. 443, 448;
2 Daniell: P. and P. *1518, 1519.

Hence the Guarantee Mortgage and Investment Co. is not injured by the decree below, and has no interest in this appeal.

It is therefore respectfully submitted that appellant's motion for substitution be denied, for the reasons above stated, and which may be summed up as follows:

1. This Court is without power to order a substitution of parties.

2. The Court of Chancery cannot make such an order, not only because by the appeal it has lost such jurisdiction, but because, regardless of the appeal, the status cannot be changed except by an original bill.

3. The new party has no interest in the decree or in the appeal, which cannot affect its proper remedy.

Taking up next the motion of these respondents to dismiss the appeal, it follows from what has already been said that the motion should prevail, if no substitution of parties is made, because the appellant has no longer any interest in the subject matter of the controversy.

Fulton v. *Greacen,* 44 N. J. Eq. 443, 446.

Ample technical grounds for such dismissal are set out in the notice, *i. e.,* that the petition of appeal was not filed in time (#4), and that copies of the notice and petition of appeal were not served in time (#6, 8), because of which defects in procedure the Court may dismiss the appeal.

Aside from these technical grounds there is, in addition to the reason already urged, another meritorious ground upon which we submit that the motion to dismiss should prevail, to wit, that appellant's long delay in giving notice of his appeal to Lentz or his solicitors has misled and prejudiced Lentz to such an extent that it would be inequitable to allow the appeal to proceed as against him. The affidavits printed with the notice to dismiss disclose the extent of the injury thus caused.

If the appeal be dismissed as against Lentz it should also be dismissed as against Lenart, for otherwise, if the ultimate result of the appeal be to enforce the ancient covenant and permit only one dwelling house to be erected, the controversy between Lentz and Lenart as

to which has the right to erect the dwelling house would be concluded in favor of Lentz without affording Lenart his day in Court.

It is respectfully submitted that respondents' motion to dismiss the appeal should be granted without considering the merits.

HOPKINS & HERR,
Solicitors for and of Counsel with Defendant,
William G. Lentz.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

RUSSELL MARSTON,
Complainant-Appellant,
and
WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,
and
WILLIAM G. LENTZ,
Complainant,
and
ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

BRIEF FOR RESPONDENT ANDREW LENART.

On motion to substitute Guarantee Mortgage and Investment Company for Russell Marston as complainant-appellant, and on motion of defendants to dismiss appeal.

It is of the utmost importance to defendants that this cause should be promptly disposed of. It has already been pending for more than a year, and defendants are, in effect, deprived of the use of the property while the cause is pending. Delay is a great hardship for them. The situation brought about by complainant's sale of the property is one for which complainant is alone responsible and the defendants ought not to suffer, on that account. They will suffer greatly by delay if the cause is sent back to the Court of Chancery to be revived in favor of the new owner, if, in fact, he wishes it to be revived. Rather than suffer from this delay the defendant Lenart, will consent (if the matter can be corrected by such consent)

that the cause be decided by this Court as if no change in parties had occurred.

As to the grounds 1, 2, 3, 4, 5, 6, 7, 8 and 9 set forth in defendant's notice of motion to dismiss, defendant Lenart consented to the filing of the petition of appeal, as of time, and makes no argument on any of the other grounds mentioned. He wishes only to point out that he would be gravely prejudiced through no fault of his own, if the appeal were dismissed as to defendant Lentz unless it is also dismissed as to him.

Respectfully submitted,

OSBORNE, CORNISH & SCHECK,
Solicitors for and of Counsel with Defendant Andrew Lenart.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

RUSSELL MARSTON,
Complainant-Appellant,
and
WILLIAM G. LENTZ and ANDREW LENART,
Defendants-Respondents,
and
WILLIAM G. LENTZ,
Complainant,
and
ANDREW LENART, JOHN D. MUNTHER and RUSSELL MARSTON,
Defendants.

On Appeal from Chancery.

BRIEF FOR RESPONDENTS, WILLIAM G. LENTZ AND ANDREW LENART, ON THE APPEAL.

Facts.

The statement of the facts by the complainant is, in the main, correct.

We wish to call attention, however, to certain points in connection therewith:

1. The action is brought in behalf of Marston and not Marston's wife. Marston owned a lot 100 feet front on Charlton avenue opposite the premises owned by the defendant Lenart.

2. It does not appear from the record that the suit is being prosecuted at the instance and for the benefit of the purchaser from Marston.

3. There is no issue of fact, but the issue at law is whether or not a court of equity will aid the complainant.

4. The Lentz bill was not a cross bill but was an original bill in which Marston was a defendant. A *lis pendens* was filed in this. The two causes were consolidated on the filing of the Marston bill.

Summarized, the facts are as follows:

About 1866 John G. Vose, having purchased about 210 acres in South Orange, N. J., proceeded to develop the tract by laying it out in streets and plots. He prepared a map on which the streets and plots were shown, which is referred to as the map dated January 1, 1867. The map so prepared was not filed, although recitals in certain deeds refer to it as filed. But in 1869 he prepared and filed a map having the same lay-out, with certain exceptions mentioned in the stipulation as to facts.

In 1866, before making the map, he sold off the end of the property, between South Orange avenue and Ralston avenue, by two deeds—one of which deeds contained no restrictions and the other of which contained restrictions running for twenty-five years only, and with no restriction as to the number of dwelling houses. These sales were in one block at the extreme end of the property and were prior to the making of the map.

He made two other conveyances in 1866 to King and to Woodward—one on the north and one on the south side of Ralston avenue—with restrictions substantially the same as in the deed for complainant's and defendants' property.

Between January 1, 1867, and September, 1868, he conveyed ten plots, with the same restrictions as in complainant's and defendants' deeds, except as to the number of dwellings. These properties varied in size and the restrictions varied as to the number of dwellings permitted on each, but otherwise the restrictions were the same. The sale to de Gomme was the last of these ten deeds.

No further sales were made by Vose until the deed to Freeland, which is dated December 31, 1872, and was re-

corded January 4, 1873. The property conveyed in this deed to Freeland fronted on Charlton avenue (a street not shown on the earlier maps). This street extended through the properties of Vose in a northeasterly and southwesterly direction, adjoined the property of de Gomme and divided the block in which de Gomme's property was located.

The plot adjoining de Gomme, of 3.40 acres, shown as "T" on the earlier maps, was divided into six lots—three lots fronting on Charlton avenue, each having a frontage of 100 feet, and three lots fronting on a proposed road (now known as Grove Road), each having a right angle width of 100 feet. A plot to the south of that, shown as "U" on the prior maps, and having an area of over three acres was also divided into six lots—three on Charlton avenue, each having a frontage of 100 feet and three on Grove Road, each having a width of 100 feet. This map showed the de Gomme property divided into three plots of 100 feet each. The map was dated May, 1873, and filed in November, 1873. In May, 1873, Vose gave to de Gomme an agreement modifying the restrictive covenant in his deed, so far as to permit the erection of three houses on his plot instead of one.

Shortly after this, all the property shown as "T" and "U" on the earlier maps, except the Marston plots, was foreclosed and the property sold free of restrictions. The property on Raymond avenue, in the block diagonally opposite the de Gomme plot and opposite Mrs. Marston's plot, and all the other properties fronting on Raymond avenue, in that block, have either been foreclosed or the restrictions have been violated and the properties declared free of the restrictions by decrees in Chancery—*Fort* v. *Field* and *Turrell* v. *Dormitzer*.

The restrictions on the properties on Charlton avenue, adjoining the de Gomme plot, have expired, as have the restrictions on the southerly side of Ralston avenue. The changes in the character of the neighborhood, in the fifty-five years that have elapsed since the conveyance to de

Gomme, have been marked, as is shown by comparing the 1869 map with the map made from the tax records by Ira T. Redfern. In many cases, both prior to and subsequent to the purchase by defendants (sometimes by agreement among the property owners and sometimes without agreement) the Vose restrictions have been violated. In two cases, affecting premises in the immediate neighborhood, decrees have been entered in the Court of Chancery, holding the Vose covenant to be void as to the properties which were the subject of those cases—*Fort* v. *Fields* and *Turrell* v. *Dormitzer*.

The defendants, when purchasing, were advised by their respective attorneys that, as a result of the violation of the restrictions and the changes in the character of the neighborhood, the restriction to one dwelling house was no longer effective.

The defendants propose to erect three dwelling houses —one on each 100 foot lot fronting on Charlton avenue— which houses are to be of a character in keeping with the residences in the neighborhood, as to expense and style, and defendants have offered to join with adjoining owners in restricting the property to insure the maintenance of the premises as a high class residential section.

The complainant does not allege or prove that he bought his property, relying on the covenant in the de Gomme deed.

The complainant alleged, but offered no proof to the effect that he will be injured by the erection of three houses on the defendant's property. On the other hand, he has offered to agree that two houses may be erected.

The complainant's property has the same frontage on Charlton avenue that the defendants propose to give to each lot on which a house is to be erected, namely, 100 feet.

Conditions as to housing in South Orange, have greatly changed in fifty-five years.

Defendant Lentz owns one lot 100 feet front on Charlton avenue and defendant Lenart owns two lots, each 100 feet front, on Charlton avenue, and the enforcement of the original restrictions would result in one or the other being unable to use his property for any purpose to which it is suited, and would result in great hardship.

For convenience of the Court we give, immediately below, a synopsis of the points on which the defendants rely, and follow this synopsis with a discussion of each of those points.

The relief asked by the complainant was properly refused by the Court below because

A.

The action is for specific performance and the relief is discretionary and will not be granted unless the complainant suffers injury by the failure to perform, nor when to grant the relief would work great hardship on the defendant without corresponding benefit to the complainant.

1. The complainant has offered absolutely no proof of injury to himself.

2. The character of the buildings proposed to be erected are in keeping with the residences in the neighborhood and not detrimental to it.

3. Many of the buildings permitted by the covenant in question would be detrimental to the neighborhood, such as pig pens and cow sheds.

4. The complainant sold his property while these proceedings were pending.

5. One or the other of the defendants will suffer great hardship if prevented from using his property for the purpose of erecting a dwelling.

B.

The right of the complainant to relief must be free from doubt. Complainant's rights are at least doubtful.

1. The covenant, under which he seeks relief, was created fifty-five years ago, and none of the parties to it are now available to testify as to the circumstances surrounding its creation.

2. The purpose of the covenant is, at least, the subject of fair argument.

3. The circumstances attending the conveyance to complainant's predecessor in title, Freeland, creating a doubt as to his rights under the covenant.

4. Within a very short time after the modification of the covenant a large part of the premises adjacent to the premises in question were sold under foreclosure without restriction. Later, restrictions on other adjacent property expired. The restriction on other adjacent property was violated. Decrees have been entered as to other adjacent properties to the effect that the covenant is now void, so that it is now impossible to carry out any restrictive scheme for the neighborhood. The complainant has acquiesced in many or all of the violations. The character of the neighborhood has changed.

ARGUMENT.

A.

The action is for specific performance and the relief is discretionary and will not be granted unless the complainant suffers injury by the failure to perform, nor when to grant the relief would work great hardship on the defendant without corresponding benefit to the complainant.

In *Page* v. *Murray,* 46 Eq. 325, at page 330, it is said:

"as it (the relief) is specific performance, a discretionary relief, the question to be now determined

is whether it shall be afforded to him or whether he shall be left to his remedy at law." See also

Trout v. *Lucas,* 54 Eq. 361, at page 368;

Sandford v. *Keer,* 80 N. J. Eq. 240, at page 247.

In the last-mentioned case, 6 Pom. Eq. Juris., Sec. 1316, is quoted as follows:

> "Specific performance not being an absolute right, the fact that enforcement would be of little or no benefit to the complainant and a burden upon the defendant, is sufficient to constitute performance oppressive, and it will not be given."

This is a universally recognized principle, both in this State and elsewhere, and citation of further authorities is deemed unnecessary.

1.

The complainant has offered absolutely no proof of injury to himself.

In the complaint, the complainant alleges that the action proposed to be taken by the defendants, that is, to erect three houses on the two plots owned by them on Charlton avenue, opposite complainant's property, is detrimental to him, but when it came to the trial of the case, he made no effort to prove any injury. Not one word of proof is offered anywhere, nor is it seriously argued by the complainant that the three houses, of the character proposed by the defendants, would in any respect deteriorate the value of complainant's property, nor in any manner deteriorate the character of the neighborhood. This failure to offer proof could not have been an oversight. The complainant prepared his statement of facts deliberately, and the only conclusion that can be drawn from his failure to include proof is that no detriment can be proved.

Another thing of significance in this connection is that complainant does not allege, nor prove, that either he or his predecessor in title purchased the premises relying on the advantage supposed to accrue from existence of the original covenant on defendants' land.

2.

The character of the buildings proposed to be erected are in keeping with the residences in the neighborhood and not detrimental to it.

The only complaint that the complainant expresses is that more than one house is to be erected on the premises in question. The character of the neighborhood will not be in any way deteriorated, so far as the use to which the buildings are to be put, are concerned, or in so far as the character of the buildings themselves are concerned. Further, the houses are to be erected, as is shown by the State of the Case, on lots, each having a frontage of one hundred feet, fronting on the street on which the complainant's property fronts, and this is the same frontage as the lot which he owned, and on which he has the right to erect a house, and the same frontage as the lot belonging to his wife, adjoining his, on which she has a house, and the same frontage as the lot adjoining the premises in question, on which there is a house—the remaining frontages in that block being unrestricted as to the size of the lot.

He does not complain as to the character of the house and the garage. He cannot reasonably complain as to the frontage of the lots on which it is proposed to put these houses. It appears from his brief that his chief complaint is as to the number of square feet in the lot and, as the front is equal to his own, it must be that it is the smallness of the back yard that causes him uneasiness. Reduced to its true condition, his whole case is an effort to secure more extensive grounds in the rear of the houses proposed to be erected. He does not, however, state in any place that the area is such as to cause a condition detrimental to his property.

3.

Many of the buildings permitted by the covenant in question would be detrimental to the neighborhood, such as pig pens and cow sheds.

An examination of the covenant itself shows, even as it was originally expressed, the owner had the right to put more than one building on the premises. In fact, the owner had the right to put more than one *dwelling* on the premises. The enumeration of the buildings allowed by the covenant are as follows:

One dwelling house,
Gardners' cottages,
Porters' lodges,
Private billiard rooms,
Private bowling alleys,
Private gas works,
Arbors,
Wall houses,
Summer houses,
Ice houses,
Tool houses,
Barns,
Stables,
Carriage houses,
Reservoirs,
Ornamental lakes,
Water works,
Sheds,
Henneries,
Cow houses,
Pig houses,

and other buildings and offices appropriate for a gentleman's country residence.

The complainant seems to take the view that the times have changed so that the owner of the premises in question would be, in fact, restricted to a dwelling house and a garage. If such is the case, it only emphasizes the point

which we make later on, that the conditions are so changed as to make it impossible to carry out the purpose which the parties had in mind when they put the burden of this covenant on our property. It is needless to say that the buildings allowed, both in respect to number, and in respect to their character, would, if erected on this premises, be detrimental to the complainant's property. The neighborhood has changed. If the public authorities would now allow horse stables, henneries, cow houses and piggeries, with their attendant cows, hens, pigs and horses—the animals themselves would be very objectionable to the neighborhood. It is impossible to carry out the idea of the covenant in whole and it will not be enforced in part only.

4.

The complainant sold his property while these proceedings were pending.

The effect of this action of the complainant on the cause is discussed in connection with the motion to dismiss. Quite aside from such effect, his action proves that his property was marketable. His efforts to restrict us in the use of our property is apparently not dictated by a desire to maintain any special character of the premises for his own benefit. If he had any personal interest in the suit, it must have been because he considered that the enforcement of the restriction might have some effect on the marketability of his property. His selling the property, pending the proceeding, shows either that there was very little good faith on his part in bringing the action, or that any fears which he had, as to the effect of non-compliance on the marketability of his property, were not realized.

5.

One or the other of the defendants will suffer great hardship if prevented from using his property for the purpose of erecting a dwelling.

The Vice-Chancellor, in his opinion below, has pointed out that to grant the relief would leave one of the defendants in the ownership of a lot which he could never improve nor derive any benefit from. In this connection it ought to be said that the defendants have not gotten into this situation because of a ruthless disregard of complainant's rights. They were each advised by their respective counsel that the restrictions were no longer enforceable and this advice was given because of the way in which the restrictions had been ignored by the property owners in the neighborhood, among them, the complainant. The elements entering into their consideration of the problem, were; the changes in the neighborhood; the decrees of the Court involving titles in the neighborhood affected by the same restriction; and the other matters which are set up in this brief.

For nearly fifty-five years the property was unimproved. About fifty years ago it was shown on a map filed by the creator of the covenant as three separate lots.

About fifty years ago the owner of the lot was given the right by the creator of the covenant to erect three houses on it. It does not seem to us that the defendants can be charged with any conduct which makes it inequitable for them to urge on the Court's attention the hardship which will result to them from the enforcement of the covenant at this late day. It is the complainant who is seeking relief, and he must show an equity superior to the defendants.

B.

The right of the complainant to relief must be free from doubt. Complainant's rights are at least doubtful.

In *Fortesque* v. *Carroll,* 76 N. J. Eq. 583, this Court said (see p. 586):

> "For it is well settled that in cases where the right of a complainant to relief by 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. * * * Courts of equity do not aid one man to restrict another in the use to which he may put his land, unless the right to such aid is clear."

Fortesque v. *Carroll* has been cited on this point in the following cases:

Clevenger v. *Quinn,* 79 N. J. Eq. 487, at page 487;

Goater v. *Ely,* 80 N. J. Eq. 40, at page 43;

Meaney v. *Stork,* 80 Eq. 60, at page 65;

Howland v. *Andress,* 81 Eq., page 175, at page 181;

Camovito v. *Matthews,* 82 Eq. 218, at page 220;

Underwood v. *Herman & Co.,* 82 Eq. 353, at page 355;

Sailer v. *Podolski,* 82 Eq. 459, at page 465;

Armstrong v. *Griffin,* 83 Eq. 599, at page 603;

Fenton v. *Crook,* 88 N. J. Eq. 432;

Marsh v. *Marsh,* 89 Eq. 110, Court of Errors, 90 Eq. 244.

The last case was reversed by this Court on the strength of *Fortesque* v. *Carroll,* the Court saying:

> "It is well settled that every doubt and ambiguity in the language of the recited covenant must be resolved in favor of the owner's right."

Union Investment Co. v. *Fiske,* 107 Atl. 65, at page 66;

Odea v. *Ugnon,* 107 Atl. 794, at page 795;
Smith v. *Reidy,* 92 Eq. 586;
Hohman v. *Parker,* 118 Atl. 334, at page 335.

It is seldom indeed that any principle has been so reiterated by the Courts of Equity as this, which we are now considering. The principle has been re-stated and followed in each of the above fourteen cases, all decided in the last thirteen years, which is significant of the importance which the courts place on the maxim that, to entitle the complainant to relief, all doubt to his right must be removed. The doubts in this case are on more than one aspect of it.

1.

The covenant, under which he seeks relief, was created fifty-five years ago, and none of the parties to it are now available to testify as to the circumstances surrounding its creation.

It is said in *Meaney* v. *Stork,* 80 N. J. Eq. 60, that the covenant must be construed, not only by consideration of its language, but also by consideration of the circumstances existing at the time of the creation of the covenant, and its obvious purpose.

See especially page 65.
See also *Walker* v. *Renner,* 60 N. J. Eq., 493, at page 499.

This covenant was devised two generations ago and was applied to the premises in question, by the deed to de Gomme, fifty-five years ago. None of the parties to that contract, so far as is known, are living. Consequently none were produced to enlighten the Court as to the purpose or the circumstances. It is also true that the new lay-out of the neighborhood, as shown on the map of 1873, the modification of the agreement and the deed to Freeland, the laying out of the new street, all occurred fifty years ago and no one of the parties to that transaction is in existence so far as known, and consequently none could be

produced to enlighten the Court as to the purpose of the change or the circumstances surrounding it. We must, therefore, examine the covenant itself, the maps made at the time, and consider the condition of the premises in the surrounding neighborhood.

The complainant argues throughout as if the restriction to "one dwelling" was the main or only purpose of the covenant, and the only part of the restriction to be considered now. Such is not the case. The restriction to one dwelling is only one feature of a covenant involving many different matters. All of which matters, however, tend to one purpose, namely, the creating of a restricted neighborhood in which each property owner would have a right against every other property owner to maintain the character of the neighborhood, as established by that covenant. The recitals in the deeds, the uniformity of the restrictions, the title given to the property, the lay-out of the property, the language of the covenant itself, all evidence the fact that this was originally intended to be a restricted colony.

2.

The purpose of the covenant is, at least, the subject of fair argument.

In the first place, by the terms of the covenant itself, each purchaser out of the two hundred and ten acres comprising the Montrose Estate, is given a right of enforcement of this covenant, clearly indicative of an intention to give to every owner a similar right, and implying a mutuality of burden as well as benefit.

The prohibition in the restriction is against *"any erection * * * for any * * * purpose * * * which can or may be unwholesome or offensive to the neighboring inhabitants."*

The words "*the* neighboring inhabitants" are defined and limited by those subsequent words in the covenant which give the right of enforcement to the owners of any

of the properties mentioned in the ten recited deeds, which properties, according to the recital, comprise the estate called "Montrose," which estate is shown on the "Map of Montrose, dated January 1, 1867."

The purpose of the creator of the covenant was obviously to make a restriction for the benefit of all purchasers in the 210 acres which he was then developing and which he called "Montrose" and common to all.

His intentions are elucidated by an elaboration of the prohibitory clause in which he enumerates the erections which are permitted because appropriate for a *"gentleman's country residence."*

These last quoted words contain the essence of the restriction. Its purpose was to create a neighborhood composed of *gentlemen's country residences.*

But the originator of the covenant did not leave each individual owner, nor the Court, to construe the words *"gentleman's country residence."* He specifies the buildings and works which are appropriate and this specification, which we have quoted above, shows very clearly that the plots were intended to be, must in fact be, of large area. The idea was suited only to a country district where plots of large area were appropriate and consonant with public policy.

We have referred so far only to the wording of the deed itself.

Collateral to the deed and the covenant was the "Map of Montrose, dated January 1, 1867." The identification of the map in the deed is not entirely accurate, but it is sufficient and that map was put in evidence (see State of Case, p. 16, para. 3½). It was marked Exhibit "A," and while no copy was prepared for the use of the Court, it differs little from Exhibit "B" (State of Case, pp. 17 and 18, para. 3½, subdivision 1).

The map of 1867, is, therefore, also "internal evidence" of the scope and purpose of the covenant.

An examination of the map discloses just what one would expect from the wording of the recitals and the covenant above referred to, namely, that the property composing the 210 acres protected by the covenant is divided into spacious plots capable of development in accordance with the plan so elaborately set forth in the deed.

It is true that the map was not complete. A portion (that bordering on Central avenue) was not plotted. It was no doubt for that reason that it was not then filed. But the failure to file does not make it any the less a part of the deed, since the identification is complete.

We do not contend that, at the date of the first map, January 1, 1867, the lay-out of the property was complete, but the scheme in other respects was complete. In November, 1869, Vose had completed the detail of the lay-out and filed his map.

Looking at the map, with the covenant in mind, one gets at once a mental picture of spacious country places, with handsome residences, backed up by all the appurtenances, which a wealthy country gentleman would have felt appropriate to life in the country—stables, barns, cow houses, piggeries, hen houses, cottages and ornamental structures.

Now the scheme did not necessarily involve uniformity in the size of the plots on which one dwelling, with its appurtenances, might be erected, but did involve plots sufficiently spacious to properly accommodate the numerous appurtenant structures and works enumerated as appropriate for a gentleman's country residence. When the de Gomme lot was purchased, it and the other part of Lot S and the two portions of Lot W (of practically the same size) were the smallest plots that had then been conveyed in that section.

We must assume that the parties, Vose and de Gomme, agreed on a practical construction by which the various parts of Lots S and W were accepted as suited to the purposes of the scheme. The station lots were too remote to

have affected the character of the neighborhood in which the de Gomme plot was located.

The Vice-Chancellor, in his opinion, says clearly (see State of the Case, top of page 14):

> "Whatever scheme of development Vose had was abandoned."

But the deed itself and all the surrounding circumstances indicate that when this enterprise was started, and when the covenant was first put into use, a very definite scheme of development was in the mind of Vose, and that the purpose of this covenant was to secure the carrying out of that scheme and to insure its permanency. While this scheme was still new, and before it had demonstrated its impracticability, de Gomme bought the premises in question from Vose, but, following that, the sales stopped, and a variation from the scheme was necessary in order that Vose might dispose of the property. He was no doubt getting in trouble financially, for, after his modification in 1873, he made almost no sales and the property was presently foreclosed. It seems to us, therefore, that the purpose of the covenant in the beginning was to carry out a very definite scheme of development; that that scheme was subsequently abandoned so that the carrying out of the scheme became impossible. The complainant argues that there was no scheme; that this covenant was created for the benefit of his land and, as it turns out, for the benefit of his land alone. His grounds are technical in the extreme, and there is certainly not the freedom from doubt, in regard to this point, that is required by the rules of the Court of Equity.

3.

The circumstances attending the conveyance to complainant's predecessor in title, Freeland, creating a doubt as to his rights under the covenant.

Within four or five years of the making of the covenant, the neighborhood was changed by the laying out of a

new street contiguous to the property in question; by the re-lotting of the property contiguous to the property in question; by the sale of two lots on the street in question in one hundred-foot plots, and by an agreement entered into by the creator of the covenant and the covenantee, modifying the restriction so as to allow three houses on the premises in question instead of one, and by showing the premises in question as three lots on the map, prepared to show the new lay-out of the neighborhood. The conveyance to complainant's predecessor was so nearly of the same date as these changes as to give rise to a probability that he was fully cognizant of them, and a party to them. All of which happened fifty years ago.

4.

Within a very short time after the modification of the covenant a large part of the premises adjacent to the premises in question were sold under foreclosure without restrictions. Later, restrictions on other adjacent property expired. The restrictions on other adjacent property were violated. Decrees have been entered as to other adjacent properties to the effect that the covenant is now void, so that it is now impossible to carry out any restrictive scheme for the neighborhood. The complainant has acquiesced in many or all of the violations. The character of the neighborhood has changed.

It seems hardly necessary to argue at length on the various changes in the neighborhood and on the violations of the covenants similar to the one in question inserted in the deeds from the common grantor, Vose.

It is said in *Sandford* v. *Keer,* 80 N. J. Eq. 240, at page 248:

> "Equity would refuse to enforce a covenant not to devote certain property to business purposes where there has been such a change in the character of the neighborhood * * * *as to defeat the object and purpose of the agreement.*"

See also

Morrow v. *Hasselman,* 69 N. J. Eq. 612, at page 616;

Brigham v. *H. G. Mulock Co.,* 74 N. J. Eq. 287, at page 291;

Newberry v. *Barkalow,* 75 N. J. Eq. 128, at page 135;

Page v. *Murray,* 46 N. J. Eq. 425;

Ocean City v. *Chalfant,* 65 N. J. Eq. 165, at page 168;

Woodbine Land & Improvement Co. v. *Reimer,* 72 N. J. Eq. 787, at page 789;

Barton v. *Sleeper,* 72 N. J. Eq. 812, at pages 817-818.

A comparison of the map made by Vose in 1869, with the map made by Redfern, the tax collector, in 1923, shows the difference in the character of the neighborhood, shows the impossibility of carrying out the purpose of creating a neighborhood of estates for country gentlemen, and, to restrict the premises now owned by the two defendants to one dwelling house would not accomplish that purpose. The only purpose that it would accomplish would be to restrict that particular lot to one house. Argument does not seem necessary to show that that was not the purpose of the covenant. It was only a means of carrying out the purpose. The purpose was to create a neighborhood of country gentleman's estates.

It is said in *Ocean City Land Co.* v. *Weber,* 83 N. J. Eq. 476, at page 478:

> "Covenants of this nature in the contemplation of the remedial jurisdiction of this court are to preserve the specific plan in the covenant and not a plan which differs from that defined in the covenant, whether that difference has arisen by popular construction of the covenant or by common consent."

See also

Trout v. *Lucas,* 54 N. J. Eq. 361, at page 368, where quoting

Peck v. *Matthews,* L. R. 3 Eq. cases 515, it is said:

"The court will not, he further says, grant specific performance of an arrangement which can only be carried out in part. The things must be enforced *in toto* or not at all."

To carry out the covenant in part and thus to enforce a different scheme from that originally intended is the purpose of the complainant. He does not pretend to want the whole covenant enforced. In fact, he admits that it is both undesirable and impossible to enforce it now. He claims we are restricted as to buildings—to a dwelling and stables. He has offered to agree that we might put two dwellings on the property. He minimizes the violations on other properties where more houses than allowed by the covenant have been erected, on the ground that they are not material violations. The fact is that all of these incidents, which have occurred in the years since Freeland purchased, together with a lapse of time and the difference in housing conditions in this suburb of New York, makes it impossible and undesirable to carry out the purpose of the covenant and, unless that purpose can be carried out, the covenant will not be enforced.

The restrictive covenant, used by Vose in the deeds for the Montrose property, has been in litigation in the Court of Chancery four times, including the present case. The first case was *Coudert* v. *Sayre,* decided in 1890, and reported in 46 Eq. 386. That action involved property shown on the original Montrose map, but a very considerable distance away from the property involved in this action. It was brought by Coudert, the owner of a plot, against the owner of an adjoining plot. Vice-Chancellor Van Fleet said (p. 387):

"The case which the complainant lays before the court, as the foundation for the relief he seeks,

> is one of extreme novelty; stated generally, it must be said that the complainant is before the court asking to be relieved, as against the defendant, from the obligation of a covenant which he made voluntarily, fully understanding what he was doing, entirely uninfluenced by fraud and without the least mixture of accident or mistake."

It can readily be seen from the above statement that no grounds for equitable relief existed, and the Court so found, but the Vice-Chancellor was careful to say (see p. 399):

> "The complainant, it is important to remember, is not before the court resisting an attempt by the defendant to compel him to abide by the strict letter of his covenant. In such a posture of affairs it would undoubtedly be the right of the court, as well as its duty, to look at the conduct of the parties to the litigation and also at the conduct of their predecessors in right and duty to see how they had dealt with each other in respect to the covenant, and also to contrast the condition of the property when the litigation arose with its condition when the covenant was made, and then either decree or deny specific performance, as should appear to be most in accordance with justice and right under the circumstances of the case."

An important distinguishing feature of that case from ours is that Coudert, the complainant, was, himself, the covenantee.

The next case was *Turrell* v. *Dormitzer, et als.*, an abstract of which is set forth in pages 32f to page 40 in the State of the Case. This bill was filed in 1914, and concerned property in the next block to the premises in question, and about four hundred feet distant therefrom. That was an action brought by the owner of a property affected by the Vose restrictive covenant against some sixty-two owners of, or holders of encumbrances on, property in the neighborhood. The complainant in this cause and his wife were both defendants in that cause. The action was to declare the covenant void. Certain of the defendants entered into an agreement, agreeing to a

modification of the covenant and all the other defendants, including the complainant in this cause, defaulted and a decree was entered declaring the covenant void.

The third case was an action for specific performance brought by the executors of John Franklin Fort against Josie D. Fields, and involved property diagonally opposite the premises owned by the defendant Lenart, and directly opposite Mrs. Marston's lot on Raymond avenue. The executors of Fort and the defendant in that case had entered into a contract for the purchase of that lot. The defendant had refused to accept the title because of the violation of the restrictions imposed on that property—more houses having been erected than the restrictions allowed. The allegations in the bill were similar to the allegations in the bill in this cause. Vice-Chancellor Fielder held that the covenant was no longer enforceable by reason of the violations and changes in the neighborhood. His opinion was apparently not reported. We, therefore, print it as an appendix.

The present case was the last of the four cases, and differs from the others in that it was brought by an adjoining owner to prevent, what he asserts to be, a violation of the covenant.

It would seem beyond question that the right of the complainant herein to the relief prayed for is, considered in the most favorable aspect to him, doubtful and to doubt is to deny.

We respectfully submit that the decree below, dismissing the bill of complaint, on its merits, should be affirmed.

OSBORNE, CORNISH & SCHECK,
Solicitors for and of Counsel with Defendant,
Andrew Lenart.

HOPKINS & HERR,
Solicitors for and of Counsel with Defendant,
William G. Lentz.

APPENDIX.

IN CHANCERY OF NEW JERSEY.

52-7

Between

MARGRETTA FORT, *et al.*, Executors, etc.,

Complainants,

and

JOSIE D. FIELD,

Defendant.

On Bill, etc.

Conclusions.

Jehiel G. Shipman, Esq., for complainants.

Horace G. Grice, Esq., for defendant.

FIELDER, *V.-C.:*

Complainants are the vendors of lands in the Village of South Orange under a written contract of sale wherein defendant is the purchaser. The contract covers more land than is involved in this controversy, defendant having accepted title to a part of the land she contracted to purchase, paying a portion of the purchase price, but having refused to take title to the balance thereof, on the ground that the title thereto is not marketable and the bill is filed to compel defendant to specifically perform her contract by taking title to the remainder of the land agreed to be conveyed.

Complainants' title and power to convey comes through the last will and testament of former Governor John Franklin Fort, who died November 17, 1920, seized of all the land described in the contract. His will was duly admitted to probate in Essex County and it is conceded that

complainants can convey a good and marketable title, if the title held by Governor Fort was good.

John G. Vose owned a tract of land 250 feet front on the easterly side of Charlton avenue, by 200 feet deep on the northerly side of Raymond avenue, in which is included the two lots hereinafter called the Jewett lot and the Durbrow lot. The tract 250 feet by 200 feet was conveyed by Vose to Emeline M. Griffen by deed dated April 10, 1873, recorded May 13, 1873, in Book T-16 of Deeds for Essex County, page 490, by which deed the grantee for herself, her heirs and assigns, covenanted with Vose, his heirs and assigns, that the land conveyed should not at any time thereafter be used (among other things) "for the erection of any buildings of any kind or description, excepting one dwelling house with the appropriate gardens, cottage, etc.," designating a number of outbuildings and structures which would be included within the exception and concluding with the words: "and other buildings and offices appropriate for a gentleman's country residence." The covenant provided that it should attach to the land and run with its title and be inserted in all future conveyances and other instruments whereby the title to the lands conveyed should be transferred or effected and that the conveyance should forever thereafter be recognized, sustained and upheld and that it should be lawful not only for Vose, his legal representatives or assigns, but also for the owner or owners of any of the property mentioned in the deeds thereinafter recited, (meaning ten deeds by which the land in question and surrounding lands, comprising in the whole a tract of about 210 acres which had been conveyed to Vose) to institute and prosecute any suit or proceeding at law or in equity, for a violation, or threatened violation, of the covenant.

The tract 250 feet front by 200 feet deep, conveyed by Vose to Griffen, was subdivided by subsequent conveyances. Governor Fort acquired title to that portion of it involved in this controversy, by two deeds, one from Kate

R. Durbrow and husband dated July 19, 1915, recorded July 19, 1915, in Book H-56 of Deeds for Essex County, page 244, which conveys a plot on the northeast corner of Charlton and Raymond avenues, having a frontage of 125 feet on the easterly side of Charlton avenue, by 188.69 feet deep on the northerly side of Raymond avenue and the other, for the lot adjoining on the north, from Josephine G. Jewett and husband, dated May 28, 1914, recorded May 28, 1914, in Book M-54 of Deeds for Essex County, page 272, having a frontage of 108.30 feet on the easterly side of Charlton avenue, by 194.24 feet in depth. The land conveyed by both deeds formed a plot of land with a total frontage of 233.03 feet on the easterly side of Charlton avenue, by 188.69 feet in depth on its southerly side along Raymond avenue and 194.24 feet in depth on its northerly side, being but slightly less in area than as originally conveyed by Vose to Griffen.

The deed from Mrs. Durbrow contains a clause that "the lands herein described and conveyed herein are conveyed by express agreement between the parties hereto, subject to building and other restrictions of record affecting the said lands and premises, if any."

The deed from Mrs. Jewett contains a clause that "the party of the second part for himself, his heirs and assigns, hereby covenants and agrees that this conveyance is made subject to the covenants and restrictions set out in the deed recorded in Book T-16 of Deeds of Essex County, on pages 490, etc., in so far as said covenants and restrictions may, at the present time or hereafter, be operative or valid."

The lot purchased by Governor Fort from Mrs. Jewett was vacant and immediately after its purchase, he commenced the erection of a dwelling house thereon, which was completed about March, 1915, and in which he thereupon took up his residence and continued to live until his death. When he purchased the adjoining corner lot from Mrs. Durbrow in July, 1915, there was a dwelling house on that lot, facing Charlton avenue. Governor Fort moved that

house from its foundation to the rear of the Durbrow plot, placing it on a new foundation facing Raymond avenue and leaving the old foundation remaining. The present situation with respect to the plot conveyed by Vose to Griffen, is that the portion of it acquired by Governor Fort is now occupied by two dwelling houses and the foundation for a third.

The contract to convey set out in the bill of complaint included the Jewett lot and a portion of the Durbrow lot, with other property. Defendant accepted a deed from complainants for the Jewett lot and such "other property," but refused to accept a deed for the portion of the Durbrow lot covered by the contract, the sole ground for her refusal being that the erection of two dwelling houses and the foundation for a third, constitute a violation of the covenant contained in the deed from Vose to Griffen restricting the lands therein described to a single dwelling house and that such covenant will prevent her or her assigns from erecting a dwelling house on the corner of Charlton and Raymond avenues.

That the letter of the covenant has been violated must be conceded, but complainants contend that the covenant is a nullity and unenforceable as to the lands in question because the population of South Orange has greatly increased since the restriction was imposed by the Vose deed in 1873 and the character of the neighborhood has so changed that the original plan or scheme of large country estates which Vose had in mind, cannot be carried out; because it would be against public policy and in restraint of trade, considering the increase in population, housing conditions and the change in the character of the neighborhood, now to enforce a restriction limiting the use of a plot of land 250 feet by 200 feet to a single dwelling; because persons deriving title through deeds from Vose have indicated no intention to enforce this restriction and similar restrictions affecting their adjacent property and have acquiesced in and permitted a violation of this particular restriction and of similar restrictions

affecting adjacent property and because there has been a general violation of covenants and restrictions similar to the one in question, by those entitled to enforce this covenant and a general acquiescence in such violation by those concerned, which violation and acquiescense amount to an abandonment and estoppel.

It is alleged in the bill of complaint, admitted by the answer and shown by the evidence, that Vose conveyed various parcels of the 210-acre tract, without uniformity as to restrictions governing the number of dwelling houses to be erected upon the parcels thus conveyed, and in many instances without any restriction of such nature; that the owners of lands embraced within the 210-acre tract have permitted and acquiesced in many violations by others, of similar restrictions governing the number of dwelling houses to be erected upon separate plots within said tract and have, themselves, violated such restrictions and that such building restrictions have been generally ignored by their violation; that Governor Fort violated the restriction in question in 1914 by erecting dwelling house on the Jewett lot and that such violation was permitted and has continued without objection from anyone, although all property owners in the vicinity had ocular notice of his intention to violate it and of his actual and continued violation of it; that since 1873 the population of South Orange has increased from less than 2,000 to over 7,000 and housing conditions in the village are congested; that the village, because of the increased number of inhabitants and the limits of its area is no longer suitable for the ownership of large country estates; that many dwelling houses have been erected within the 210-acre tract and in the immediate neighborhood of the property in question, on lots having a frontage of 100 feet or less and that the average frontage of lots within said tract upon which single dwelling houses are now being erected, is 100 feet.

I conclude that the admitted facts disclose an intent on the part of Vose and those claiming under him, for whose benefit the restrictive covenant in question was

made, not to observe the spirit and intent of the covenant and to abandon it and to generally acquiesce in its violation and that it would be inequitable, under such conditions and because of the departure from the neighborhood scheme or plan as originally contemplated, to now enforce it and that such covenant, in so far as it restricts the use of that part of the Durbrow lot which is described in the contract in this suit to the erection of a single dwelling house, is a nullity and unenforceable (Page *v.* Murray, 46 N. J. Eq. 325; Ocean City Assn. *v.* Chalfant, 65 N. J. Eq. 156; Chelsea Land &c. Co. *v.* Adams, 71 N. J. Eq. 771; Sanford *v.* Keer, 80 N. J. Eq. 240; Fisher *v.* Griffith Realty Co., 88 N. J. Eq. 204). Defendant's contention that because of the covenant as applied to the number of dwelling houses to be erected upon the Jewett and Durbrow lots, the title tendered to her is not marketable, is without force and she will be decreed to specifically perform her contract.

SCOTLAND ROAD
RALSTON AVE.
TURRELL
IRVING AVE
MONTROSE AVE
CHARLTON AVE
GROVE ROAD
SOUTH ORANGE AVE.
Trinity Presbyterian Church
GROVE PARK
PARK PLA
FIELDING COURT.
WOODLAND PLACE
O-DWELLINGS
O GARAGES OR OUTBUILDINGS.
Scale 160 ft - 1 in.
IRA T. REDFERN & BRO.
MUNICIPAL ENGINEERS & SURVEYORS.
SO. ORANGE, N.J.


I hereby certify this map is a true copy of the original map filed in this office.
Thos. P. Ailsworth
Register.
TREMONT AVENUE
SCOTLAND ROAD
MONTROSE AVENUE
RANDOLPH PLACE
HARRISON AVENUE
STIRLING AVENUE
WARWICK AVENUE
CENTRE STREET
RAYMOND AVENUE
WALTON AVENUE
SOUTH GRANGE AVENUE
GROVE ROAD
J. F. Blake
J. L. Blake
Charles Candee
George B. Fussell
P. C. Baldwin
Filed in the Essex County Register's office
November 8th 1869
P. T. Spear
Register
MAP of MONTROSE
SHOWING LANDS OF
Lyon & Dike
from Original
L.D. TOMPKINS
and L.P. TAYLOR
surveys by

Return to
Osborne, Cornish & Scheck
Kinney Bldg.,
Newark, N. J.

In Chancery of New Jersey.

Between
Russell Marston,
Compl't.
and
William G. Hentz and
Andrew Lenart,
Defts.
} on Bill, etc.

Exhibit "C"

6

Exhibit B

A true copy of a portion of a map entitled "Map of SOUTH ORANGE & MONTROSE ESSEX CO. N.J. Shewing part of lands of John G. Yeos numbered from 200 to 285 and part of lands of G. W. Comstock & L. P. Taylor numbered from 1 to 87. from original Surveys by Lewis P. Taylor Surveyor South Orange and dated May 1873."

EXHIBIT C N. W. B.

Newark N. J. December 16th 1922
Bonnell & Kinnel
Surveyors

22-1344 Map No 38

Exhibit A.

A true copy of a portion of a map entitled
"Map of Montrose showing lands of John G. Vose
from original surveys by L. D. Tompkins and L. P. Taylor
Scale 4 chains to the inch
N.B. The tinted portion indicates the lands
purchased by J. G. Vose. The sites already
sold are shown by the owners names in capitols.

Newark N. J. December 16th 1922
Borrie & Heiner
Surveyors

22-1349 Map No 38

101 - 101