Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, Deceased.

Between

CHARLES F. HERR,
Petitioner-Appellant,

and

BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX, *et al.*,
Defendants-Appellees.

Brief for Petitioner-Appellant.

This proceeding is an appeal from an order of the Court of Chancery, denying the prayer of the petition filed by this appellant, praying for the payment of the sum of $8,905 (the correct amount is $6,905 as hereafter shown), into the Court of Chancery, to be there distributed according to law under section 8 of the Eminent Domain Act, Comp. Statutes of New Jersey, Vol. 2, page 2185.

The facts in this matter are set forth in the petition of appeal in the present action filed in this court, and more in detail in the stipulation constituting the record of the court below, also filed in this court in the present action. Briefly the facts are as follows: Certain commissioners were appointed by the Honorable William S. Gummere, Chief Justice of the Supreme Court of New Jersey, under the provisions of an act entitled "An

Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900, approved March 20, 1900), to examine and appraise the lands described (in the petition of appeal) and rights therein belonging to Jessie Buchanan, Austen H. McGregor and George W. Breingan, Executors of Paul Buchanan, deceased, Jessie Pauline Buchanan and others, including the compensation to be paid to this appellant and other persons having rights in the said lands or easements appurtenant to other lands owned by this appellant and others, and to assess the damages to be paid to the said Jessie Buchanan, Austen H. McGregor and George W. Breingan, Executors of Paul Buchanan, deceased, Jessie Pauline Buchanan, and others, by the Board of Education of the City of Newark for the taking of the same for school purposes. Said lands were subsequently, by the above mentioned act, declared taken and condemned by the Board of Education of Newark, for school purposes. The above commissioners made an award of $28,905, but sought to apportion said amount among the persons whom they considered were entitled to the same. We contend that the commissioners had no legal right, power or authority, to make any apportionment of the said award, but could only make an award of a lump sum. We shall endeavor to support this contention by the citation of authorities later in this brief. There now remains in the possession of the Board of Education of the City of Newark, a balance of this award undisposed of, amounting to $6,905.

An appeal was taken by this appellant and other persons referred to but not named above, but named in the stipulation filed in this cause, all of whom were made parties to the original condemnation petition, to the Essex County Circuit Court from the award of the commissioners. This appellant and certain of the other persons taking said

appeals, recovered judgments in the Essex County Circuit Court against the Board of Education of the City of Newark, as more particularly set forth in the above mentioned stipulation. These judgments of the Essex County Circuit Court were taken up to the Court of Errors and Appeals, upon a writ of error and were by stipulation tried together. After argument the Court of Errors and Appeals remitted the record for further proceedings, in accordance with the views expressed in the opinion of the court. Subsequently upon application of this appellant and the other persons who recovered judgments, as above mentioned, an order was made by the Essex County Circuit Court dismissing their appeals, but without prejudice to the rights of said persons to institute any other proceedings. Subsequently this appellant filed his petition in the Court of Chancery, concerning which this appeal is taken, which petition prayed for an order directing the said Board of Education of Newark to pay into the Court of Chancery the above mentioned sum of $8,905 (the correct amount being $6,905 as hereafter shown) to be apportioned among the persons entitled thereto according to law. An order was made by the Court of Chancery, based upon the said petition directing the Board of Education and other persons therein mentioned, to show cause before the Court of Chancery why the prayer of the said petition should not be granted. Upon the return day of the said order to show cause, and after due service of the same, in accordance with the terms thereof, the Board of Education by Charles M. Myers, its solicitor, was the only defendant which appeared. After argument was had upon the said petition before Honorable Frederick W. Stevens, one of the Vice Chancellors of the Court of Chancery, the court made an order denying the prayer of the said petition. The present proceeding is an appeal from that order.

Points.

An order should be made by the Chancellor, directing the Board of Education of Newark to pay into the Court of Chancery the sum of $6,905 to be there distributed according to law, because

a. This petitioner-appellant and others have such an interest as entitles them to have the said money paid into the Court of Chancery, to be there distributed.

b. The commissioners exceeded their powers in seeking to apportion their award which should have been an award of a lump or a gross sum for the value of all the estates or interests in the land.

c. The restriction set forth below constitutes an incumbrance or a lien upon the property taken.

Argument.

a. This petitioner-appellant and others have such an interest as entitles them to have the said money paid into the Court of Chancery, to be there distributed.

We wish to state at the outset that our attention having been directed by Mr. Myers, the solicitor for the Board of Education, to the fact that $22,000 was the total amount paid out of the award of $28,905 by the commissioners, and this appellant being satisfied that this is correct this appellant admits that the balance of the award undisposed of in the possession of the Board of Education, is $6,905 instead of $8,905.

Section 8 of the Eminent Domain Act, Comp. Statutes, Vol. 2, page 2185, referred to in the first part of this brief, and under which the

Chancery proceedings were brought, reads as follows:

> "Payment of award—In case the party entitled to receive the amount assessed by the commissioners shall refuse upon tender thereof to receive the same, or shall be out of the state or under any legal disability, or in case several parties being interested in the fund shall not agree as to the distribution thereof, or in case the lands or other property taken are incumbered by any mortgage, judgment or other lien, or in case for any other reason the petitioner cannot safely pay the amount awarded to any person, in all such cases, on petition to the chancellor, to which shall be annexed a copy of the petition in condemnation and of the report of commissioners, the amount awarded may be paid into the court of chancery by order of the chancellor, and shall there be distributed according to law, on the application of any person interested therein; and written notice given to the owner or owners and to persons interested that such money has been so paid into court shall have the same effect as if the money so awarded had been actually tendered to the owner or persons entitled thereto, and where notice cannot be personally served, notice by advertisement, in such manner as the chancellor shall direct, shall have the same effect (P. L. 1900, p. 82)."

In the first place, we would call attention to the fact that the Board of Education in its petition for condemnation above mentioned, made this appellant, together with many other property owners, parties to said condemnation petition. The said petition distinctly stated in each instance that the respective owners had or might claim to have an interest in the property taken because of certain restrictions, which constituted the easements, mentioned on page 1 of this brief, or that the respective owners had or might claim to have an interest

in the property taken because they held a mortgage on the said premises (which ever the case might happen to be). It is urged that for this reason alone, this appellant and the other property owners made parties to said petition, have a right to have the money paid into the Court of Chancery to be there distributed, as the above mentioned statements in the condemnation petition, are direct admissions on the part of the Board of Education of Newark that the petitioner and the other parties mentioned in the petition have an interest in the property taken by condemnation, and on ordinary principles of common sense, it would seem that if these property owners had sufficient interest to be made parties to the condemnation petition, they would have sufficient interest to entitle any of them to file the petition for the payment of the fund in dispute into the Court of Chancery, to be there distributed.

This is evidently the view taken by Judge Swayze in his opinion in this case, when it was previously before this court. Judge Swayze says in his opinion in this case, reported in *82 N. J. L. 610, at page 614:*

> "Section 9 of the Act permits an appeal by the petitioner, or owner of any of the land or other property. We think the language is broad enough to warrant an appeal by anyone who has been made a party as an owner of a property right in the land. Section 10 of the Act recognizes that all parties who have appeared before the commissioners are entitled to notice of the appeal and it logically follows that they may participate therein; otherwise the notice would serve no useful purpose. These provisions were obviously designed to give all parties interested a chance to review the action of the commissioners."

Further along on page 615, Judge Swayze in his opinion, says:

> "It was not incumbent upon the trial court to determine upon a preliminary motion to dismiss the appeals, whether or not the defendants in error were the owners of a property right in the Buchanan lot; it was enough that the record showed that they had been made parties as such."

It would seem to us that the same reasoning would apply to the right to have the money in dispute paid into the Court of Chancery as applies to the right to appeal from the commissioners award, as it will be noted by a reference to section 8 of the Eminent Domain Act, above set forth, that any party interested has a right to have the money paid into the Court of Chancery to be distributed.

A second reason sufficient in itself, why this appellant and the other property owners above referred to have a right to have the money paid into the Court of Chancery, is that this appellant, together with a number of the other property owners who were made parties to the condemnation petition, recovered judgments in the Essex County Circuit Court as set forth above. It is true that these judgments were reversed, but this reversal was not on the merits and that the appeals were not dismissed, but the record was sent back to the Circuit Court for further proceedings in accordance with the opinion. In view of these facts we do not think that it can be denied that this appellant and the other property owners recovering the said judgments, have on this account also, a very definite interest in the fund, and that such interest is sufficient to entitle them to have the fund paid into the Court of Chancery.

b. The commissioners exceeded their powers in seeking to apportion their award which should have been an award of a lump or a gross sum for the value of all the estates or interests in the land.

It may perhaps be contended that this appellant and the other property owners to whom the commissioners did not seek to apportion any part of their award, have no interest in the sum awarded. In answer to this possible objection we would point out that in view of the decisions in this State there can be no doubt that the commissioners appointed under the Eminent Domain Act have no power or authority to apportion their award, but that the award stands in the stead and place of the thing appropriated, namely, the land, and represents all interests therein. Judge Swayze, in his opinion in this case, when the same was formerly before this court, which case is reported in *82 N. J. L. 610,* says in his opinion (on page 611):

> "An important preliminary question is the proper procedure under the statute of 1900. *Comp. Stat.,* p. 2182. This is not left in doubt by our decisions. The question was thoroughly considered by this court in *Bright* v. *Platt,* 5 Stew. Eq. 362. In that case a railroad company, under a charter containing provisions for condemnation similar to those contained in the act of 1900, condemned land which was subject to a mortgage, but failed to make the mortgagee a party. An award was made to the mortgagors. Subsequently the amount of the award was paid into the Court of Chancery, and the mortgagors sought to obtain it for themselves upon the theory that the award having been made to them was for their interest only, and that the mortgagee had no interest therein. We held that the fund did not represent merely the estate of the mortgagors, but the whole value of the land; and we said that an interpretation of the act 'which devolved upon these commissioners the duty

> of estimating the value of each particular interest in the land to be taken, 'would not only do violence to the language of the provisions, but would also impose upon these appraisers obligations which, with their limited means of investigation, their want of knowledge of nice legal and equitable distinctions and their inability to settle authoritatively the rights of the parties, they could not conscientiously assume to discharge. Their simple duty is to ascertain what sum of money is an equivalent for the rights which the railroad company seeks to acquire, and the injuries it is to inflict by the construction and operation of its road."

Referring to the case of *Ross* v. *Elizabethtown and Somerville Railroad Company,* Spen. 230, cited in *Bright* v. *Platt*, 32 N. J. Eq. 362, at 370, quoted from by Judge Swayze in his opinion in the Herr case. The above mentioned case of Ross v. Elizabethtown and Somerville Railroad Company was on certiorari to the Clerk of Middlesex County, to bring up the report and proceedings of commissioners appointed to examine and appraise certain land or property and to assess the damages for the taking of the same. The court held in this case that the commissioners have nothing to do with the quantity of estate or interest, which the owner has in the land acquired. Their duty is to estimate the whole value of the land acquired and to assess the damages resulting to all owners, and not to each one separately.

In the case of *McIntyre* v. *Easton and Amboy Railroad Co.,* 11 C. E. Green, 425, at page 431, (this is another case quoted from in Bright vs. Platt). A railroad company which condemned certain lands was directed to pay into the Court of Chancery, in order to protect the rights of a *cestui que trust,* in certain lands condemned, an award as to the specific portion of the lands to which the interest of the *cestui que trust* attached, which

award had been made separately as to such land. The court in its opinion on page 430 and 431, says:

> The proceedings for condemnation are, for aught that appears in the bill, regular. The act gives to the company the right to possession of the land, on payment of the value and damages; or, on refusal to receive them, on a tender; or, in case of the legal disability of the owner, payment of the money into this court (the court of chancery). On their complying with this provision of the charter, they should not be restrained at the suit of the complainant or Mrs. Hubbard (the cestui que trust) for the cause set forth in the bill, from taking possession. In order to protect the rights of Mrs. Hubbard in the premises, they will be required to pay into this court the award as to the land covered by her agreement, and complainant will have leave to amend his bill by making Titus (the vendor of the land) a party defendant, and Mrs. Hubbard a complainant, and giving to it such form as to secure Mrs. Hubbard's rights. The company will be ordered to pay the money into court within two days from the entry of the order on this decision; and, on failure to do so, an injunction will be ordered.

We urge that the cases above quoted from show that from the earliest history of this state, down to the present time, the courts have held that an award by commissioners for the damages accruing from the taking of land by condemnation, should be an award of a lump sum and that this sum represents all interests; that where there are no intervening claims, the award is presumably the award to the owner of the fee, but where there are intervening claims, the money should be paid into the Court of Chancery and there distributed to the persons entitled thereto. It is further urged that the interest contemplated in section 8 of the Eminent Domain Act previously set forth in this brief, en-

titling the person so interested to have the award paid into the Court of Chancery, is presumed to exist in any person or persons made a party to the condemnation petition. It is difficult to see how this could be otherwise, as the very purpose of section 8, above mentioned, is to have the Court of Chancery decide who shall be entitled to participate in the award of the commissioners, and necessarily the actual interests of the person or persons applying to have the award paid into the Court of Chancery, could not be determined until such an award is paid into the Court and proceedings with a view to the distribution of the same had, this being the very purpose of the provisions of said section.

Judge Swayze, proceeding in his opinion on page 611, of the Herr case, and referring to the above mentioned case of *Bright* v. *Platt,* says:

> "This decision has been consistently followed. In Crane *v.* Elizabeth, 9 Stew. Eq. 339, we held that the charter of Elizabeth which required compensation to be made to the owner or owners of the land did not require compensation to be made to mortgagees specifically. We used this language: 'The action of the city authorities has thus the distinctive qualities of a proceeding *in rem,* a taking, not of the rights of designated persons in the thing needed, but of the thing itself, with a general monition to all persons having claims in the thing. When, by the appraisement of the commissioners, the price of the thing is fixed, that price stands instead of the thing appropriated, and represents all interests acquired. The legislature has not imposed upon the city officials the duty of searching out all these interests and assigning to each its just equivalent. It has contented itself with the simple direction that the fund shall be paid to him who is presumably entitled to it, the general owner of the land. Where no other claimant intervenes, that course will usually meet the ends of justice.

> But if, in any special case, this owner ought not, in equity, to receive the fund, the Court of Chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute has left without express protection.' These cases establish the practice, and where a railroad company had paid the award into court, it was held that it was entitled to have the lien of the municipality for taxes discharged out of the fund, although the municipality had not been made a party to the condemnation proceedings. *In re Sleeper,* 17 Dick. Ch. Rep. 67. In *Zimmerman* v. *Hudson and Manhattan Railroad Co.,* 47 Vroom 251, a lessee sought to review the action of commissioners proceeding under the act of 1900 (this being the act under which we are now proceeding) upon the ground that they erred in reporting the value of the property taken and the damages sustained by the taking in a lump sum, instead of making a separate award of the moneys to be paid to the applicant for his leasehold interest, and of the amount to be paid to Hill, the owner of the fee. But the Supreme Court held that the commissioners had followed the rule laid down in Bright *v.* Platt, and refused to review their action."

In *Pennsylvania Railroad Co.* v. *National Docks Co.* 28 Vroom 86, *the same rule was followed.*

In *Dabb* v. *Hudson County Park Commission,* 48 Vroom 36, the Supreme Court held that section 7 of the Act of 1900, did not authorize a separate action at law by a lessee for the value of his estate in the lands condemned; that an action to recover the amount of the award must be one suit only for the whole amount. The Court, in the course of its opinion, in the above case, in speaking of the Eminent Domain Act, said:

> "Section 6 requires the commissioners to view the land or other property and to make

a just and equitable appraisement of the value of the same, and an assessment of the amount to be paid by the petitioner for such land or other property, and damages. This evidently contemplates an award in a gross sum for the value of all the estates in the land, such as was made by the commissioners in this case."

c. The restriction set forth below constitutes an incumbrance or a lien upon the property taken.

"This conveyance is however made and received by the parties hereto upon the express understanding, covenant and agreement that no house or other structure shall be erected or placed upon the land hereby conveyed within forty feet of the easterly line of Bergen Street, nor shall any such house, structure or other building be used as and for a tenement house, nor shall there be kept or maintained or carried on therein any store, saloon or other business, nor shall such buildings be used for any purpose than as a private residence for but one family, and that no three-story house shall be erected on said lands, and that there shall not be erected more than one house on every fifty feet fronting on Bergen Street, and that this covenant and agreement shall not only bind the said party of the second part, but shall run with the land and bind the heirs and assigns of the party of the second part, and all other persons who may hereafter acquire any interest in the said lands by, through or from the said party of the second part, or any of his heirs and assigns."

It will be noted by reference to section 8 of the Eminent Domain Act, previously set forth in this brief that another ground on which payment of the award into the Court of Chancery, can be demanded, is where the lands or other property taken are encumbered by any mortgage, judgment, or other lien. It is admitted in the condemnation peti-

tion that two mortgages were made on the property taken, to certain of the persons made parties to said petition because they held the said mortgages on said property. We would also point out that the restrictions above mentioned existing on the property taken, as well as on the property of certain of the other persons made parties to the condemnation proceedings, are also such liens as would themselves be sufficient ground to have the award paid into the Court of Chancery, under the provisions of section 8 of the Eminent Domain Act. (The restrictions above mentioned were uniform restrictions and made in pursuance of a general plan.)

That restrictions such as the above are an incumbrance and a lien upon the property, see case of *Howell* v. *Northampton Railway Co.* 60 Atl. 793, where the court held that

> "An 'incumbrance' is a burden on land which depreciates its value, as a lien, easement, or servitude, and includes 'any right to or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the conveyance of the title."

That building restrictions in grants of real estate are encumbrances on the title; see *Whelan* v. *Rossiter,* 82 Pac. 1082, 1083, 1 Cal. App. 701, citing:

Reynolds v. *Cleary,* 16 N. Y. Supp. 421, 61 Hun. 592;

Wetmore v. *Bruce,* 23 N. E. 303; 118 N. Y. 319;

Kramer v. *Carter,* 136 Mass. 504;

Jeffries v. *Jeffries,* 117 Mass. 184;

Van Schaick v. *Lese,* 66 N. Y. Supp. 64, 31 Misc. Rep. 610.

Summary.

We would respectfully urge that we have shown four distinct grounds on which the appellant and others of the property owners who were made parties to the condemnation petition, have a right to have the fund paid into the Court of Chancery to be there distributed. In the first place this appellant and the others of the said property owners, were made parties defendant to the condemnation petition which distinctly stated that said parties had or might claim to have an interest in the property taken. This alone being sufficient, according to Judge Swayze's opinion in this case, quoted from above, to entitle the said persons to appeal, and by analogy being sufficient to entitle them to have said money paid into the Court of Chancery. The making of these persons parties defendant to the condemnation petition, being an admission by the Board of Education of such an interest as would entitle them to have the money so paid into court. Also this appellant and certain others of said property owners, as more particularly set forth in the stipulation filed in this cause, recovered judgments on their appeals in the Essex County Circuit Court. These judgments, while being reversed by this Court, were not reversed on the merits, but for the purpose of remitting the record to the Circuit Court for further proceedings. This, we think, is also sufficient to entitle this appellant and said other persons, to have the money paid into court. Also, as we have shown above, the commissioners only have power to make a gross or a lump award, and have not power to determine the values of any particular interest in the property. This being so, the only interest contemplated by section 8 of the Eminent Domain Act, requiring the payment of the money into the Court of Chancery in case several parties are interested in the fund, or requiring such payment upon the application of any person interested

in the fund, is such an interest as is shown by the making of such persons parties to the condemnation petition or by their recovering judgments such as were recovered in this case. This is so by reason of the fact that in the very nature of the proceeding there can be no absolute determination of the interests of the various parties until the proceeding in the Court of Chancery, authorized by section 8, above mentioned, is had, as the sole purpose of the proceeding there provided for, is to have the interests of the various parties determined.

The fourth ground upon which said appellant and the other persons made parties to the condemnation petition, are entitled to have the money paid into court, is that the property is encumbered by both mortgages and other liens. It is admitted in the condemnation petition that certain of the persons therein made parties defendant, hold mortgages on the property taken. It is also well established by the decided cases in this state, as above set forth, that building restrictions such as those existing against the property in question, are liens or encumbrances against the same. It will be noted in section 8, above mentioned, that where the property is encumbered by any mortgage, judgment or other lien, this is another ground for the payment of the money into the Court of Chancery.

That the payment into the Court of Chancery is not discretionary, but is an absolute right, is, we think, shown by the provision in Sec. 8 (mentioned above) for payment into the Court of Chancery, "*in all such cases,*" namely, where there are several parties interested in the fund, or where the property is encumbered by any mortgage, judgment or other lien.

We would, therefore, urge that on any and all of the four grounds above mentioned, this appellant is entitled to have the money paid into the Court of Chancery, to be there distributed.

Respectfully submitted,

RIKER & RIKER,
Solicitors of Petitioner—Appellant.

EDGAR H. PINNEO,
Of Counsel with Petitioner—Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

CHARLES F. HERR,
Petitioner-Appellant,

and

BOARD OF EDUCATION OF NEWARK,
in the County of Essex, *et al.*,
Defendants-Appellees.

Brief for Board of Education.

The original proceedings upon which the present petition is based were commenced more than six years ago.

They resulted in an award by commissioners in condemnation of $27,000 to the owners of the land, the sum of $1,905 as damages to seven owners of property on the west side of Bergen street, opposite the land taken, no damages to the present petitioners, who own property on the east side of Bergen street and on the same side of the street upon which the school was proposed to be built and about 125 feet therefrom, and other owners on the east and west sides of Hunterdon street, in the neighborhood of the rear of the proposed school, were also awarded no damages.

The owners of the nearby restricted properties, who were not awarded damages, appealed to the Circuit Court of the County of Essex. The Board of Education also appealed from the award of $1,905. Orders framing issues were prepared and entered, and damages aggregating $5,266.67 were assessed by a jury in favor of the four

owners on the east side of Bergen street. The other appeals were not tried.

These judgments were removed to this court and by the order of this court were reversed, and the record and proceedings were remitted to the Essex County Circuit Court to be proceeded with in accordance with the practice of said court.

Instead of making an application to the Circuit Court to have a proper issue framed as indicated by this court, the petitioners herein were apparently content with the judgment of this court, because for more than three years no effort was made by them to proceed with their appeals.

In the summer of 1915 on their application, an order was made by the Essex County Circuit Court dismissing their appeals. The appeal by the Board of Education from the award of $1,905 is still pending in the Circuit Court.

Thereafter they filed a petition in the Court of Chancery asking for an order under Section 8 of the Eminent Domain Act, directing the Board of Education to pay certain moneys into court, which request was denied.

Points.

The order of the Court of Chancery should be affirmed for the following reasons:

1. There is no award to be paid into that court.

2. If the money should be paid into court the appellants are not entitled to share in the distribution because

   a. They are not "persons interested."

   b. The restrictions are enforceable only in equity.

   c. The restrictions are not in the nature of an easement that would entitle the owners of land not taken to damages.

d. Neither the owner of property that is taken under the power of eminent domain, nor the Board of Education exercising such power, and building a school on a lot subject to restrictions, can be compelled to pay damages to owners of restricted property in the neighborhood when their land is not taken.

e. A restrictive covenant is not a property right.

As to the FIRST reason it is claimed that, having dismissed their own appeals, they are now out of court and there is no award to be paid into the Court of Chancery.

With their appeals dismissed and an appeal pending in the Essex County Circuit Court from the award of damages of $1,905 to seven owners on the opposite side of the street (not the petitioners herein), there is only the one award of $27,000 to consider, and under Section 8 "the amount *awarded* may be paid into the Court of Chancery." They surely cannot expect the Court of Chancery to direct the payment into court of a part of the award. They ask to have paid into court the sum of $6,905, which amount is apparently arrived at by deducting from the award of $27,000 to the owners and the separate award of $1,905 to seven neighbors, the sum of $22,000 which was the amount for which the owners of the land thereafter sold their property to the Board of Education, and which sum was paid to them and a deed accepted and recorded.

At the time of the conveyance by the owners to the board, the present petitioners could have gone into the Court of Chancery seeking an injunction to restrain the building of the school, but they stood by and saw the building erected without complaint. They evidently were satisfied to have the school as a neighbor, provided they could obtain money damages.

If the petitioners are correct in their present contention that they now have a right to have apportioned to them any part of the award, such right was theirs in the first instance, and they should not have appealed. They chose the latter remedy because, under the award, they received no damages. As the case now stands, they have no award and no damages, and it was their duty, as has been pointed out, to prove their damages on a proper issue in the Circuit Court.

They have no mortgage, judgment or other lien that would entitle them to distribution under Section 8. The restrictions on their own property are not a lien on the property taken.

That section provides, among other things, that in case

> "Several parties being interested in the fund shall not agree as to the distribution thereof, or in case the lands or other property taken are incumbered by any mortgage, judgment or other lien * * * the amount awarded may be paid into the Court of Chancery by order of the Chancellor, and shall there be distributed according to law, on the application of any person interested therein * * *."

While it is true that the original petition in condemnation brought into court the owners of nearby restricted properties, this Court said, in *Herr* v. *Board of Education*, 82 Law, page 610, on page 613:

> "It cannot be said in this case that the proceeding was in effect a proceeding against the defendants in error to condemn their interests in the land."

The petition in condemnation alleged that the present petitioners and others might have a claim against the property sought to be acquired by reason of being owners of nearby restricted properties, or by reason of holding mortgages upon said prop-

erties. This was not, as counsel would have us believe, a direct admission on the part of the Board of Education that the persons mentioned in the petition had an interest in the property taken by condemnation.

Mr. Justice Swayze says, on page 613:

> "The petition was not framed in that aspect."

He further says, on page 614:

> "These provisions (Sections 9 and 10 permitting an appeal) were obviously designed to give all parties interested a chance to review the action of the commissioners."

In reversing the judgments, this Court said:

> "If therefore the defendants in error were owners of a property right in the Buchanan lot, they had a right to appeal, and their appeal should not have been dismissed (evidently referring to the application made by the Board of Education at the beginning of the trial in the Circuit Court to dismiss their appeal), but a proper issue should have been framed * * * *."

The record was therefore remitted so that the cases might be tried on a proper issue.

Counsel urges that the judgments of the Essex County Circuit Court were not reversed on the merits, but nevertheless they were reversed, and this Court said, "Whether the reversal should result in a new trial upon a proper issue, or in a dismissal of the appeal depends upon the right of the appellant to review the award," and the Court thereupon indicated that the language of Section 9 quoted below was "broad enough to warrant an appeal by any one who has been made a party as an owner of a property right in the land."

Section 9 vests in the Circuit Court "full right and power to hear and adjudge the same, and to

direct a proper issue for the trial to be framed between the parties."

On an appeal the jury might have awarded a greater or less sum to the owners of the fee, and it might have taken into consideration "any special interest" that the owners of these nearby restricted properties might have in the land taken.

Counsel are in error when they say at the top of page 14 of their brief that "two mortgages were made on the property taken, to certain of the persons made parties to said petition because they held the said mortgages on said property." They also misunderstand the condemnation petition when they say, on page 16, "that certain of the persons therein made parties defendant, hold mortgages on the property taken."

The condemnation petition made no such allegation, and it is a fact that the property condemned was not "encumbered by any mortgage, judgment or other lien," and, unless this Court shall hold that the owner of restricted property in the neighborhood has a lien on the property taken, Section 8 cannot apply.

Are owners of restricted property in the neighborhood of the property taken, both being purchased from a common grantor, "persons interested," who may make application for distribution through the Court of Chancery of the sum awarded by commissioners for the taking of the land? This question has been answered in the negative by the cases here cited:

> "But the word 'owner' in this connection will be held to include any person having an interest in the land, and who sustains loss or damage at the time of the taking, as a tenant in common, the holder of a possessory title under some circumstances, or the owner of the equitable title, although he may be re-

quired to account for it to the proper *cestuis que trustent.* But it does not include a trespasser nor a tenant by sufferance, or from month to month, nor a mere licensee." 15 Cyc., page 789.

In *National Railway Co.* v. *Easton & Amboy R. R. Co.,* 36 N. J L., page 181 (1873), Mr. Justice Depue, speaking for the Supreme Court, defines "owner" and "persons interested" as follows, page 184:

"By owner is meant the person having some legal estate which the company proposes by the condemnation to acquire. Under the more comprehensive expression of persons interested, are included not only the person in whom is vested the legal title which the company proposes to acquire as indicated by their application, but also other individuals having some independent right or interest thereon, not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower, or curtesy, or encumbrances, such by judgments or mortgages, which are charges or liens on the legal estate. The object attained in making the latter class of individuals parties to the proceedings, is that their interests may be extinguished by payment out of the money awarded or compensated for under the provisions of the general statute, which authorizes the court into which the money may be paid, to make allowance out of the fund in satisfaction of such interest."

It will be observed that the charter of the railroad provided for "persons interested" just as does Section 8 of the Condemnation Act.

The foregoing decision has been cited with approval in *McIntyre* v. *Easton & Amboy R. R. Co.,* 26 N. J. Eq., page 425-428 (1875).

In *Butterworth-Judson Company* v. *Central Railroad Company,* 72 N. J. Eq., page 568 (1907), Vice Chancellor Emery said, on page 570.

> "The General Eminent Domain Act (Revision, P. L. 1900, p. 79, &c.,) provides for compensation to the owners, occupants and all *persons appearing of record to have any interest in the land taken,* and under statutes of this character, it is settled that persons holding *easements of right of way* are included as persons interested, State National Railway Co. Prosecutor *v.* Easton and Amboy Railroad Co., 36 N. J. Law (7 Vr.) 181, 184 (Supreme Court, 1873)."

> "* * * When the land taken is subject to restrictions imposed for the benefit of the neighboring estates, and the public use to which it is to be devoted will defeat the restrictions, it is a taking of the negative easements which belonged to the owners of the land to which they were attached. The easement to entitle its owner to compensation must be an enforceable one, as a right to light and air from adjoining premises can exist in this country only by actual grant, in the absence of such a grant, compensation based on the existence of such a right cannot be recovered."

Nichols on Eminent Domain, Section 175.

Washburn on Real Property, Vol. 2, page 312 (5 Ed.) includes among rights and privileges embraced under the name of easements, that of way, of water, of light and air, of support, and of party-walls. None of the foregoing rights has been taken by the Board of Education.

On page 314, Washburn divides easements into affirmative and negative, and defines them.

No one of the conditions described by him has been violated by the Board of Education.

This would seem to settle the question, as this proceeding was not "in effect a proceeding against the defendants in error to condemn their interests in the land." *Herr* v. *Board of Education,* 82 Law, page 613.

They have no interest in the land. They simply own property which is subject to similar restrictions.

While it is conceded that the commissioners in condemnation should have made an award representing all interests, this court has indicated, as I have already stated, that the condemnation act gave "all parties interested a chance to review the action of the commissioners."

The petitioners herein took advantage of the requirements of the act and appealed from the award and obtained a verdict, but after reversal they declined to proceed to have the award of the commissioners reviewed in the manner declared by this court to be proper.

It is contended that they are not the kind of interested persons contemplated by the act, and it does not follow, simply because they are made parties, that they have such interest. The act gives them the right to establish their interest and its value when it tells them how to appeal.

Thereafter, if the petitioner in condemnation fails to pay the award into the Court of Chancery, they, having proven their interest in the Circuit Court, could then make the necessary application. It is now prematurely made.

Under the act the right of determining the interest is not exclusive in the Court of Chancery. If it were, why should this Court have directed the proceedings to be remitted to the Circuit Court for a trial on a proper issue?

Is it not clear that owners of restricted properties have not such an interest in the land condemned as would give the Court of Chancery the right to apportion the money?

The third point of the appellants is that the restriction constitutes "an encumbrance or a lien upon the property taken."

While it is true that restrictions are an incumbrance on land, they are not incumbrances or liens held by the adjoining property owners.

> "An 'incumbrance' is not always a lien, although a lien is always an incumbrance."

Wilson v. *Wilson,* 105 N. Y. Supp., page 151.

The cases cited by counsel on page 14 of his brief are suits for specific performance of an agreement to sell.

In the case of *Howell* v. *Northampton Railroad Co.,* 60 Atl., page 793, the defendant refused to accept a deed because a part of the land was occupied by a public road. The Court held it to be an "encumbrance" that affects its physical condition.

In the case of *Wetmore* v. *Bruce,* 23 N. E. Reporter, 303, it appeared that there had been an agreement that twelve feet of the front of the lot should not be built upon.

The Court of Appeals of New York (1890) said:

> "It is entirely competent for adjoining owners of land, by grant, to impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in the position of buildings. The covenants being mutual and imposing such restriction in perpetuity, are, in effect, reciprocal easements, the right to enjoyment

of which passes as appurtenant to the premises. Observances of such a covenant will be enforced by a court of equity. Lattimer *v.* Livermore, 72 N. Y., 174; Trustees *v.* Lynch, 70 N. Y., 440; Insurance Co. *v.* Insurance Co., 87 N. Y., 400; Perkins *v.* Coddington, 4 Rob. (N. Y.) 647."

In *Riggs* v. *Purcell,* 66 N. Y., 193, an agreement required a courtyard to be left in front of all the lots, and the Court said, "While this agreement may in one sense be regarded as an encumbrance upon the lot, it cannot be assumed, without proof, that it injuriously affects its value to any extent whatever," and it was held to be an immaterial defect.

In *Krah* v. *Wassmer,* 75 N. J. Eq., page 109, affirmed 78 N. J. Eq., page 305, the Court held that where a person bargained for property free and clear of all encumbrances, he was entitled to insist upon a conveyance without restrictions.

An examination of the covenants in our case discloses the fact that they simply restrict the grantees from doing certain specified acts upon their several parcels of lands.

There are no reciprocal covenants on the part of the grantor that he will refrain from doing on the lands retained by him the acts forbidden to be done by the grantees, nor that he will insert such covenants for the benefit of the said grantees in deeds of other parcels that he might thereafter sell.

These covenants, then, far from conferring upon the appellants any rights of which they are deprived by these proceedings, and for which they are entitled to compensation, are merely burdens upon their several estates, depriving them of the free and uncontrolled use thereof.

The restrictions were that "no house or other structure shall be erected or placed upon the land hereby conveyed within forty feet of the easterly line of Bergen street."

This restriction has not been violated.

> "Nor shall any such house, structure or other building be used as and for a tenement house, nor shall there be kept or maintained or carried on therein any store, saloon or other business."

This restriction has not been violated.

> "Nor shall such buildings be used for any purpose than as a private residence for but one family, and that no three-story house shall be erected on said lands, and that there shall not be erected more than one house on every fifty feet fronting on Bergen street."

The land taken was 200 feet in width by about 200 feet in depth and there has been erected thereon the most beautiful school building in the City of Newark.

Can the petitioners say that they are thereby damaged?

As was said in *Wharton* v. *United States,* 153 Fed. Rep., page 876 (1907) * * *

> "The purpose of the United States in acquiring the property does not appear to be in any substantial particular inconsistent with the conditions of the deeds or destructive thereof." * * *

This Court has said in this case,

> "The trial judge in the present case allowed testimony that the use of the Buchanan tract for a school house would affect the value of the property of the defendants in error. This amounted to allowing the owner

of a tract not taken to recover damages for the injuries to that tract."

"A school is not a nuisance in the legal sense."

Lewis on Eminent Domain, Section 65.

It is not disputed that restrictions are an encumbrance upon the property, which they affect, but it is claimed they are enforceable only in equity.

In the restrictions in question it was stated that the covenant and agreement should not only bind the grantee, but should run with the land and bind the heirs and assigns of the grantee, and all other persons who might thereafter acquire any interest in the lands from the grantee or his heirs or assigns. The grantor did not bind himself to insert similar restrictions on the sale of their remaining lands, and as there was no proof in the case of a general plan of development, it comes within the case of *Leaver* v. *Gorman,* 73 N. J. Eq., 129, where Vice Chancellor Stevens, on page 131, said:

"The law is this: A court of equity will restrain the violation of a covenant entered into by a grantee, restrictive of the use of lands conveyed, not only against the grantee covenantor, but against all subsequent purchasers having notice of the covenant, whether it run with the land or not. There is, however, this distinction: The original grantor, in imposing the covenant upon the grantee, either may or may not bind himself. If he does not bind himself, then his grantee having no right of action against *him,* cannot pursue any other grantee to whom he may subsequently convey the whole or a part of the remaining lands * * *."

"It appears to be settled law in the state that restrictive covenants, of the character set forth in the bill, will be enforced in equity, not only against the original grantee, but also against all subsequent purchasers with notice of the covenant. DeGray *v.* Monmouth Beach Co., 5 Dick. Ch. Rep. 329; Hayes *v.* Waverly &c. Railroad Co., 6 Dick. Ch. Rep. 345, and cases there cited."

Roberts v. *Scull,* 58 N. J. Eq., page 396, 401 (1899).

"* * A deed given upon condition that no buildings shall be erected upon the land conveyed other than dwelling houses, may be enforced in equity as a restriction. * *"

Jones on Easements, Section 109.

"Any restriction of the use of land, not against public policy, and beneficial to the adjacent land of the grantor, whether in the form of a condition, covenant or agreement, may be enforced in equity against the grantee or his assigns with notice. When adjoining owners of land by grant or mutual covenants impose mutual and corresponding restrictions upon the lands of each, such restrictions are reciprocal easements, the enjoyment of which passes as appurtenant to the land, and the enforcement of which is within the jurisdiction of a court of equity."

Jones on Easements, Section 108, *referring to Wetmore* v. *Bruce, supra.*

In *Washburn's Easements and Servitudes,* 4th Ed., (1885), page 115, appears the following:

"* * * Where two or more parties upon dividing their lands for the purposes of sale agree together that there shall be no

tavern maintained upon any of these lots, it was held to bind all purchasers, in equity, to observe this restriction, who should purchase any of them with notice."

and refers to *Brewer* v. *Marshall,* 19 N. J. Eq., 537, (1868).

Lewis on Eminent Domain, in Section 224, refers to *Evans* v. *Foss,* 194 Mass. 513, which holds on page 515, that the restriction

"gives him a right in the nature of an easement, which will be enforced in equity against the grantee of one of the other lots * * * *."

" * * * * The covenant is an easement for the benefit of the remaining lots, which a court of equity will enforce."

Jones on Easements, Section 116.

"A person owning a body of land and selling a portion thereof, may, for the benefit of his remaining land, impose any restrictions not against public policy, upon the land granted he sees fit, and a court of equity will generally enforce them (Trustees of Columbia College *v.* Lynch, 70 N. Y. 440; Same *v.* Thacher 87 *id.* 311; Hodge *v.* Sloan, 107 *id.* 244)."

Rowland v. *Miller,* 139 N. Y., page 93, 102.

To the same effect:

Jones on Real Property, Vol. 1, *Sec.* 733, and refers to the foregoing and other cases.

Jones on Easements, Section 8, says:

"The owner in fee of land may impose upon it any burden however injurious or destructive, not inconsistent with his general right of ownership, if such burden is not in

violation of public policy, and does not injuriously affect the rights or property of others," and refers to Van Rensselear *v.* Albany & S. R. Co., 1 Hun. 507, 509.

In *Coudert* v. *Sayre*, 46 N. J. Eq., page 386 (1890), Vice Chancellor Van Fleet says, on page 389, quoting from *Whitney* v. *Union Railway Co.*,

"Every owner of real property has a right to so deal with it, as to restrain its use by his grantee, within such limits as to prevent its appropriation to purposes which will impair the value or diminish the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade."

In support of our third reason that the restrictions are not in the nature of an easement that would entitle the owners of land not taken to damages, the following authorities are submitted:

"Whatever interest the plaintiff in error has with regard to the lands taken by the United States does not constitute a true easement as known to the common law * * *."

Wharton v. *United States, supra.*

In *Gale on Easements*, 6th Ed., page 16, the author divides them "into two principal classes, which may be termed affirmative and negative. Those coming under the head of affirmative easements authorize the commission of acts which, in their very inception, are positively injurious to another—as a right of way across a neighbour's land, or a right to discharge water—every exercise

> of which rights may be the subject of an action. Negative easements are injuries consequentially only—restricting the owner of the soil in the exercise of the natural rights of property—as where he is prevented building on his own land to the obstruction of lights. With respect to this latter class, it is evident that no cause of action can arise from their exercise; they can be opposed only by an obstruction to their enjoyment."

The author mentions more than twenty affirmative easements and only two negative easements, neither of which has been disturbed by the Board of Education.

In *Gale on Easements*, 6th Ed. page 552, the text reads as follows:

> "It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement."
>
> "The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved."

Jones on Easements, in Section 111, says:

> "All the easements here referred to arise out of covenants and conditions restrictive of the ordinary rights of ownership, and such covenants are termed negative covenants and the easements created are termed negative easements."

"An easement is called negative when the owner of the servient tenement is restricted in the exercise of his natural rights of property for the use and benefit of the owner of adjacent land, as the dominant tenement."

Jones on Easements, Section 112, referring to *Tinker* v. *Forbes,* 26 N. E. Rep., 503.

"A condition that no building shall ever be erected on the granted land does not create a servitude upon it or easement for the benefit of adjoining land, unless so intended, and the burden is upon the party claiming that the right is annexed as an appurtenance to his land, to show it. An easement or servitude of this description ought not to be imposed for the benefit of an adjacent lot of land, in the absence of any words in the grant itself implying it, unless the circumstances and situation at the time of the grant were such as to make it manifest that the condition or restriction or reservation was intended to be for the benefit of such adjacent lot, and to be annexed to it as an appurtenance.

"In a deed by one having other land and a residence on the same street, a provision that only buildings of a certain class should be built on the granted land, and that they should be set back a certain distance from the street, 'with reversion to the grantor, his heirs and assigns, in case of any breach of such condition,' is to be regarded as a condition or restriction, which creates an incumbrance on the grantee's land for which he would be liable upon a subsequent conveyance with covenants of warranty and against incumbrances in an action for a breach of

the latter covenant. The incumbrance is not in the nature of an easement or servitude in favor of the premises owned and occupied by the original grantor on the same street. The restrictions or conditions inserted in his deed were undoubtedly an advantage to his other land; but for that reason alone these provisions cannot be construed as subjecting the land conveyed to an easement or servitude in favor of such other land. Whether a condition or a restriction, it constitutes an incumbrance."

Jones on Easements, Section 114, referring to *Lowell Inst. for Savings* v. *Lowell,* 153 Mass., 530, 533, and *Locke* v. *Hale,* 165 Mass., 20.

"A restriction which is merely a personal covenant with the grantor can be enforced by him only. In a deed of land bounded on a street there was a restriction that no building should be placed within a certain distance from the street; but there was nothing in the deed to show that the parties intended that the restrictions should create a servitude or easement on the granted land, which should attach to and be an appurtenance to any neighboring land. The Court held that the restriction was merely a personal covenant with the grantor which his heirs could not enforce after his death. * * *

"In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate. For anything that appears,

it may have been intended only for the benefit of the grantor and for his personal convenience."

Jones on Real Property, Vol. 1, Section 796.

Skinner v. *Shepard,* 130 Mass. 180, 181.

Badger v. *Boardman,* 16 Gray, 559.

Jewell v. *Lee,* 14 Allen, 145.

"A negative easement is a right in the owner of the dominant tenement to restrict the owner of the servient tenement in respect of the tenement, in the exercise of general and natural rights of property."

Am. & Eng. Ency. of Law, 2d Ed., Vol. 10, p. 405, referring in notes to

Pitkin v. *Long Island R. Co.,* 2 Barb. Ch. (N. Y.) 221; *Day* v. *New York Cent. R. Co.,* 31 Barb. (N. Y.) 548.

"Easements of this character are rights to light and air, acquired rights to support, and the like."

Note, page 405, *supra.*

" * * * The burdens of covenants do not run at law in England at all, nor in the States of New Jersey and Virginia. * * *"

"The theory applied to restrictive covenants is that the right to compel a man to leave his land open to a line is an easement. And while this may be true in cases where by the covenant the use of the property in the front of each house is given to the city for parking, and the easement is thus in the public; it would seem to be untrue where the purpose of the covenant is to give the adjoining owners a right to restrain each other to a line. Certainly in this case it is not one

of the historical subjects of easement. It is not for passage, occupation, outlook, or air. It is merely for an appearance of symmetry. So, too, it must be enforced in limine, or it is useless; while all other easements are enforced only to a reasonable degree."

Sims on Covenants, page 225.

"For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must 'touch or concern,' or 'extend to the support of the thing' conveyed. 5 Rep. 16 a, 24 c. They must be 'for the benefit of the estate.' Cockson *v.* Cock, *ubi supra.* Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden. Keppel *v.* Bailey, 2 Myl. & K. 517, 535; Ackroyd *v.* Smith, 10 C. B. 164; Hill *v.* Tupper, 2 H. & C. 121."

Norcross v. *James,* 140 Mass., page 188, 192.

Another reason asserted for denying relief at this time to the appellants is that damages are not allowable to owners of restricted property when their land is not taken, either from the owner of the land condemned or from the power exercising the right of eminent domain.

In *Washburn's Easements and Servitudes,* page 115, is found the following reference:

"So where the owner of several lots of land sold them to different persons, and stip-

> ulated in the deeds thereof that no houses built thereon should be set within ——— feet of the line of the street; it was held that, though accepting these deeds did not bind their grantees as covenantors, they being deeds-poll, and that they did not form the basis of actions at law for a breach of the stipulations, they created mutual easements and servitudes in respect to the several lots, which equity will enforce by enjoining the violation of these terms, even between the grantees of the original purchasers."

In *Winfield* v. *Henning*, 21 N. J. Eq., page 188, the complainant and defendant owned adjoining properties that they had purchased from a common grantor who had made a provision in the deeds that the houses should be set back ten feet from the street line. Thereafter the defendant commenced erecting an addition to his house which would occupy the ten feet between it and the street, and the complainant sought an injunction which was granted; but the court took occasion to say (page 190) "An action at law could not be maintained by the complainant against the defendant on such covenant."

The situation in the case cited is not dis-similar to ours. The appellants herein might have been able to secure an injunction restraining a violation of the restrictions. Their present claim to damages is equivalent to bringing a suit at law against the Buchanan estate, the owner of the land, because if damages had been allowed, it would have been paid out of the amount awarded to it, and while the question of distribution is not now before the Court it has been discussed for the purpose of showing that even if the adjoin-

ing owners are "persons interested" they are not entitled to damages.

"In Brewer *v.* Marshall, 18 N. J. Eq. 337, same case, 19 N. J. Eq. 537, and in other cases in New Jersey it is held that even restrictive covenants do not bind in law courts."

Sims on Covenants, page 230.

"It is probably the law in New Jersey that the burden of covenants will not run at law. The question has never been decided precisely in an action at law, but the language in several cases, and the common custom to sue in equity in that State, seems to indicate that there is not much room to doubt the condition of the law. * * *"

Sims on Covenants, page 166.

" * * * * * The defendant's right to the benefit of the complainant's covenant does not at all depend upon the defendant's ability to maintain an action at law against the complainant for its breach." * * * *

"* * * And any grantee of the land to which such right is appurtenant, acquires by his grant, a right to have the servitude or easement, or right of amenity, as it is sometimes called, protected in equity, notwithstanding that his right may not rest on a covenant which, as a matter of law, runs with the title to his land, and notwithstanding that it may also be true that he may not be able to maintain an action at law for the vindication of his right."

Coudert v. *Sayre, supra,* page 395.

If the taking of the land by the State under its superior right of eminent domain results in a breach of the covenant by the owner, is it such a breach for which the covenantee could maintain an action for damages?

It is respectfully urged that the restrictions on the lands sought to be condemned are not in the nature of an easement that would entitle the owners of adjoining property to damages for a breach.

The restrictions are more properly called constructive negative easements.

It will be noticed that running through all the decisions is the statement that such easements are enforceable in equity, but never a reference to a suit at law for damages.

> "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a 'taking,' within the meaning of the constitutional provisions."
>
> "They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. * * *"
>
> *Northern Transportation Co.* v. *Chicago,* 99 U. S. Sup. Court, Rep. page 333.
>
> *Meyer* v. *Richmond,* 172 U. S. S. C. Rep. page 82, (p. 374), (1893).

In *Allen* v. *City of Chicago*, 176 Ill., page 113 (52 N. E. Rep. page 33), two persons were tenants in common in a right of way which was sought to be taken as a street.

The Supreme Court of Illinois said:

> "One holding an easement in a strip of land as a right of way merely sustains no damage in consequence of the taking of the fee for a street. When the fee is taken and maintained as a street by the public authorities, the owner's easement of a way is not impaired, but still exists, as he has all the right of way before enjoyed. No property of his is therefore taken from him, and he is deprived of no interest."

The Constitution of New Jersey provides for compensation to be made when property is "taken" for public use.

In *Beseman* v. *Pennsylvania R. R. Co.,* 21 Vroom, page 235 (1888), Chief Justice Beasley, on page 245, says:

> "When property has been incidentally injured, no matter to what extent, as an unavoidable result of public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use. All the public improvements in the State have been built and are now resting on this foundation."

In *Burt* v. *Merchants Insurance Company,* 115 Mass., page 1 (1874), the Supreme Court, on page 15, held:

> "But no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole. Edmands *v.* Boston, 108 Mass., 535. Penny *v.* Penny, L. R. 5 Eq. 227."

In *Turner* v. *Robbins,* 133 Mass., page 207 (1882), it was held, on page 203:

"It has heretofore been held that owners of land cannot, by their contracts, cut off the right of the public to take the land by eminent domain, or increase the amount of damages which the public can be compelled to pay for such taking. Edmands *v.* Boston, 108 Mass., 535, 544, 549. Burt *v.* Merchants Ins. Co., 115 Mass. 1."

In *Nichols on Eminent Domain,* Section 55, there is found the following:

"* * * It was the common law of England, and consequently of this country, when the constitutions were adopted, that if a private owner suffered necessary damage from a public improvement, but his land was not actually entered on or taken, it was *damnum absque injuria.*"

British Cast Plate Mfrs. v. *Meredith,* 4 *Durnf. & East,* page 794-796.

"Every great public improvement must, almost of necessity, more or less affect individual convenience and property; and where the injury sustained is remote and consequential, it is *damnum absque injuria,* and is to be borne as a part of the price to be paid for the advantages of the social condition. This is founded upon the principle that the general good is to prevail over partial individual convenience."

Lansing v. *Smith,* 8 Cow. 146, 149.

"* * * Unless property is physically affected or the owner is disturbed in the enjoyment of some right which he is entitled to make use of in connection with his prop-

erty, he cannot recover. If the loss or depreciation arises from the mere proximity of the work or improvement, as from its unsightly nature or its incongruity with the uses to which the neighboring property is put, there can be no recovery. There are no decided cases to which we can refer on this point, but we can easily illustrate our meaning. Suppose the public authorities purchase or condemn a lot in a fashionable residence locality and erect and maintain a jail thereon, and suppose the direct effect is to depreciate the surrounding property twenty-five to fifty per cent. Is the property so depreciated, damaged, injured, or injuriously affected within the meaning of the provisions in question? We answer in the negative, because the owners have not been disturbed, either in the enjoyment of their estates, or of any right connected with their estates. Their property and rights remain as before * * *."

"A city, for example, under legislative authority, might condemn land for the purpose of establishing a hospital thereon or a prison, which, if established, would have the consequential effect to injure or depreciate the market or actual value of property in the neighborhood. Such injuries, however, would not, in our judgment, be within the Constitutional Amendment. This amendment must, as it seems to us, be limited to cases where the *corpus* of the owner's property itself, or some appurtenant right or easement connected with it or by the law annexed thereto, is directly (that is, in general, if not always, physically) affected, and is also specially affected (that is, in a manner not common to

the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property."

Dillon on Municipal Corporations, Section 1018, 5th Edition (1911).

Lewis on Eminent Domain, Section 366.

In *Illinois Central R. R.* v. *Trustees of Schools,* 72 N. E. 39 (1904), page 42, the Court held:

"The injury must also be actual, susceptible of proof, and capable of being approximately measured. It must not be merely speculative, remote, prospective or contingent. The special damage must be different in kind from that sustained by the general public, although it does not cease to be special, because a considerable number are affected in the same way. City of Chicago *v.* Union Building Ass'n., 102 Ill. 379."

"Such injury, however, must be 'the natural and direct result of the act itself * * * and not a consequence which results from the fears, prejudices, passions or caprices of the public; for in the former case, the damages may be ascertained by clear and precise evidence, whilst in the latter, there is no rule by which they can be determined."

Bordentown v. *Camden,* 17 N. J. Law, page 320 (1839).

Is it not a fact that the erection of the school on the land taken has tended to perpetuate the purpose of these restrictions rather than to destroy them? Does it not effectually prevent the erection of any building to be used as a tenement house or as a store, saloon or for other business? It is true that the building is used for a purpose

other than a private residence for but one family and that a three-story building has been erected on the lands. It is only in these two items that the restrictions can be said to be violated, and in no event has the light, air or prospect of either of the petitioners been disturbed, as the nearest owner is 125 feet to the south of the southern line of the land, and a lot 75 feet in width adjoining the property taken for the school was sold by the original grantor without any restrictions, and one of the petitioners owns 12½ feet of his land which he purchased without restrictions. In either of the latter cases, if the owners should erect a building thereon that violated the restrictions, the other owners would have no remedy either in law or equity. Why, then, should the owner of the land taken in condemnation be required to pay damages to them; because really that is what is contended for by the petitioners.

In *United States* v. *Certain Lands,* 112 Fed. Rep., page 622, the Court, on page 625, said:

> "Looking at the condition, it may be said, as a matter of common sense, that the appropriation of land to coast defense effectually prevents its use by private persons for noxious, dangerous, or offensive trade or business, * * *; and it is safe to say that applying the land to coast defense neither necessarily nor in any probability, in these respects, destroy or impairs or 'takes' the rights of restriction, or conflicts with their purpose."

It is apparent that the restrictions give the neighboring owners no right in the lands. They cannot go on them or use them. Any damage which may result to them will not result from

the taking by the Board of Education, or from a direct invasion thereof.

> "It is an established rule of law in proceedings for condemnation of land, that the just compensation which the landowner is entitled to receive for his lands and damages thereto must be limited to the tract, a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance."

Currie v. *Waverly, &c. Railroad Co.*, 52 N. J. L., page 391, 392; *Bergen Neck Railroad Co.* v. *Point Breeze Ferry & Improvement Co.*, 57 N. J. L., 163, 191; *In re Lehigh Valley Railroad Co.*, 78 N. J. L., 699; *Herr* v. *Board of Education*, 82 N. J. Law, page 610-613.

In *United States* v. *Certain Lands, supra,* it appeared that no land of the claimants was actually taken by the decree of condemnation and their lands did not adjoin the lands taken for the United States; that the claimants were owners of lots on a large tract known as "Ocean Highlands" from which many lots had been sold, subject to restrictions or conditions designed for the benefit of every portion of the plot. Certain lots subject to these restrictions, and belonging to other persons, were condemned by the United States for military uses. The claimants asserted that the taking of these lands destroyed the rights to restrict their use, and that these rights of restriction were appurtenant to the claimants' estates as "negative easements." They contended that the destruction of these "negative easements" was a taking of their property, and that they were entitled to compensation. The

United States contended that the rights were not taken, and that the claimants were not entitled to compensation. The Court, on page 625, said:

> "The proper inquiry is whether the necessary effect of the condemnation of other lands for the purpose specified was to take and destroy the restrictive rights and 'negative easements' of the claimants, and whether this is a taking for which compensation must be made."

On page 626, the Court further said:

> " * * * I think this case might well be put upon the ground that the right acquired by the government does not appear to be in any substantial particular inconsistent with the provisions of this condition, or destructive thereof, and that for this reason there is no taking of the claimants' property in this particular. But if we go further, and taking a more literal view, say that the condition does provide against exactly what the United States has now acquired the right to do, the case of the claimants is not yet clear."

The Court then gave its reasons for its decision, which have already been quoted, and, on page 629, gave an illustration that is exactly in point with the situation in our case:

> "Let us suppose that real estate owners in a seaside town, resorted to by summer residents, should mutually covenant that no school house should be erected upon their lands, and that such provisions should in fact enhance the value of their estates; must the town, in order to procure a suitable school site, pay for the depreciation due to a necessary public use? It would seem en-

> tirely immaterial whether private persons had contracted with reference to this subject or not."

As to the proposition that a restrictive covenant is not a property right, the burden is upon the appellants to satisfy this Court that they have been interfered with in the enjoyment of any of their so-called property rights.

The only element of damages that the appellants can claim is that they have been deprived of the right and privilege, as an appurtenant to their several properties, of enforcing restrictive covenants or negative easements, in favor of their several properties as against the land taken.

In *United States* v. *Certain Lands, supra,* the Court said, on page 626:

> "Have these claimants any property rights, under these deeds, to prevent such a use? Upon a fair construction of the condition in question, must we not regard it as having reference merely to the prohibition of such structures and such uses as might be made by private individuals in private business, and as having no reference whatever to such uses or structures as might be required for national defense?"

If the restrictions could be construed as creating equitable easements they do not create any such property right as to entitle the appellants to damages, and if they are not entitled to damages they should not be permitted to have any sum of money paid into Court.

In order to show that they are entitled to damages they must prove that something of value belonging to them has been taken.

The mere ownership of restricted land in the neighborhood is not sufficient to satisfy a court

that they have lost anything which entitles them to damages.

Why should they compel the owner of the lands taken, who was not the person who made the restrictions, but who bought, as they did, from the original grantor, suffer a loss, for their benefit, when other owners in the same tract whose property was sold without restrictions, could not, under any conditions, receive payment from any one if the restrictions on the tract taken are violated?

There is no rule of law which permits compensation where the claim is based upon the taking of property for public purposes, in which property the person seeking compensation has no interest other than to prevent the doing of some act prohibited by deed or contract.

It is claimed, and I believe proved by the decisions herein set forth, that the appellants are not entitled to damages from the Buchanan estate, or from the Board of Education because the State has exercised its right of eminent domain and by the erection of a school building has technically violated restrictions imposed on the property by the original grantor.

Respectfully submitted,

CHARLES M. MYERS,
Solicitor for and of Counsel with Defendant-Appellee.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, deceased,

Between

CHARLES F. HERR,
Petitioner-Appellant,

and

BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX, ET AL.
Defendants-Appellees.

Replying Brief of Petitioner-Appellant to Brief of Defendant-Appellee, Board of Education of Newark, in the County of Essex.

As counsel for the Board of Education has undertaken in his answering brief to cover questions which we consider entirely without the issues in the present proceeding, we are filing this brief in reply thereto.

In the first place as we have stated in our original brief, we do not think that there can be any doubt but what the only matter to be decided in the present proceeding is merely the question whether this petitioner and certain other property owners are entitled to have the money in question

paid into the Court of Chancery, to be there distributed. It is impossible under the issues raised before this Court at the present time to decide the right, if any, of this petitioner and the other property owners, to damages. If this Court could do so, the payment of the money into the Court of Chancery under section 8 of the Eminent Domain Act, would be a proceeding entirely useless, as if this Court decided the question of damages the matter would be settled and there would be absolutely nothing to be done by the Court of Chancery. As this is merely an appeal from the order denying the prayer of the petitioner to have the money paid into the Court of Chancery, that is the only question which can be decided in the present proceeding.

The statement of respondent (on page 2 of its brief) that there is no award to be paid into the Court of Chancery seems in view of the facts to verge on the ridiculous. The report of the commissioners making the award is on file with the Supreme Court and the stipulation signed by both counsel of the parties to this proceeding specifically admits the award.

The respondent contends that the petitioner should have prayed for the payment of the full amount of the award into the Court of Chancery. We would respectfully urge that the petitioner's action in praying for the payment of only the undisposed of balance of the award is strictly according to the broad general principles of equity. The payment into Chancery of the total amount of the award—$22,000—of which amount has already been paid by the respondent, would serve no useful purpose and would be merely a hardship on the Board of Education. We think it is fundamental that a court of equity will not decree relief which is unnecessarily harsh. We also believe that

this petitioner is bound as is every litigant in a court of equity by the equitable maxim "He who seeks equity must do equity" and that a requirement that the full amount of the award be paid into Chancery would under the particular circumstances of the present case be unjust and inequitable. However, of course, there could be no possible objection on the part of the petitioner to the Board of Education paying the full amount of the award into the Court of Chancery if it saw fit to do so.

The respondent states in substance that by reason of the fact that the petitioner and the other property owners did not seek an injunction to restrain the building of the school on the premises in question, they have in some way waived or abrogated the right given by the Eminent Domain Act to have the money paid into Chancery. We must confess that we can see no reason whatever in this contention, as surely the petitioner was not bound to invoke the remedy by injunction—the strong arm of equity—when he could be compensated by an award of damages for any injury which he might suffer.

That the remedy by appeal and by payment into the Court of Chancery are concurrent remedies is evidently the opinion of Judge Swayze as will be seen by referring to his opinion in the Herr case (82 N. J. L. 610). That the remedy by payment into the Court of Chancery is available we would quote the following from Judge Swayze's opinion at page 612, where he quotes the following from the opinion of the Court of Errors and Appeals in *Crane* vs. *Elizabeth,* 9 Stew. Eq., 339:

> "When, by the appraisement of the commissioners, the price of the thing is fixed, that price stands instead of the thing appropriated, and represents all interests acquired. The

> legislature has not imposed upon the city officials the duty of searching out all these interests and assigning to each its just equivalent. It has contented itself with the simple direction that the fund shall be paid to him who is presumably entitled to it, the general owner of the land. Where no other claimant intervenes, that course will usually meet the ends of justice. But if, in any special case, this owner ought not, in equity, to receive the fund, the Court of Chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute has left without express protection."

Judge Swayze's opinion is supported by many other cases which are collected and quoted from in our original brief in the present appeal. Speaking of the remedy by appeal Judge Swayze says, on page 614, of the above case:

> "Section 9 of the (Eminent Domain) act permits an appeal by the petitioner, or owner of any of the land or other property. We think the language is broad enough to warrant an appeal by anyone who has been made a party as an owner of a property right in the land."

However, as the appeals have been dismissed, it would seem that they could not in anyway effect the right to the remedy in the Court of Chancery. The statement of respondent (on page 4 of his brief) that the restrictions on the petitioner's property are not a lien on the property taken, seems to be immaterial as we are contending that the restrictions on the property taken are a lien on that property and that they are therefore sufficient to bring the present case within that portion of section 8 of the Eminent Domain

Act, requiring the award to be paid into the Court of Chancery, reading: "In case the lands or other property taken are incumbered by any mortgage, judgment or other lien, etc."

On pages 5 and 6 of the respondent's brief, it suggests that if the appeal had been prosecuted, the jury might have awarded a greater or less sum to the owners of the fee and it might have taken into consideration any special interest that the owners of these nearby restricted properties might have in the land taken. It certainly cannot be contended that the petitioner or any of the other persons entitled to appeal were obliged to prosecute the same, which view was upheld by the Circuit Court judge when he dismissed the appeals on the motion of this petitioner and the said other persons. Certainly the petitioner and the other parties had an undoubted right to dismiss their appeals and it is difficult to see after these appeals had been dismissed, how the bringing of the same in the first place could affect the right of this petitioner and the other property owners to the remedy in Chancery provided by section 8.

We wish at this point to admit that counsel for the respondent is correct in his statement on page 6 of his brief, that the property taken was not incumbered by any mortgage. We find that we were in error in making this statement in our original brief. However, even though there are no mortgages on the property taken; there are restrictions on that property which as we have shown in our original brief, constitutes a lien and incumbrance on the property taken, a number of such cases holding that building restrictions in grants of real estate are incumbrances on the title (see page 14 of our original brief). On page 6 of its brief, the respondent asks, "Are owners of restricted property in the neighborhood

of the property taken, both being purchased from common grantors, 'persons interested,' who may make application for distribution through the Court of Chancery of the sum awarded by commissioners for the taking of the land?'' It then states that the question has been answered in the negative by the cases which it cites. In its question the word ''owners'' refers to the owners of the neighboring restricted property. The cases which it quotes have relation to who is an owner of the property taken, and therefore have no possible application on this point. However, the case of *National Railway Company* vs. *Easton and Amboy R. R. Co.*, 36 N. J. L., 181, at page 184, states in effect that the object attained in making persons having easements or incumbrances parties, is that their interests may be extinguished by payment out of the money awarded or compensated for under the provisions of the General Statute, which authorizes the Court into which the money may be paid to make allowance out of the fund in satisfaction of such interest. We would point out that this was the very object of the Board of Education in making this petitioner and the other property owners parties to the condemnation petition, as indeed they could have had no other object in making them parties. This being so, it would certainly seem impossible to hold that these parties have not at least the *prima facie* interest necessary to entitle them to have the money paid into the Court of Chancery, under section 8, so that their interests, if any, may be there determined and the amount distributed according to law.

Respondent, on page 9 of its brief, admits that the petitioner and others made parties, have a right to establish their interest by means of an appeal. We urge that if there is sufficient interest

to entitle the parties to employ the proceedings by appeal to establish their interest, that there is sufficient interest to allow them to establish any rights which they may have by means of the Chancery proceeding under section 8.

Respondent states that petitioner and the other property owners should have proven their interest in the Circuit Court (presumably on appeal) and that then they might have their remedy in Chancery. It would seem preposterous to suppose that the legislature would compel persons in such cases to take two proceedings to have their interests determined. This would be in effect the situation if this petitioner and the others were obliged to determine their interests by an appeal to the Circuit Court, and after they were determined in that Court to go into Chancery and take the proceedings all over again.

Respondent states on page 10 of its brief: "While it is true that restrictions are incumbrances on land, they are not incumbrances or liens held by the adjoining property owners." As it is here admitted by the respondent that restrictions are incumbrances on the land, this fact alone would give the petitioner a right to have the money paid into the Court of Chancery. Those portions of section 8 dealing with incumbrances merely provide that if the lands are incumbered by any mortgage, judgment or other lien &c., the money may be paid into Court. On page 13 of its brief, respondent says: "It is not disputed that restrictions are an incumbrance upon the property which they affect, but it is claimed they are enforceable only in equity." We are at a loss to understand the meaning of this statement as we cannot see how it can be possibly held that the present proceeding is anything but an equitable one. It should also be borne in mind, as we have pointed out before, that the *present* proceeding is not one to en-

force these restrictions. We would also call attention to the fact that this is another admission by the respondent that the restrictions are an incumbrance upon the property which they affect. The case cited on page 16 of the respondent's brief, which it seems to consider authority for the proposition that the restrictions are not easements would seem to have no bearing upon the matter now before the Court. These restrictions being liens and incumbrances on the property, it is entirely immaterial to the present proceedings whether they are technical easements.

On pages 22 and 23 of its brief, respondent makes a statement which is entirely in error, the substance of the statement being that the present claim of the petitioner is for damages. This is not so. As we have stated above, the present proceeding is merely for the payment of the money into the Court of Chancery where the right to damages, if any, of the petitioner and the other persons interested, will be determined.

Conclusion.

We respectfully urge that this petitioner has shown his right and the right of the other property owners made parties to the condemnation petition, to have the money above specified paid into the Court of Chancery by virtue of the provisions of section 8 of the Eminent Domain Act for the purpose of having the rights, if any, to damages of the said petitioner and said other parties, determined by the Court of Chancery and the amount found due distributed by ~~the Court of Chancery~~ it.

Respectfully submitted,

RIKER & RIKER,
Attorney of Petitioner-Appellant.

EDGAR H. PINNEO,
Of Counsel with Petitioner-Appellant.

INDEX.

Stipulation.

Filed February 11, 1916.

New Jersey Court of Errors and Appeals

10

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, Deceased.

Between

CHARLES F. HERR,
Petitioner-Appellant,

and

BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX, *et al.*,
Defendants-Appellees.

On Petition, &c.

On Appeal, &c.

20

Stipulation.

The following causes were by stipulation of the counsel tried together in the Essex County Circuit Court:

30

Charles F. Herr,
Plaintiff,

vs.

The Board of Education of Newark in the County of Essex
Defendant.

On Appeal from Award of Commissioners.

40

Albert Wickman and Elsie Wickman,
Plaintiffs,
vs.
The Board of Education of Newark in the County of Essex
Defendant.

Charles H. Agne and Augusta B. Agne,
Plaintiffs,
vs.
The Board of Education of Newark in the County of Essex
Defendant.

Joseph Harter and Bernhardina Harter,
Plaintiffs,
vs.
The Board of Education of Newark in the County of Essex
Defendant.

On Appeal from Award of Commissioners.

It is stipulated and agreed between the respective counsel hereto that the following be used for the purposes of this appeal as the record below:

That on the twenty-sixth day of November, nineteen hundred and nine, there was filed in the Supreme Court the petition of the Board of Education of Newark in the County of Essex, for the appointment of commissioners to condemn certain property in the City of Newark, described in the petition of appeal filed in this court.

That said petition recited that the said Board of Education had control of the public schools of

Stipulation.

the City of Newark and had the power to take land for the use of public schools therein; that it had determined to acquire the said lands for the purposes of a school building; that it is clothed with the right of eminent domain for such purposes; that by resolution attached thereto it was determined that it was necessary to purchase such lands for such purpose, that the estimated cost of the purchase of said lands was thirty-one thousand five hundred dollars, that the total amount necessary for said purchase and for the purchase of other lands, and for the erection and equipment of school buildings thereon, was two hundred and sixty-seven thousand dollars, and that the Common Council be requested to appropriate the sum of two hundred and sixty-seven thousand dollars for such purpose; that the Common Council authorized the sale of Newark City bonds in the sum of two hundred and sixty-seven thousand dollars for the purposes mentioned in said resolution; that the comptroller of the City of Newark sold bonds to the extent of two hundred and sixty-seven thousand dollars; that the auditor of the City of Newark reported to said Board that there had been placed to its credit the sum of two hundred and sixty-seven thousand dollars, the proceeds of the sale of such bonds; that the said Board of Education thereafter, on the twenty-eighth day of January, nineteen hundred and nine, adopted a resolution apportioning the sum of thirty-one thousand five hundred dollars out of said sum of two hundred and sixty-seven thousand dollars for the above described premises; that on the said twenty-eighth day of January, nineteen hundred and nine, the said Board of Education passed a resolution authorizing the condemnation.

Stipulation.

The said petition after the foregoing recitals described the premises in full and stated that they were encumbered by the following restrictions:

"This conveyance is, however, made and received by the parties hereto upon the express understanding, covenant and agreement that no house or other structure shall be erected or placed upon the lands hereby conveyed within forty feet of the easterly line of Bergen street, nor shall any such house, structure or other building be used as and for a tenement house nor shall there be kept or maintained or carried on therein any store, saloon or other business, nor shall such building be used for any purpose than as a private residence for but one family, and that no three-story house shall be erected on said lands, and that there shall not be erected more than one house on every fifty feet fronting on Bergen street, and that this covenant and agreement shall not only bind the heirs and assigns of the party of the second part, but shall run with the land and bind the heirs and assigns of the party of the second part, and all other persons who may hereafter acquire any interest in the said lands by, through or from the said party of the second part, or any of his heirs and assigns."

It then recited that the premises were devised by Paul Buchanan, the former owner thereof, to his wife, Jessie Buchanan, for life, with remainder to his daughter, Jessie Pauline Buchanan, with power of sale to his executors, Jessie Buchanan, Austin H. McGregor and George W. Breinigan.

The petition then recited that said above described lands are a portion of a tract sold in building lots by William Hill, subject to various restrictive covenants, which affect all of the lots of the plaintiffs above named; that the said Board of Education could not acquire by agreement or purchase from

the executors of said Paul Buchanan a valid title to the above described premises because of the restrictions therein contained.

The petition thereupon recited the names of a large number of persons who the Board of Education alleges may have a claim against said property sought to be acquired by reason of being owners of nearby restricted properties, or by reason of holding mortgages upon said properties, and among said names are included the names of the plaintiffs in the above cases, who are all owners of property upon Bergen street in said petition specifically described.

And further recited that the said Charles F. Herr is the owner of a lot of land on the easterly side of Bergen street one hundred and fifty feet northerly from the corner of Bergen street and Eighteenth avenue, sixty-two and one-half feet in width and two hundred feet in depth, and subject to practically the same restrictions as hereinabove set forth, as to fifty feet thereof.

And further recited that the said Albert Wickman and Elsie Wickman are the owners of premises on the easterly side of Bergen street, eighty-seven and one-half feet northerly from the northerly corner of Eighteenth avenue and Bergen street, fifty feet in width and two hundred feet in depth, and subject to practically the same restrictions as aforesaid.

And further recited that the said Charles H. Agne and Augusta B. Agne, are the owners of premises on the northeasterly corner of Eighteenth Avenue and Bergen street, thirty-seven and one-half feet in width on Bergen street and two hundred feet in depth, and subject to practically the same restrictions as aforesaid.

Stipulation.

And further recited, that the said Joseph Harter and Bernhardina Harter, are the owners of a lot on the easterly side of Bergen street, beginning thirty-eight and one-half feet from the corner of Bergen street and Eighteenth avenue, being forty-nine feet in width and two hundred feet in depth, and subject to practically the same restrictions as aforesaid.

The petition thereupon prays that commissioners be appointed to fix the compensation to be paid for the premises.

That thereafter Richard C. Jenkinson, Edgar E. Bond and Herman B. Lehlbach were upon notice under order of William S. Gummere, Chief Justice, on the fourteenth day of December, nineteen hundred and nine, appointed commissioners; that thereafter on the thirtieth day of March, nineteen hundred and ten, the report of the commissioners was filed, allowing the sum of $27,000 to the executors of Paul Buchanan, deceased; the sum of $1,905 to seven owners of property (not plaintiffs above named) for the value of their rights in the land, and to the plaintiffs above named allowing nothing.

That on the eleventh day of April, nineteen hundred and ten, a petition of appeal was filed by each of the above mentioned plaintiffs from the report of the commissioners, and praying for the framing of issues by the Essex County Circuit Court; that thereafter an order framing issues was entered in the Charles F. Herr case, and one in similar form in the other cases herein directing that the jury assess the value, if any, of the rights in the land therein above described claimed by Charles F. Herr, taken and appropriated by the Board of Education for a site for a public school, and the damages, if any, sustained by said Charles F. Herr by reason of such taking.

Stipulation.

After the trial and argument of the above mentioned cases verdicts were rendered for the respective plaintiffs therein, and judgments entered in the respective cases on June 16th, 1910. In the first of the above mentioned cases the judgment for damages and costs amounted to $2,276.84; in the second of the above mentioned cases the judgment for damages and costs amounted to $1,061.45; in the third of the above mentioned cases the judgment for damages and costs amounted to $1,061.45; and in the fourth and last of the above mentioned cases the judgment for damages and costs amounted to $1,061.45.

That subsequently the said matter was removed to the Court of Errors and Appeals of New Jersey upon writ of error, and after argument the Court reversed the judgment and remitted the record for further proceedings in accordance with the views expressed in the Court's opinion rendered on April 26th, 1912.

That subsequently on July 6th, 1915, upon motion of Riker & Riker, attorneys for the respective plaintiffs in the above mentioned actions, an order was made by the Honorable Frederic Adams, Judge of the Essex County Circuit Court, dismissing the appeals of the said plaintiffs, without prejudice to the rights of said persons to institute any other proceedings.

That subsequently in the month of September, 1915, a petition was filed in the Court of Chancery of New Jersey, which petition alleged, among other things, that there remained in the possession of the Board of Education of Newark in the County of Essex the sum of $8,905, alleging said sum to be the undisposed of balance remaining in the possession of the said Board of Education of Newark in the County of Essex of the above mentioned award of commissioners, which award amounted to $28,-

Stipulation.

905. Said petition prayed that the said Court of Chancery direct the said Board of Education of Newark in the County of Essex to pay into the said ~~of~~ Court of Chancery the said sum of $8,905, to be apportioned among the persons entitled thereto according to law. That on the 21st day of September, 1915, an order was made by the Court of Chancery of New Jersey directing the Board of Education of Newark in the County of Essex, and the other persons therein named, to show cause why the prayer of the above mentioned petition should not be granted. That upon the argument of said order to show cause, and after service upon the other defendants of said petition and order to show cause, in accordance with the provisions of said order to show cause, the only one of the defendants appearing was the said Board of Education of Newark in the County of Essex. It was admitted in open court that the executors of Paul Buchanan, deceased, had conveyed the premises to the Board of Education of Newark in consideration of the payment of $22,000 to them, which was accepted as full consideration for the taking of the premises, and that no other money was paid by said Board of Education to any other of the parties to said condemnation petition. That after hearing the argument upon said order to show cause an order was made by said Court of Chancery on the 19th day of October, 1915, denying the prayer of said petition.

Dated February 10, 1916.

RIKER & RIKER,
Solicitors for Petitioner-Appellant.

CHARLES M. MYERS,
Solicitor for Defendant-Appellee,
Board of Education of Newark, in the County of Essex.

Order.

Filed Oct. 23, 1915.

In Chancery of New Jersey.

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, Deceased. } *Order.*

This matter coming on to be heard in the presence of Riker & Riker, attorneys for the petitioner, and in the presence of Charles M. Myers, attorney for the Board of Education of Newark, and argument of counsel having been heard, it is thereupon on this nineteenth day of October, 1915, ordered that the prayer of the petition filed in the above entitled cause in this court on or about the 21st day of September, 1915, be and the same is hereby denied.

Respectfully advised,

FREDERIC W. STEVENS,
V. C.

Notice of Appeal.

Filed Oct. 25, 1915.

In Chancery of New Jersey.

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, Deceased.	*Notice of Appeal.*

The petitioner, Charles F. Herr, hereby appeals from an order made on the 19th day of October, 1915, and from the whole and every part thereof, made in this court in the above stated cause to the Court of Errors and Appeals, in the last resort in all causes.

RIKER & RIKER,
Solicitors of Complainant.

EDGAR H. PINNEO,
Of Counsel.

Dated October 23, 1915.

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

EDGAR H. PINNEO,
Of Counsel with Complainant.

Petition of Appeal.

Filed November 10, 1915.

New Jersey Court of Errors and Appeals

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, Deceased.

Between

CHARLES F. HERR,
Petitioner-Appellant,

and

BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX, *et al.*,
Defendants-Appellees.

On Petition, &c.

On Appeal, &c.

Petition of Appeal.

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

The petition of Charles F. Herr, the appellant in in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final order made in the Court of Chancery, by his Honor, Edwin R. Walker, Chancellor of the State of New Jersey, bearing date the 19th day of October, in the year 1915, in a cause wherein the said Charles F. Herr was petitioner and the said Board of Education of Newark, in the County of Essex, Jessie Pauline Buchanan and Jessie Buchanan, Austen

H. McGregor and George W. Breingan, executors; William Hill, Barbara Hill, his wife; Caroline Schaller, Charles F. Herr, Anna L. Herr, his wife; Albert Wickman, Elise Wickman, his wife; Charles H. Agne, Augusta B. Agne, his wife; Joseph Harter, Bernhardina Harter, his wife; Louis Schlesinger, Sophie Schlesinger, his wife; Adam Freund, Mrs. Adam Freund, his wife; Frank Neher, Mrs. Frank Neher, his wife; Elizabeth Schaible, Rosalie Kormann, William Fischer, Christina Fischer, his wife; Anna Lowentraut, Peter Lowentraut, her husband; Jacobina Stuetz, Charles J. Stuetz, her husband; Israel Eisenstein, Esther Eisenstein, his wife; Mary Mintz, Oscar Mintz, her husband; Edward M. Sterling, Anna M. Sterling, his wife; Joseph Strauss, Mrs. Joseph Strauss, his wife; Henry J. Betz, Emma Betz, his wife; Harry Tapper, Katie Tapper, his wife; Rudolph Isenmann, Rosina Isenmann, his wife; James S. Smith, Emelia Smith, his wife; William Herda, Mrs. William Herda, his wife; Albert L. Hirth, Lena Hirth, his wife; Bertha M. C. Schmauder, George J. Schmauder, her husband; Emma Brittle, William Brittle, her husband; Minnie Rubsam, Kate A. Mentz, J. Henry Mersfelder, Louis Mersfelder, Adolph Mersfelder and Albert Mersfelder, executors and trustees; Cornelia L. Campbell, Mary E. Higgins, Theodore A. Kastner, Rosalie Desch, Joseph Reinert, Mary Reinert, his wife; Hattie M. Ward, Anna Voget, Augusta N. Groel, Philip Miller, Frederick W. Gnichtel, Wells P. Eagleton, The Trustees of Rutgers College in New Jersey, Joseph Betz, Firemen's Insurance Company of Newark, Franklin Savings Institution, Thomas E. Sisserson, West End Building and Loan Association, Laura E. T. Dodge, and Florence P. Trippe were defendants in this respect, to wit:

That the said order denies the prayer of the petition filed in the Court of Chancery of New Jersey, in the above entitled cause. And your petitioner humbly appeals from said order of the Chancellor and from every part thereof upon the ground that the same is erroneous, for that whereas the petition of Charles F. Herr, filed in the Court of Chancery of New Jersey on or about the 13th day of October, 1915, shows that Richard C. Jenkinson, Edgar E. Bond and Herman B. Lehlbach were appointed by the Honorable William S. Gummere, Chief Justice of the Supreme Court of the State of New Jersey, commissioners under the provisions of an Act entitled "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use," (Revision of 1900, approved March 20, 1900), to examine and appraise the lands hereinafter described and rights therein belonging to Jessie Buchanan, Austen H. McGregor and George W. Breingan, executors of Paul Buchanan, deceased, Jessie Pauline Buchanan and others, including the compensation to be paid to your petitioner and others having rights in said lands or easements therein appurtenant to other lands owned by your petitioner and others, and to assess the damages to be paid to the said Jessie Buchanan, Austen H. McGregor and George W. Breingan, executors of Paul Buchanan, deceased, Jessie Pauline Buchanan and others by the Board of Education of the City of Newark for the taking of the same for school purposes.

And whereas said petition further shows that the said premises are described as follows: The lands situated on the easterly side of Bergen street in the City of Newark, Essex County, New Jersey, beginning at the corner formed by the intersection

of the easterly line of Bergen street, with the southerly line of Seventeenth avenue; thence running southerly along the easterly line of Bergen street two hundred and ten feet and forty-four hundredths of a foot; thence south sixty-four degrees forty-five minutes east two hundred feet to the westerly line of Hunterdon street; thence northerly along the westerly line of Hunterdon street two hundred and six feet and fifteen hundredths of a foot to the southerly line of Seventeenth avenue; thence westerly along the southerly line of Seventeenth avenue two hundred feet and four hundredths of a foot to the easterly line of Bergen street and place of beginning.

And whereas said petition further shows that said land and premises have under and by virtue of said act been declared taken and condemned by the Board of Education of Newark, in the County of Essex, for school purposes.

And whereas said petition further shows that by report, dated the 24th day of January, 1910, and filed the 30th day of March, 1910, the said Richard C. Jenkinson, Edgar E. Bond and Herman B. Lehlbach, commissioners appointed as aforesaid, made an award of $28,905 and sought to apportion said amount among the persons whom they considered were entitled thereto; that said commissioners erred in seeking to apportion said amount, for the reason that said commissioners had no legal right, power or authority to apportion said amount, but should have made their award in a lump sum.

And whereas your petitioner further shows that there remains in the possession of the Board of Education of Newark, in the County of Essex, a balance of said award undisposed of, of $8,905.

And whereas said petition prays that the Honorable Court of Chancery direct the said Board of

Education of Newark, in the County of Essex, to pay into the said Court of Chancery, said sum of $8,905, to be apportioned among the persons entitled thereto according to law.

Your petitioner is entitled under and by virtue of the provisions of an act entitled "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900, approved March 20, 1900), to have said sum of $8,905 paid by the said Board of Education of Newark, in the County of Essex, into the Court of Chancery of New Jersey, to be apportioned among the persons entitled thereto according to law.

And for that the said Chancellor under and by virtue of the provisions of said act entitled "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900, approved March 20, 1900), should have made an order directing the said Board of Education of Newark, in the County of Essex, to pay into said Court of Chancery of New Jersey, the said sum of $8,905, to be apportioned among the persons entitled thereto according to law.

RIKER & RIKER,
Solicitors of Appellant.

EDGAR H. PINNEO,
Of Counsel with Appellant.

Dated November 8, 1915.

Answer to Petition of Appeal.

Filed December 8, 1915.

New Jersey Court of Errors and Appeals

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, Deceased.

Between

CHARLES F. HERR,
Petitioner-Appellant,

and

BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX, *et al.*,
Defendants-Appellees.

On Appeal from Court of Chancery.

Answer to Petition of Appeal.

The answer of the above named Board of Education of Newark, in the County of Essex, respondent, to the petition of appeal of the above named Charles F. Herr, Appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that an order was, on the 19th day of October, 1915, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto

when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be ~~adjusted~~ adjudged to this respondent.

CHARLES M. MYERS,
Solicitor for and of Counsel with Respondent.

Amendment to Petition of Appeal.

Filed February 9, 1916.

New Jersey Court of Errors and Appeals

In the matter of the application of the Board of Education of Newark, in the County of Essex, for the appointment of commissioners to condemn property belonging to the Estate of Paul Buchanan, deceased.

Between

CHARLES F. HERR,
Petitioner-Appellant,

and

BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX, *et al.*,
Defendants-Appellees.

Amendment to Petition of Appeal.

The petitioner-appellant hereby amends his petition of appeal by inserting the words "in the month of September, 1915," in the place and stead of the words "on or about the 13th day of October, 1915," on lines 21 and 22 of page 2 of said petition.

RIKER & RIKER,
Solicitors of Appellant.

EDGAR H. PINNEO,
Of Counsel with Appellant.

Dated Feb. 7, 1916.

I hereby consent to the within amendment.

CHARLES M. MYERS,
Solicitor of the Board of Education of Newark, in the County of Essex.