INDEX

PAGE

TESTIMONY

BILL OF COMPLAINT

IN CHANCERY OF NEW JERSEY

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

The complainant, Catherine E. Lister, of the City of Asbury Park, in the County of Monmouth and State of New Jersey, respectfully shows unto your Honor:

1. That she is the owner in fee simple of a property known as No. 706 Third Avenue, in the City of Asbury Park, Monmouth County, New Jersey, which said property is described as follows:

> All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Asbury Park, in the County of Monmouth and State of New Jersey, comprising parts of lots Nos. 890, 891, 892 on map of Asbury Park, made by F. H. Kennedy A. D. 1874, bounded and described as follows:
>
> BEGINNING at a point in the southerly line of Third Avenue, distant one hundred and fifty feet westerly from the southwesterly corner of Third Avenue and Bond Street; thence (1) westerly along the southerly line of Third Avenue, fifty feet; thence (2) southerly, at right angles with Third Avenue, one hundred and fifty feet; thence (3) easterly, parallel with Third Avenue, fifty feet; thence (4) northerly, again at right angles to Third Avenue, one hundred and fifty feet to place of beginning.

2. That Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, are the owners in fee simple of a property on the southeast corner of Main Street and Third Avenue, in the said City of Asbury Park, which said property is described as follows:

All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Asbury Park, in the County of Monmouth and State of New Jersey, comprising part of lots designated as numbers 890, 891 and 892 on a map of Asbury Park, made by F. H. Kennedy & Sons, A. D. 1874.

BEGINNING at the southeast corner of Third Avenue and Main Street, thence (1) southerly along the easterly line of Main Street, on hundred and fifty feet; thence (2) esaterly parallel with Third Avenue ninety feet; thence (3) northerly at right angles with Third Avenue, one hundred fifty feet to the southerly line of Third Avenue; then (4) westerly, along the southerly line of Third Avenue, ninety feet to the place of beginning.

3. That both your complainant and the said defendant derive title through a common grantor, namely, James A. Bradley.

3A. The said James A. Bradley had obtained title to the premises now owned by your complainant and by the defendants, as part of a large tract of land conveyed to the said James A. Bradley; that the said James A. Bradley thereafter laid said tract out into streets; that he prepared and filed in the office of the Clerk of the County

of Monmouth, a map showing such streets; that said streets were laid out and said tract subdivided into lots in a manner which was intended to secure to all of the owners of such lots an unobstructed view of the street, fire protection, circulation of air, and ample light; that these were to be secured to such owners by the maintenance of a building line.

3B. Covenants similar to the covenants hereinafter recited were inserted in all deeds from said James A. Bradley as part of the said scheme and as an exaction from all purchasers for the benefit of each.

3c. That a large portion of the area now covered by the City of Asbury Park was conveyed to various grantees by the said James A. Bradley by deeds containing restrictions similar to those hereinafter recited, and having the purposes aforementioned.

4. That the said James A. Bradley originally conveyed the premsies of which complainant is now the owner, to Hubbard Hurley on October 16,1882, and through various mesne conveyances, complainant acquired title to said property on April 18, 1925.

5. That the said James A. Bradley originally conveyed the premises of which the defendants are now the owners, to Sarah Jane Hurley by deed dated March 17, 1882, said deed containing the following covenants, conditions and restrictions:

> The said premises are hereby conveyed upon the following conditions, to wit: That no house, cottage or other building shall ever be erected thereon nearer to

the line of the said Third Avenue than twenty five (25) feet therefrom, nor nearer to the line of said Main Street than ten (10) feet therefrom. And also upon conditions that the said premises shall never be used for the sale of intoxicating liquors, or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, butcher shops, barber shops, fish markets or public gas works shall ever be erected thereon, and that no fence which shall exceed four (4) feet in height shall ever be erected thereon within twenty-five (25) feet of said Third Avenue; and also that no fence which shall exceed four (4) feet in height shall ever be erected thereon within ten (10) feet of said Main Street. And that in case the said party party of the secdnd part, or her heirs, executors, administrators or assigns, or any of them, shall violate any or all of the conditions herein contained, then this deed shall be null and void, and thereupon the fee of the said land shall revert to the said party of the first part.

5A. The covenants, conditions and restrictions contained in said deed were for the benefit of lands retained by the said James A. Bradley, of which the lands now owned by complainant are a part.

5B. That by deed dated June 13, 1884, James A. Bradley re-acquired title to the premsies now owned by defendants, and on the same day title thereto was conveyed to Nelson E. Buchanon, Garret S. Smock and George A. Smock.

6. That in the original deeds from the said James A. Bradley to all the properties fronting on Third Avenue,

in the City of Asbury Park, and in particular to the property of the complainant, which adjoins on the east the property of the defendants, the following covenants, condition and restrictions, running with the land, were inserted:

That no house, cottage or other building shall ever be erected thereon nearer to the line of said Third Avenue than twenty-five feet therefrom. And also that not more than one house or cottage shall be built upon the said lot of land within the period of five years next after the date hereof. And also upon condition that the said premises shall never be used for the sale of intoxicating liquors or for any manufacturing purposes whatever, and that no hog pens, public laundries, livery stables, meat or fish markets or public gas works, shall ever be erected thereon. And that no fence which shall exceed four feet in height shall ever be erected upon the said lot of land within the distance of twenty-five feet from the line of said Third Avenue. And that in case the said party of the second part or his heirs, executors, administrators or assigns, or any of them, shall violate any or all of the conditions herein mentioned, then this deed shall be null and void and once and thereupon the fee of the said land shall revert to the said party of the first part.

6A. That thereafter the said James A. Bradley entered into an agreement with the predecessors in title of your complainant whereby the clause in the original deed from James A. Bradley, covering said premises, which provided for a reversion to the grantor in the event of a violation of the covenants, conditions and restrictions in the deed, was released, and there were substituted there-

for covenants similar to the covenants recited in paragraph 8 of this bill of complaint.

7. That in the original deeds from the said James A. Bradley to all the properties fronting on Third Avenue, in the City of Asbury Park, and in particular to the property of the defendants, the following covenants, conditions and restrictions, running with the land, were inserted:

> That no house, cottage or other building shall ever be erected thereon nearer to the line of the said Third Avenue than twenty-five feet therefrom, nor nearer to the line of said Main Street than ten feet therefrom. And also upon condition that the said premises shall never be used for the sale of intoxicating liquors, or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, meat or fish markets, or public gas works, shall ever be erected thereon. And that no fence which shall exceed four feet in height shall ever be erected thereon within the distance of twenty-five feet of said Third Avenue, nor within the distance of ten feet from said Main Street. And that in case the said parties of the second part, their heirs or assigns, or any of them, shall violate any or all of the conditions herein mentioned, then and in that case this deed shall be null and void and thereupon the fee of the said land shall revert to the said party of the first part and his heirs.

8. That on May 14, 1923, Samuel H. Gillespie, Executor of the Estate of James A. Bradley, entered into an agreement with Alfred A. Jones and Mattie E. Jones,

who were then the owners of the premises now owned by the defendants, whereby the clause in the original deed from James A. Bradley to Nelson E. Buchanon, Garrett V. Smock and George A. Smock, which provided for a reversion to the grantor in the event of a violation of the covenants, conditions and restrictions in the deed, was released, and there was substituted therefor the following covenants:

And the said parties of the second part, their heirs and assigns, do hereby covenant and agree with the said Samuel H. Gillespie, sole acting executor, his heirs, legal representatives, successors in office and assigns, that they the said parties of the second part, their heirs and assigns, shall not, nor will, at any time or times hereafter, build or erect, or cause or procure, permit or suffer to be built or erected upon the lot or parcel of land hereinabove described, any dwelling house, or other kind of building (exclusive of ordinary open piazzas) nor any fence which shall exceed four feet in height, nearer to the southerly line of Third Avenue than twenty-five feet, nor nearer to the easterly line of Main Street than ten feet; nor cause or procure, permit or suffer the said lot of land, or any part thereof, to be used or occupied for any manufacturing purpose whatever; nor erect, keep or carry on, or cause or procure, permit or suffer to be erected, kept or carried on upon the said lot of land, any hog pen, public laundry, livery stable, slaughter house, butcher shop, fish market, public gas works, or any dangerous, noxious, unwholesome or offensive establishment, business, trade or calling whatsover.

And it is expressly understood and agreed, that the

said several covenants on the part of the said parties of the second part, above specified, shall attach to and run with the land, and that it shall be lawful, not only for the said Samuel H. Gillespie, acting executor as aforesaid, his heirs, legal representatives, successors in office and assigns, but also for the owner or owners of any lot or lots of land adjoining or in the neighborhood of the premises hereby released, deriving or having derived title from or through the said Samuel H. Gillespie, acting executor and trustee as aforesaid, or from or through the said testator, to institute and prosecute any proceedings at law or in equity against the person or persons violating or threatening to violate the same; it being understood, however, that this covenant is not to be enforced personally for damages against the said parties of the second part, their heirs or assigns, unless they be the owner or owners of the said premises, or of some part thereof, at the time of the violation of the said covenant, or of a threatened or attempted violation thereof, at the time said covenant may be proceeded on for an injunction of, and for a specific performance and execution thereof, against the said parties of the second part, their heirs or assigns, and for damages against the party or parties violating the said covenant, his or their heirs, executors, administrators or assigns.

9. Complainant alleges the defendants purchased said premises subject to said conditions, covenants and restrictions, all of which appear of record in the Monmouth County Clerk's Office.

9A. That your complainant on April 18, 1925, purchased the premises now owned by her, and immediately

adjoining on the west the premises owned by the defendants, relying upon a continued maintenance of the building line as set forth in the restrictions affecting the defendants' premises.

9B. The covenant entered into by and between Samuel H. Gillespie, Executor of the Estate of James A. Bradley, and Alfred A. Jones and Mattie E. Jones, which covenant is set forth in paragraph 8 of this bill of complaint, was made for the express benefit of any owner or owners of the premises now owned by your complainant and was accepted by defendants as such.

10. The defendants, Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser, have entered into a contract with the defendant, James Sutherland, Inc., a corporation of the State of New Jersey, whereby the defendant, James Sutherland, Inc., is to erect for the defendants a building on the land owned by them, which said building is to be erected nearer the line of Third Avenue than twenty-five feet therefrom; that the plans and specifications show the north wall of said building will be twenty-four feet, eleven inches (24' 11") from the curb line of Third Avenue.

11. Complainant further shows that the curb line of the south side of Third Avenue is not the line referred to in the covenants, conditions and restrictions affecting the said property, but that the line of Third Avenue referred to is at a point ten or fifteen feet south of said curb line.

12. That on January 24, 1928, complainant served

upon defendants a notice, a copy of which is annexed hereto and made part hereof.

13. Complainant alleges that, notwithstanding the notice aforesaid, the defendants have proceeded with their plans to erect the said building and have started to make excavation and have stated that they intend to erect a building so that the north wall thereof will be at a point twenty-four feet eleven inches (24′ 11″) from the south curb line of Third Avenue.

14. Complainant shows that if the defendants are permitted to violate the covenants, conditions and restrictions in their deeds and agreement, that she will be cut off from light and air on the west side of her property, and also the view of the complainant will be obstructed on the west side of her property, and further that by the erection of said building in violation of said covenants, conditions and restrictions, the value of the complainant's property as a residence property will be materially depreciated.

15. Complainant further shows that all the property on Third Avenue east of the corner of Main Street and Third Avenue, and extending east to the ocean, a distance of seven city blocks, is either residential or occupied by hotels, with the exception of a Catholic school which is situated at the corner of Bond Street and Third Avenue.

16. That all of the property, including hotels, residences and school, have complied with the covenants, conditions and restrictions in the deeds and are all twenty-five feet from the line of Third Avenue and to the com-

plainant's knowledge, there are no violations of said covenants, conditions and restrictions on said Third Avenue, and that all of said properties have been restricted in accordance with a general neighborhood scheme.

Complainant is without adequate remedy at law, and therefore prays that:

1. Defendants and each of them may answer this bill of complaint.

2. That a writ of subpoena may issue out of and under the seal of this Honorable Court, commanding the defendants to answer this bill of complaint.

3. That an injunction may issue, restraining, enjoining and preventing defendant, their servants and agents, and each of them, from erecting or constructing a building in violation of the covenants, conditions and restrictions in the deeds through which the defendants derive title to the premises, and that they, their servants and agents, be perpetually restrained and enjoined from erecting a building nearer the line of Third Avenue than twenty-five feet therefrom.

4. That complainant may have such further and other relief as equity and good conscience may decree.

And your complainant will ever pray, etc.

GERAN & MATLACK,
Solicitors for Complainant.

ISAIAH MATLACK,
Of Counsel with Complainant.

To Nathan Vogel, Jasper Silbergleit and Aaron Glaser, Owners, and

James Sutherland, Inc., Builder.

You are hereby notified that the building which you propose to build and for which you have begun excavation at the southeast corner of Third Avenue and Main Street, in the City of Asbury Park, is in violation of the covenants, of the deeds under which you, Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser, hold title, in that you propose to erect a building nearer the line of Third Avenue than twenty-five (25) feet therefrom, and unless you immediately cease the violation of said covenant, I will take such proceedings as I am advised may be necessary to compel you to cease such violation.

Catherine E. Lister,

By Geran & Matlack,
Attorneys.

Dated: January 23, 1928.

ANSWER

IN CHANCERY OF NEW JERSEY

Between CATHERINE E. LISTER, *Complainant,* and NATHAN VOGEL, *et als.*, *Defendants.*	ON BILL, &c. ANSWER OF DEFENDANTS, NATHAN VOGEL, JASPER C. SILBERGLEIT AND AARON GLASER.

The answer of defendants, Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser, answering the amended bill of complaint say that:

1. These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the amended bill of complaint and therefore leave complainant to her proof of the same.

2. They admit the allegations contained in Paragraph 2 of the amended bill of complaint.

3. They admit the allegations contained in Paragraph 3 of the amended bill of complaint.

3(a). They deny each and every allegation contained

in Paragraph 3(a) of the amended bill of complaint, except that they admit that James A. Bradley acquired title to a large tract of land including the premises now owned by complainant and these defendants, and sub-divided said tract into lots.

3(b). They deny each and every allegation contained in Paragraph 3(b) of the amended bill of complaint.

3(c). They deny each and every allegation contained in Paragraph 3(c) of the amended bill of complaint.

4. These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the amended bill of complaint and therefore leave complainant to her proof of the same.

5. They admit the allegations contained in Paragraph 5 of the amended bill of complaint.

6. They deny each and every allegation contained in Paragraph 6 of the amneded bill of complaint, except that they admit that the covenants, conditions and restrictions therein set forth were imposed upon complainant's lands.

6(a). Defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6(a) of the amended bill of complaint and therefore leave the complainant to her proof of the same.

7. They deny each and every allegation contained in Paragraph 7 of the amended bill of complaint, except that

they admit that said covenants, conditions and restrictions contained in Paragraph 6(a) of the amended bill of com-defendants' predecessors in title, to which deed for greater certainty these defendants refer.

8. They deny each and every allegation contained in Paragraph 8 of the amended bill of complaint, except that they admit that Samuel H. Gillespie as the sole acting executor and surviving executor and trustee under the last will and testament and codicils thereto of James A. Bradley, deceased, entered into an agreement in writing with Alfred A. Jones and Mattie E. Jones, his wife, which writing bears date May 14, 1923 and was recorded July 23, 1924 in the Monmouth County Clerk's Office in Book 1268 of Deeds, page 41, to which, for greater certainty defendants hereby refer. Defendants further allege and charge that said agreement by the terms thereof, has never become operative and the same is without force or effect.

9. They deny each and every allegation contained in Paragraph 9 of the amended bill of complaint.

9(a). They deny each and every allegation contained in Paragraph 9(a) of the amended bill of complaint.

9(b). They deny each and every allegation contained in Paragraph 9(b) of the amended bill of complaint and allege and charge that the agreement made by and between Samuel H. Gillespie and Alfred A. Jones and Mattie E. Jones, referred to in Paragraph 8 of this answer, has, by the terms thereof, never become operative, and is without force and effect.

10. They admit the allegations contained in Paragraph

10 of the amended bill of complaint, except that they deny that the said plans and specifications show that the north wall of said building will be twenty-four feet eleven inches from the curb line of Third Avenue, and allege and charge that said plans and specifications show that the said north wall is more than twenty-five feet south of the south curb line of Third Avenue.

11. They admit the allegations contained in Paragraph 11 of the amended bill of complaint.

12. They admit the allegations contained in Paragraph 12 of the amended bill of complaint.

13. They deny the allegation contained in Paragraph 13 of the amended bill of complaint and allege and charge the work of excavation for their said new building had been completed at the time said notice was received by them. They admit that they have proceeded with the construction of their said new building. The work has been commenced, contracts made, large sums of money spent, the building foundation erected without protest by complainant and that she acquiesced and permitted this to be done.

14. The deny each and every allegation contained in Paragraph 14 of the amended bill of complaint and they allege and charge that their said building will in no wise cut off light and air from the west side of complainant's lands, and will in no wise interfere with, or obstruct the view from the west side of complainant's lands, and allege that their said building will be the cause of enhancing the value of complainant's lands.

15. They deny each and every allegation contained in

Paragraph 15 of the amended bill of complaint, except that defendants allege and charge that there are a number of places of business and amusement located on Third Avenue between the east side of Main Street and the Atlantic Ocean, and allege and charge that Third Avenue west of the east side of Main Street is almost entirely used and occupied for business purposes.

16. They deny each and every allegation contained in Paragraph 16 of the amended bill of complaint and allege and charge that there are a large number of buildings and structures erected on Third Avenue which are less than twenty-five feet away from the property line. That conditions have changed, the character of the immediate community has changed, and said covenants consistently ignored. That the same have long since been abandoned.

17. These defendants further allege and charge that the buildings which were on their lands at the times said lands were purchased by them consisted of a row of six wooden dwellings in a badly dilapidated condition, which were known locally as "Bedbug Row;" that said buildings constituted an eye sore to the community and a detriment to the value of complainant's lands and other lands in the vicinity, and that said buildings known as "Bedbug Row" constituted a fire menace to complaintant's building and all othre buildings in the vicinity.

18. After purchasing their lands defendants desired to demolish said buildings known as "Bedbug Row" and to erect in their place and stead a modern store and apartment building of brick and semi-fire proof construction, and caused plans for a structure of pleasing design and appearance to be made.

19. Thereupon these defendants, not understanding the precise nature and effect of the covenants, conditions and restrictions contained in the title deeds for their said lands, and on or about November 11, 1927 comunicated to complainant and other owners of land in the vicinity their desire to demolish said "Bedbug Row" and to erect in place thereof the store and apartment building aforesaid, and also communicated to complainant and said other owners of property their desire to place the north wall of their said new building twenty-five feet south of the southerly curb line of Third Avenue.

20. Complainant thereupon informed defendants that she approved of their plans to so tear down said" Bedbug Row" and so locate and erect said new building, and the complainant stated that she had no objection to the proposed new location of said building and agreed with defendants that she would interpose no obstacles and in no way interfere with such location and erection of their new building by defendants.

21. In reliance upon complainant's said consent and agreement, defendants on November 16, 1927 started the work of demolishing said "Bedbug Row" and entered into contract with the defendant James Sutherland Inc. for the construction and erection of their said new building at a cost to defendants of One Hundred and Twenty Two Thousand Dollars (122,000.00). In addition thereto, defendants entered into other contract and commitments respecting said new building amounting in the aggregate to approximately $150,000.00.

22. The said James Sutherland Inc. a corporation, immediately ordered a large quantity of materials to be used

in the construction of said new building and incurred liability therefor in a sum in excess of $40,000.00.

33. The work of demolishing said "Bedbug Row" was completed within a short time and defendants long prior to January 24, 1928 commenced the work of construction and erecting their said new building.

24. Prior to January 24, 1928 the excavation for defendants' said new building had been made and the foundation walls for the north and south sides thereof had been completed, and a large amount of other work had been done in the construction and erection of said new building and complainant was well aware that said work was being done and said walls located as aforesaid.

25. Defendants had no notice that complainant objected to their plans to locate their said building as aforesaid until January 24, 1928 when complainant caused to be served upon them the notice annexed to the bill of complaint.

26. Defendants further allege and charge that James A. Bradley, the common grantor of lands now owned by complainant and defendants, did not lay out and develop the tract of which complainant's and defendants' said land form a part in pursuance of a general scheme or plan of development.

27. Said Bradley did not impose uniform restrictions upon all the lands in said tract, or of any considerable portion of same adjacent to complainant's and defendants' land.

28. The covenants, conditions and restrictions contained in the deed made by said James A. Bradley to Hubbard Hurley on October 16, 1882, conveying the lands subsequently acquired by the complainant, were imposed by said Bradley for the benefit of lands then owned by him, of which the lands now owned by these defendants form part.

29. The covenants, conditions and restrictions contained in the deed made by said James A. Bradley to Nelson E. Buchannon, Garrett V. Smock and George A. Smock on July 3, 1884, conveying the lands now owned by defendants were imposed by said Bradley, for the benefit of lands then owned by said Bradley, of which the lands now owned by said complainant do not form part. Complainant's said lands having been previously conveyed to Hubbard Hurley as aforesaid.

30. At the time said James A. Bradley conveyed said lands to complainant's and defendants' predecessors in title, Asbury Park was a small summer colony containing a permanent population of less than 3,000 people. Most of the business transacted in said community was done in a center approximately nine blocks south of defendants' land. The neighborhood in which defendants' lands are situated was then sparsely settled.

31. At the present time, Main Street, Asbury Park, upon which defendants' land front, is almost entirely devoted to business purposes throughout its full length; said Main Street is a part of the State Highway System and at certain times in the summer season more vehicles pass along said street than pass along any other street or public highway in the State of New Jersey.

32. At the present time the taxes and assessments levied upon lands and buildings in Main Street in the City of Asbury Park, are so great as to render it necessary for the owners of said lands and buildings to devote the same to business and other productive uses which will yield revenue sufficient to pay such taxes and assessments and other proper charges and expenses.

33. At the present time practically every building on both sides of Main Street from the Asbury Park & Ocean Grove Bank building near the southerly boundary of Asbury Park, to Deal Lake, at the northerly boundary, is over the building lines; especially all the new and improved buildings on both sides of Main Street, viz; the Asbury Park & Ocean Grove Bank building at the corner of Mattison Avenue and Main Street, is out over the line of Mattison Avenue and Main Street; the Ingalls building at the corner of Summerfield Avenue and Main Street is out over the line of both streets; the new Y. M. C. A. building on the corner of Monroe Avenue and Main Street is out over the building line on both streets; Becker & Schultze Delicatessen Store on Main Street, between Asbury Avenue and First Avenue, is out over the building line; the Montauk Drug Store at Main Street and First Avenue is out over the building line; the Edelsberg building on Main Street, between Sewall and Asbury Avenues, is out over the building line; the Daly property at Asbury Avenue and Main Street, is out over the building line; the building on the northeast corner of Second Avenue and Main Street is out over the building line on both streets; and numerous other buildings over the entire length of Main Street, a distance of about one mile, are all out over the building line; almost all of the build-

ings on the west side of Main Street for its entire length are over the building line; the Rectory of the Catholic Church on the north side of Second Avenue is out over the building line; the Catholic Church at the northwest corner of Second Avenue and Bond Street is a number of feet out over the building line on Second Avenue. The Parochial School standing on the southwest corner of Bond Street and Third Avenue, is over the building line on Third Avenue.

34. At the present time a large number of buildings and structures on both sides of Third Avenue from the ocean to Langford Street extend out over the building line.

35. At the present time a large number of buildings and structures in the block in which defendant's lands are located, extend out over the building line.

36. Any building lines which may have been established by said James A. Bradley by restrictions contained in his deeds conveying lands in the vicinity of Main Street and Third Avenue and in the City of Asbury Park generally, have been so persistently and in so many instances violated that if any general plan or scheme had been originally formed, the same has been abandoned and destroyed.

37. The character of the use made of lands in the City of Asbury Park, particularly the character of the use made of lands in the vicinity of complainant's and defendants' lands, has been so completely changed and altered since said lands were sub-diivded into lots, that it

would be inequitable, unreasonable and unjust to now enforce a building line restriction imposed in or about the year 1884.

COOK & STOUT,
Solicitors of Defendants,

NATHAN VOGEL, JASPER C. SILBERGLEIT and AARON GLASER.

AMENDMENT TO ANSWER

IN CHANCERY OF NEW JERSEY

Between CATHERINE E. LISTER, *Complainant,* and NATHAN VOGEL, *et als.*, *Defendants.*	ON BILL, &C. AMENDMENT TO ANSWER OF DEFENDANTS, NATHAN VOGEL, AARON GLASER AND JASPER C. SILBERGLEIT.

The defendants, Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, hereby amend their answer by striking out paragraph 5 thereof, and by adding hereto ,paragraph numbered 5, 5A, 5B, to read as follows:

5. These defendants deny the allegations contained in paragraph 5 of the amended bill of complaint except that they admit that James A. Bradley and Helen M. Bradley, his wife conveyed lands described in paragraph 2 of the amended bill of complaint to Sarah Jane Hurley by Deed dated March 17, 1882, and recorded in the Monmouth County Clerk's office in Book 347 of Deeds, page 333, and that said Deed contained the conditions as set forth in paragraph 5 of the amended bill of complaint.

5A. These defendants deny that any covenants, conditions or restrictions contained in said Deed of James

A. Bradley and wife to Sarah Jane Hurley, were for the benefit of lands retained by James A. Bradley, and deny that any covenants, conditions or restrictions were imposed in said Deed for the benefit of the lands now owned by complainant.

5B. These defendants deny the allegations contained in paragrph 5B of the complainants bill of complaint, except that they admit and allege that in order to secure the full purchase price for said Deed of conveyance said Sarah Jane Hurley and Jacob Hurley, her husband executed and delivered to said James A. Bradley, a mortgage of even date with said Deed which was on March 18, 1882 recorded in Book V44 of mortgages for Monmouth County, page 3; and admit and further allege that said mortgage was foreclosed by said James A. Bradley, and that at a sale held under and by virtue of a decree of this court, made in said foreclosure suit, the Sheriff of Monmouth County, sold said lands to James A. Bradley, and delivered to him Deed therefor, which Deed bore date June 13, 1884, and was recorded in the Mounmouth County Clerk's office in book 381 of Deeds page 390. By Deed dated June 13, 1884 said James A. Bradley conveyed said lands, now owned by these defendants to Nelson E. Buchanon, Garrett S. Smock and George A. Smock.

COOK & STOUT,
Solicitors of Defendants.

REPLICATION

IN CHANCERY OF NEW JERSEY

67/50

Between

CATHERINE E. LISTER,
Complainant,
and
NATHAN VOGEL, *et als.*,
Defendants.

ON BILL, &C.
REPLICATION.

The replication of Complainant, Catherine E. Lister, to the answer of defendants, Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser.

Complainant, replying to the answer of defendants, Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser, says that:

1. She joins issue with the answer of the defendants, Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser.

2. The agreement mentioned in paragraph 8 of the said answer, is valed and subsisting and of full force and effect.

3. The agreement mentioned in paragraph 9(b) is valid and subsisting and of full force and effect.

4. Complainant denies the allegations in paragraph 13 of the said answer and says that said notice was served upon said defendants as soon as the work of excavation for said new building was begun. Complainant further alleges that any work that has been done by defendants on said premises has been done over the protests of said complainant and with full knowledge on the part of defendants that complainant was opposed to any violation of said restrictive covenants by the defendants.

5. Complainant denies the allegations in paragraph 14 of the said answer, and further says that even if such building will enhance the value of complainants lands, such enhancement is immaterial in this cause.

6. Complainant denies the allegations contained in paragraph 15 of the said answer, and says further without admitting their existence, that even if a number of places of business and amusement are located on Third Avenue, such existence is immaterial in this cause.

7. Complainant denies the allegations contained in paragraph 16 of said answer.

8. Complainant denies the allegations contained in paragraph 17 of the said answer, except that she admits that a row of six wooden dwellings existed on the defendants lands. Complainant further says that the existence of such buildings and their condition is in no way material to this issue.

9. Complainant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 18 of the said answer and says further that the allegations in said paragraph are immaterial in this cause.

10. Complainant denies the allegations in paragraph 19 of said answer except that she has no knowledge or information sufficient to form a belief as to any transactions by the defendants with other owners of property.

11. Complainant denies the allegations of paragraph 20 of the said answer and alleges that after learning of defendants' intention to violate the restrictive covenants contained in their deed, she frequently protested to them against any such action and immediately upon learning of the execution of a contract with the defendant James Southerland, Inc., for the erection of a building nearer the line of Third Avenue than 25 feet therefrom, she caused a formal notice to be served upon said defendants as set forth in paragraph 12 of the said bill of complaint.

12. Complainant denies the allegations of paragraph 21 of the said answer except that she admits that defendants started the work of demolishing said "Bedbug Row", and says that she has no knowledge or information sufficient to form a belief as to the allegations concerning the contract or commitments.

13. Complainant says she has no knowledge or information sufficient to form a belief as to the allegations in paragraph 22 and further says that the allegations in said paragraph are not material in this cause.

14. Complainant admits the allegations in paragraph 23 of the said answer, except that she denies that the construction of said new building was commenced prior to January 24, 1928.

15. Complainant denies the allegations in paragraph 24 of said answer.

16. Complainant denies the allegations in paragraph 25 of said answer.

17. Complainant denies the allegations in paragraph 26 of said answer.

18. Complainant denies the allegations in paragraph 27 of said answer.

19. Complainant admits the allegations contained in paragraph 28 of the said answer, and further says that said covenants, conditions and restrictions, were made and intended for the benefit of all lands in the vciinity of the lands now owned by these defendants.

20. Complainant admits the allegations in paragraph 29 and further says that said covenants, conditions, restrictions, were also for the benefit of all lands in the vicinity of the lands now owned by these defendants.

21. Complainant denies the allegations in paragraph 30 of said answer.

22. Complainant admits the allegations in paragraph 31 except that she denies that Main Street is devoted entirely to business purposes throughout its full length, said Main Street being occupied only about half its length for business purposes such as being in the main to the South of Third Avenue. Complainant further says that the allegations in paragraph 31 are not material to this cause.

23. Complainant denies the allegations in paragraph 32 of the said answer.

24. Complainant denies the allegations in paragraph 33 of the said answer, and further says, without admitting their existence, that if any such encroachments exist they are merely minor encroachments. Complainant further says that the allegations in said paragraph are immaterial in this cause.

25. Complainant denies the allegations contained in paragraph 34 of the said answer.

10

26. Complainant denies the allegations contained in paragraph 35 of the said answer.

27. Complainant denies the allegations contained in paragraph 36 of the said answer.

28. Complainant denies the allegations in paragraph 37 of the said answer, except that she admits that some changes in the character of the use made of lands in the
20 City of Asbury Park, has occurred since said lands were subdivided into lots.

GERAN, MATLACK & LAUTMAN,
Solicitors for Complainant.

30

DEMAND FOR BILL OF PARTICULARS

IN CHANCERY OF NEW JERSEY

Between
CATHERINE E. LISTER,
Complainant,
and
NATHAN VOGEL, *et als.*,
Defendants.

ON BILL, &c.

To COOK & STOUT, ESQ., Solicitors of Defendants,

NATHAN VOGEL, JASPER C. SILBERGLEIT and AARON GLASER:

PLEASE TAKE NOTICE that on Thursday, May 3, 1928, at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Long Branch, we shall apply to the Chancellor for an order directing you to furnish to the complainant., within such time as the court may fix, a bill of particulars as hereinafter set forth:

1. That you set forth in detail the terms of the agreement mentioned in paragraph 8 of defendants' answer, which render said agreement inoperative and without force or effect.

2. That you set forth said particulars with respect to said agreement as set forth in paragraph 9B of defendants' answer.

3. That you set forth in detail what circumstances render the aforementioned agreements inoperative; for what reasons they are inoperative.

4. That you specify in detail the places of business and amusement which it is alleged in paragraph 15 of defendants' answer, are located on Tihrd Avenue between the east side of Main Street and the Atlantic Ocean.

5. That you set forth in detail where and by whom Third Avenue, west of the east side of Main Street, is used and occupied for business purposes, as set forth in paragraph 15 of defendants' answer.

6. That you specify the buildings and structures which, it is alleged in paragraph 16 of defendants' answer, are erected on Third Avenue less than twenty-five feet away from the property line.

7. Specify in detail how far the Montauk Drug store is out over the building line of Main Street and of First Avenue; how far the Daley property is out over the building line of Asbury Avenue and of Main Street; how far out over the building line of Second Avenue and of Main street is the building located on the northeast corner of said streets, and at what point or points is the parochial school out over the building line of Third Avenue.

All of said encroachments are alleged in paragraph 33 of defendants' answer.

8. Specify in detail which buildings, on both sides of Third Avenue, from the ocean to Langford Street, extend over the building line, as alleged in paragraph 34 of defendants' answer.

9. Specify in detail which buildings and structures in the block in which defendants' lands are located, extend over the building line, as alleged in paragraph 35 of defendants' answer.

10. Specify whether the agreement between complainant and defendants, as set forth in paragraph 20 of defendants' answer, was oral or written. If written, set forth in detail.

11. Specify in detail exactly what work in the contruction and erection of defendants' building had been accomplished on and prior to January 24, 1928.

12. Specify on what date the work of construction and erection of defendants' building was commenced, as set forth in paragraph 23 of defendants' answer.

and giving said complainant a reasonable time thereafter to file her reply to defendants' answer, or other pleading thereto, and for such further relief as the court shall deem equitable and just, which application will be founded on the petition and affidavits, copies of which are herewith served upon you.

GERAN & MATLACK,
Solicitors of Complainant.

BILL OF PARTICULARS

IN CHANCERY OF NEW JERSEY

Between
CATHERINE E. LISTER,
Complainant,
and
NATHAN VOGEL, *et als.*,
Defendants.

ON BILL, &c.
BILL OF
PARTICULARS.

To Complainant, CATHERINE E. LISTER, or GERAN, MATLACK AND LAUTMAN, ESQUIRES, her Solicitors:

The following is a bill of particulars of the matters and things set out and alleged in the answer of Nathan Vogel, Jasper Silbergleit and Aaron Glaser. This bill of particulars is furnished you pursuant to an order of this court made in this cause on the Thirty-first day of May, 1928.

1. This demand was not allowed by the court.

2. This demand was not allowed by the court.

3. This demand was not allowed by the court.

4. This demand was not allowed by the court.

5. This demand was not allowed by the court.

6. The following are the buildings and structures which are erected on Third Avenue, less than twenty-five away from the building line, as set out in Paragraph 16, of said defendants' answer:

House No. 216	1 1-2 ft.
Hotel Babchin	5 ft.
Hotel Powhatan	3 1-2 ft.
House No. 206	3 ft.
House No. 204	4 ft.
(West End) House No. 202	3 inches
(East End) Store No. 202	15 ft.
House No. 110	7 3-4 ft.
House No. 106	7 ft. 10 in.
Steeplechase (Main part) west end	7 ft. 4 in.
Steeplechase (Outside structure Apo. 30′ high)	11 1-2 ft.
Steeplechase (Outside structure Apo. 30′ high) east end on the property line.	
House No. 109	6 1-2 ft.
Aberdeen Hotel	8 1-2 ft.
Restaurant	3 ft. 3 in.
House No. 203	2 ft. 9 in.
House No. 205	3 ft.
House No. 207	4 ft. 9 in.
House No. 209	5 1-2 ft.
House No. 211	1 ft.
House No. 616	5 in.
House No. 614	5 in.
House No. 612	1 1-2 in.
House No. 600	5 in.
House No. 510	2 in.
E. Cor. of Baptist Church	5 in.

House on the Cor. of Grand Ave.	5 in.
Hotel Windsor	2.0 ft.
House No. 306	1.5 ft.
House No. 707	5 in.
House No. 709	5 in.
House No. 711	6 in.
House No. 605	7 in.
House No. 301	7 in.

7. This demand was not allowed by the court.

8. The following buildings on both sides of Third Avenue from the ocean to Langford Street extend over the building line, see answer to six above, each instance therein specified is hereby repeated and made a part of this paragraph.

9. The following are the buildings and structures in the block in which defendants' lands are located which extend over the building line:

Northeast corner of Main Street and Second Avenue 10 feet over Main Street building line, 7 ft. over Second Avenue building line.

705 Second Avenue, 4 inches.

Church of the Holy Spirit, extends over the building line of Second Avenue 13 ft. in some places and 15 ft. in others. Parts of said church on the west side of Bond Street are over the building line on Bond Street from 2 to 5 feet.

The Parochial School at the southwest corner of Bond

Street and Third Avenue extends over the building line of Third Avenue, 8 inches.

10. This demand was not allowed by the court.

11. This demand was not allowed by the court.

12. This demand was not allowed by the court.

COOK & STOUT,
Solicitors for Defendants,

NATHAN VOGEL, JASPER SILBERGLEIT AND AARON GLASER.

FINAL DECREE

IN CHANCERY OF NEW JERSEY

67-50

Between
CATHERINE E. LISTER,
Complainant,
and
NATHAN VOGEL, *et als.*,
Defendants.

ON BILL, &c.
FINAL DECREE.

This cause coming on to be heard in the presence of Geran, Matlack & Lautman, Solicitors of and of counsel with complainant, and Cook and Stout, Solicitors of and of counsel with defendants, and the court having examined the pleadings and having taken proofs orally and in open court, and having considered the arguments of counsel thereon;

And it appearing to the satisfaction of the court that the defendants Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, are the owners of a certain tract of land having a frontage of ninety feet (90') on the south side of Third Avenue and a depth of one hundred and fifty feet (150') abutting its full depth on the east side of Main Street, in the City of Asbury Park, County of Monmouth and State of New Jersey; and that said land is sub-

ject to a building restriction that defendants shall not, nor will at any time or times, erect or cause or procure, permit or suffer to be built or erected thereon, any dwelling house or other kind of building, exclusive of ordinary open piazzas, nearer to the line of the said Third Avenue than twenty-five feet (25') therefrom;

And it further appearing that a rule to show cause why a preliminary injunction restraining the said defendants from erecting or constructing a building in violation of the building restrictions affecting said premises, was entered on the 26th day of January, 1928, and that on the 14th day of February, 1928, said rule to show cause was discharged by an order which provided, that if the defendants erected a building which in any way violated the restrictions in the deed to the property at the southeast corner of Third Avenue and Main Street, in the City of Asbury Park, the complainant's rights should not thereby be prejudiced, but the defendants should be deemed to have erected such building at their peril.

And it further appearing that the said defendants Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, have caused a building to be built over the entire restricted area aforesaid, in violation of said building restriction, and notwithstanding the above recited proviso in said order and are now permitting and suffering said building to remain upon said restricted area in violation of said restriction;

It is on this 29th day of October, 1930, ORDERED, ADJUGED and DECREED that the said defendants Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, be and they are hereby enjoined and commanded to forthwith refrain and cease from violating said restriction and to forthwith refrain and cease from permitting said building or any

part thereof to remain upon said land nearer to the said line of Third Avenue than twenty-five (25') therefrom;

And it is further ORDERED, ADJUDGED and DECREED that said defendant Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, forthwith remove and cause to be removed all parts of said building that are nearer to the said line of the said Third Avenue than twenty five feet (25') therefrom, and to forthwith remove and cause to be removed all parts of said building that are located upon any part of the aforementioned restricted area;

It is further Ordered that the said defendants Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, pay to the complainant the costs of this suit to be taxed, together with a counsel fee of five hundred dollars ($500.00), which is hereby allowed to said complainant.

E. R. WALKER,
C.

Respectfully advised
MAJA LEON BERRY,
V. C.

IN CHANCERY OF NEW JERSEY

Between
CATHERINE E. LISTER,
Complainant,
and
NATHAN VOGEL, et als.,
Defendants.

ON BILL, &C.
ORDER.

This matter being opened to the court in the presence of GERAN & MATLACK, solicitors of the complainant, and COOK & STOUT, solicitors of the defendants, and it appearing to the court that a rule to show cause why a preliminary injunction should not issue, heretofore entered, should be discharged, and a motion to dismiss the bill should likewise be dismissed.

It is, on this 14th day of February, 1928, ORDERED that the rule to show cause heretofore made on January 26, 1928, be and the same is hereby discharged,

It is further ORDERED that the motion made by defendants to dismiss the bill, be and the same is hereby dismissed,

And it is further ORDERED that if the defendants erect a building which in any way violates the restrictions in the deed to the property at the southeast corner of Third

Avenue and Main Street, in the City of Asbury Park, the complainant's rights shall not thereby be prejudiced, but the defendants shall be deemed to have erected such building at their peril.

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

NOTICE OF APPEAL

IN CHANCERY OF NEW JERSEY

Between
CATHERINE E. LISTER,
Complainant,
and
NATHAN VOGEL, *et als.,*
Defendants.

ON BILL, &c.
NOTICE OF APPEAL.

TO GERAN, MATLACK AND LAUTMAN, ESQUIRES,
Solicitors for Complainant, CATHERINE E. LISTER:

Take Notice: That the defendants, Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser, hereby appeal from the final decree made in the above entitled cause on October Thirty-first, 1930, by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Maja Leon Berry, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated: December 30th, 1930.

COOK AND STOUT,
Solicitors for Defendants.

WILLIAM J. O'HAGAN,
Of Counsel with Defendants.

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

WILLIAM J. O'HAGAN,
Of Counsel with Defendants.

PETITION OF APPEAL

NEW JERSEY COURT OF ERRORS AND APPEALS

CATHERINE E. LISTER, *Complainant,* and NATHAN VOGEL, *et als., Defendants.*	ON APPEAL FROM THE COURT OF CHANCERY. PETITION OF APPEAL.

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

The petition of Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser the appellants in the above entitled cause, respectfully shows that:

1. The petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his honor, Ed-

win Robert Walker, Chancellor of the State of New Jersey, on advice of His Honor, Maja Leon Berry, Vice-Chancellor bearing date the Thirty-first day of October 1930, in a certain cause in said Court of Chancery, wherein said Catherine E. Lister was complainant and said Nathan Vogel, Jasper C. Silbergleit and Aaron Glaser were defendants, in this respect, to wit, that the said decree adjudges that said defendants be and are enjoined and commanded to forthwith refrain and cease from violating a certain restriction and forthwith refrain and cease from permitting a certain building, or any part thereof, to remain upon the lands of said defendants, nearer the line of Third Avenue than twenty-five (25) feet therefrom, and that the said decree further adjudges that the said defendants forthwith remove and cause to be removed all parts of said building that are nearer the said line of said Third Avenue than twenty-five (25) feet therefrom, and forthwith remove and cause to be removed all parts of said building that are located upon any part of the aforementioned restricted area; and that said decree further adjudges that said defendants pay to complainant the costs of suit to be taxed, together with a counsel fee of $500.00, which is thereby allowed said complainant.

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

1. Complainant, by assenting to the erection of defendants' building on the site selected and the spending of moneys for the erection of said building in said place by defendants in reliance upon said assent, was estopped from maintaining this suit.

2. That the said decree is further erroneous for the reason that the conduct of complainant in giving her approval to the project of defendants and their plan to erect their building on said site, was a waiver of any rights she may have had to maintain this suit.

3. That the said decree is further erroneous for the reason that there was no neighborhood plan or scheme and there had been violations of similar restrictions in the neighborhood and there was no proof that the complainant would be in any wise injured by reason of the violation of the supposed restrictions by which the court held defendants bound and no peculiar injury to complainant which would warrant under the facts and circumstances of this case the interposition of the court of equity, and great loss and damage would be occasioned to defendant by the injunction prayed for and the decree is inequitable.

4. That the said decree is further erroneous for the reason that the bill being brought in the nature of a bill for specific performance the remedy rested not in right but in sound judicial discretion and, under the circumstances of this case, sound judicial discretion required that the relief should have been denied.

5. That the said decree is further erroneous for the reason that the conditions imposed by Bradley (The common grantor) in his deed to Sarah Jane Hurley, conveying defendants' property, cannot be enforced by complainant, for the reason that a purchase money mortgage for the full purchase price was given to Bradley simultaneously therewith, which mortgage was foreclosed and title revested in Bradley and consequently defendants' title out

of the common grantor is subsequent to that of complainant.

6. That the said decree is further erroneous for the reason that the restrictions of the use and the limitations upon the grant of the fee in the deed from Bradley to Sarah Jane Hurley, Book 347, page 333, and in the deed, Bradley to Buchanan & Smock, Book 377, page 392, are by way of condition and cannot be construed as covenants, the performance of which can be enforced in equity at the instance of this complainant.

7. That the said decree is further erroneous for the reason that there was no proof that the restrictions contained in the deed Bradley to Sarah Jane Hurley were imposed for the benefit of lands of which complainant was the owner and said restrictions were not imposed for the benefit of lands of which complainant is the owner.

8. That the said decree is further erroneous for the reason that there was no proof that Bradley's executor had authority to enter into the agreement made between him and Jones (defendants' predecessor in title), and that agreement, according to its terms, did not become effective until after defendants' building was completed and the agreement was not made in pursuance of a neighborhood scheme of restriction and there was no privity between Bradley's executor and defendants' predecessor in title, and complainant, and the restrictions contained in said agreement were unreasonable restrictions upon the use of defendants' lands.

9. That the said decree is further erroneous for the reason that the covenants contained in said agreement

made by Bradley's executor and Jones were not made for the benefit of complainant and there was no proof that said covenants were made for her benefit.

10. That the said decree is further erroneous for the reason that there have been many violations of similar restrictions in the neighborhood and the character of the neighborhood has changed.

Petitioners therefore pray that said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as this court shall seem proper.

COOK & STOUT,
Solicitors for Petitioners.

WILLIAM J. O'HAGAN,
Of Counsel with Petitioners.

ANSWER TO PETITION OF APPEAL

NEW JERSEY COURT OF ERRORS AND APPEALS

CATHERINE E. LISTER,
Complainant-Appellee,

vs.

NATHAN VOGEL, AARON GLASER and JASPER C. SILBERGLEIT,
Defendants-Appellants.

ON APPEAL FROM THE COURT OF CHANCERY.
ANSWER TO PETITION OF APPEAL.

The answer of Catherine E. Lister, the above named appellee, to the petition of appeal of Nathan Vogel, Aaron Glaser and Jasper C. Silbergleit, the above named appellants.

This appellee not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits, that a decree was on the 29th day of October, 1930, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and she prays that the same may be affirmed with costs to be taxed in favor of this appellee.

GERAN, MATLACK & LAUTMAN,
Solicitors for and of
Counsel with Appellee.

Due and legal service of the within answer to petition of appeal is hereby acknowledged this 10th day of January, 1931.

COOK & STOUT,
Solicitors for Defendants-Appellants.

EXHIBIT C-1

JAMES A. BRADLEY, et ux.,
To
SARAH JANE HURLEY,
ux JACOB

This Indenture, made the seventeenth day of March in the year of our Lord one thousand eight hundred and eighty-two, Between James A. Bradley and Helen M., his wife, of the township of Neptune in the County of Monmouth and State of New Jersey, of the first part, and Sarah Jane Hurley, wife of Jacob Hurley, of the Township of Neptune in the County of Monmouth and State of New Jersey, of the second part, Witnesseth, that the said party of the first part, for and in consideration of Two Thousand Five Hundred Dollars ($2,500) lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to their heirs and assigns forever, All that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Asbury Park in the County of Monmouth and State of New Jersey, known as the westerly parts of Lots eight hundred and ninety (890), eight hundred and ninety-one (891), and eight hundred and ninety-two (892), on a map of Asbury Park, New Jersey, made by

F. H. Kennedy and Son, A. D. 1874. Beginning at the southeast corner of Third Avenue and Main Street, Thence southerly along the easterly line of Main Street one hundred and fifty (150) feet, thence easterly parallel with Third Avenue ninety (90) feet, thence northerly at right angles with Third Avenue one hundred and fifty (150) feet to the southerly line of Third Avenue, thence westerly along the southerly line of Third Avenue ninety (90) feet to the place of beginning. The said premises are hereby conveyed upon the following conditions to wit: That no house, cottage or other building shall ever be erected thereon nearer to the line of the said Third Avenue than twenty-five (25) feet, therefrom, nor nearer to the line of said Main Street than ten (10) feet therefrom. And also upon conditions that the said premises shall never be used for the sale of intoxicating liquors or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, butcher shops, barber shops, fish markets or public gas works shall ever be erected thereon. And that no fence which shall exceed four (4) feet in heighth shall ever be erected thereon within twenty-five (25) feet of said Third Avenue and also that no fence which shall exceed four (4) feet in heighth shall ever be erected thereon within ten (10) feet of said Main Street. And that in case the said party of the second part or her heirs, executors, administrators or assigns or any of them shall violate any or all of the conditions herein contained then this deed shall be null and void and thereupon the fee of the said land shall revert to the said party of the first part. Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in any wise appertaining; Also,

all the estate, right, title, interest, property claim and demand whatsoever of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof. To Have and to Hold, all and singular the above described land and premises with the appurtenances, unto the said party of the second part, her heirs and assigns to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever, and the said James A. Bradley doth for himself, his heirs, executors and administrators covenant and grant to and with the said party of the second part, her heirs and assigns, that he, the said James A. Bradley, is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation or by any encumbrance whatsoever, by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises can or may be changed, charged, altered or defeated in any way whatsoever. And Also that the said party of the first part, now—good right full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. And Also, that he, the said James A. Bradley, and his heirs will warrant, secure and forever defend the said land and premises unto the said Sarah Jane Hurley, wife as aforesaid, her heirs and assigns forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever. In Witness Where-

of, the said party of the first part have hereunto set their hands and seals the day and year first above written.

JAMES A. BRADLEY (L. S.)

HELEN M. BRADLEY (L. S.)

Signed, sealed and delivered
in the presence of

DAVID HARVEY, JR.

STATE OF NEW JERSEY }
COUNTY OF MONMOUTH } ss:

Be it Remembered, that on this twenty-eighth day of March in the year of our Lord one thousand eight hundred and eighty-two, before me the subscriber, a Master in Chancery of New Jersey, personally appeared James A. Bradley and Helen M., his wife, who I am satisfied are the grantors in the within deed of conveyance named; and I having first made known to them the contents thereof they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said Helen M. Bradley, wife as aforesaid, being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

DAVID HARVEY, JR.,
M. C. C.

Received and recorded March 29th, 1882.

THOMAS V. ARROWSMITH,
Clerk.

STATE OF NEW JERSEY,
MONMOUTH COUNTY, } ss:

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify, that the foregoing copy of Deed:

JAMES A. BRADLEY, et ux.,
To SARAH JANE HURLEY, ux JACOB

is true and correct as the same remains of record in my office in Book 347 of Deeds on pages 333, &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 30th day of April, A. D. 1929.

(SEAL)

JOSEPH MCDERMOTT,
Clerk.

EXHIBIT C-2

SAMUEL H. GILLESPIE,
EXR., &C.,
TO
ALFRED A. JONES,
MATTIE E., HIS UX.

THIS INDENTURE, made the fourteenth day of May in the year of our Lord, One Thousand Nine Hundred and twenty-three, BETWEEN SAMUEL H. GILLESPIE, of Morristown, in the County of Morris and State of New Jersey, as the sole acting Executor and surviving Trustee under the last will and testament and codicils thereto of JAMES A. BRADLEY, late of the City of Asbury Park, in the County of Monmouth and State of New Jersey, deceased, party of the first part, and

ALFRED A. JONES and MATTIE E. JONES, his wife, of the Borough of Bradley Beach, in the County of Monmouth and State of New Jersey, party of the second part:

WITNESSETH, That whereas the said James A. Bradley in his lifetime, now deceased, and his wife, Helen M. did by their deed of conveyance bearing date the Thirteenth day of June, A. D. 1884, and recorded in the Clerk's Office in and for the County of Monmouth aforesaid, in Liber 377 of Deeds for said County at pages 392 &c. grant and convey unto Nelson E. Buchanon, Garret V. Smock and George A. Smock, and to their heirs and assigns forever, certain lands and premises hereinafter particularly described, to wit, ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Asbury

Park, in the County of Monmouth and State of New Jersey, comprising parts of lots designated as Numbers Eight Hundred and ninety (890), Eight hundred and ninety-one (891) and Eight Hundred and ninety-two (892) on a map of Asbury Park, made by F. H. Kennedy & Son, A. D. 1874.

BEGINNING at the southeast corner of Third Avenue and Main Street, thence (1) southerly along the easterly line of Main Street, one hundred and fifty (150) feet; thence (2) easterly, parallel with Third Avenue, ninety (90) feet; thence (3) northerly, at right angles with Third Avenue, one hundred and fifty (150) feet to the southerly line of Third Avenue; thence (4) westerly, along the southerly line of Third Avenue, ninety (90) feet to the place of beginning.

AND WHEREAS, It was expressly stipulated in said deed, that the said lot or parcel of land was conveyed to the said Nelson E. Buchanon, Garrett V. Smock and George A. Smock, their heirs and assigns, subject to certain conditions therein, in words following, to-wit:

"The said premises is hereby conveyed upon the following conditions to wit: That no house, cottage or other building shall ever be erected thereon nearer to the line of the said Third Avenue than Twenty-five (25) feet therefrom nor nearer to the line of said Main Street than ten (10) feet therefrom.

AND ALSO upon condition that the said premises shall never be used for the sale of intoxicating liquors or for any manufacturing purpose whatever. And that no hog-pens, public laundries, livery stables, meat or fish markets,

or public Gas Works, shall ever be erected thereon. And that no fence which shall exceed four (4) feet in height shall ever be erected thereon within the distance of twenty-five (25) feet of said Third Avenue nor within the distance of ten (10) feet from said Main Street. And that in case the said parties of the second part their heirs or assigns or any of them, shall violate any or all of the conditions herein contained, then and in that case this deed shall be null and void and thereupon the fee of the said land shall revert to the said party of the first part and his heirs", as by reference to the said deed will more fully appear.

AND WHEREAS. The said Alfred A. Jones, afterwards, by virtue of a deed of conveyance to him from T. Herman Beringer Jr. and Estelle Beringer, his wife, bearing date the First day of April A. D. 1922 and recorded in the Clerk's Office in and for the County of Monmouth aforesaid in Liber 1177 of Deeds for said County at pages 244 &c., became the purchaser of said lot or parcel of land and is now the owner thereof in his own right, in fee simple, but subject to the conditions aforesaid:

AND WHEREAS, The said parties of the second part have requested the said party of the first part, sole acting executor and surviving trustee as aforesaid, to release to the said Alfred A. Jones, his heirs and assigns, all the estate, right, title and interest, vested or contingent, which the said James A. Bradley at the time of his death had or could have in the said lot or parcel of land, hereinabove described, for or by reason of the above recited conditions contained in the above mentioned deed from the said James A. Bradley and Helen M. his wife to the said Nelson E. Buchanon, Garret V. Smock and George A.

Smock, for the said lot or parcel of land and have agreed as the consideration for the said release to enter into and substitute in place and stead of said conditions certain covenants hereinafter set forth, the same to be covenants running with the land.

NOW THIS INDENTURE WITNESSETH, That the said party of the first part, favoring said request, and by virtue of the power and authority to him given in and by said last will and testament and codicils thereto, and for and in consideration of the covenants herein contained, entered into by the said parties of the second part, and of ONE DOLLAR lawful money of the United States of America to him in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released and forever quit-claimed and by these presents does remise, release and forever quit-claim unto the said Alfred A. Jones and to his heirs and assigns.

ALL THAT the aforesaid lot or parcel of land hereinbefore particularly mentioned and described, with the appurtenances;

TO HAVE AND TO HOLD, the said lot or parcel of land freed and discharged of and from all right of entry for condition broken, right of action, reversion or forfeiture or otherwise, which the said James A. Bradley, at the time of his death, or which the said party of the first part now has or might or could have in or to the said lot or parcel of land hereinabove described, for or by reason of the hereinbefore recited conditions contained in the above mentioned deed of conveyance from the said James A. Bradley to the said Nelson E. Buchanon, Garret V.

Smock and George A. Smock and under which the said Alfred A. Jones holds title to the said lot or parcel of land hereinabove described, or for or by reason of any violation of the said conditions.

AND the said parties of the second part, for and in consideration of the foregoing release and of one dollar, lawful money of the United States of America to them in hand paid by the said party of the first part at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged do hereby covenant and agree to and with the said SAMUEL H. GILLESPIE, sole acting Executor and surviving Trustee as aforesaid, his heirs, legal representatives successors in office and assigns, that they the said parties of the second part their heirs and assigns, shall not, nor will, at any time or times hereafter, build or erect, or cause or procure, permit or suffer to be built or erected upon the lot or parcel of land hereinabove described, any dwelling house, or other kind of building (exclusive of ordinary open piazzas) nor any fence which shall exceed four (4) feet in height, nearer to the southerly line of the said Third Avenue than twenty-five (25) feet therefrom, nor nearer to the easterly line of the said Main Street than ten (10) feet therefrom; nor cause or procure, permit or suffer the said lot or parcel of land to be used for the manufacture or sale of intoxicating liquors thereon; nor use or occupy, or cause or procure, permit or suffer the said lot of land, or any part thereof, to be used or occupied for any manufacturing purpose whatever; nor erect, keep or carry on, or cause or procure, permit or suffer to be erected, kept or carried on upon the said lot of land, any hog pen, public laundry, livery stable, slaughter house, butcher shop, fish market, public gas works, or any dangerous, noxious, unwhole-

some or offensive establishment, business, trade or calling whatsoever.

And it is expressly understood and agreed, that the said several covenants on the part of the said parties of the second part, above specified, shall attach to and run with the said land, and that it shall be lawful, not only for the said Samuel H. Gillespie, acting Executor and Trustee as aforesaid, his heirs, legal representatives, successors in office and assigns, but also for the owner or owners of any lot or lots of land adjoining or in the neighborhood of the premises hereby released, deriving or having derived title from or through the said Samuel H. Gillespie, acting executor and Trustee as aforesaid or from or through the said testator, to institute and prosecute any proceedings at law or in equity against the person or persons violating or threatening to violate the same; It being understood however, that this covenant is not to be enforced personally for damages against the said parties of the second part, their heirs or assigns, unless they be the owner or owners of the said premises, or of some part thereof, at the time of a violation of the said covenant or of a threatened or attempted violation thereof, but the said covenant may be proceeded on for an injunction of, and for a specific performance and execution thereof against the said parties of the second part, their heirs or assigns, and for damages against the party or parties violating the said covenant, his or their heirs, executors administrators or assigns.

And it is further mutally understood and agreed by and between the said parties to these presents, as a condition precedent (and not merely as a covenant) that the

foregoing release by the said SAMUEL H. GILLESPIE, sole acting Executor and surviving Trustee as aforesaid, shall have no force or effect, and shall be for nothing holden until these presents shall be signed by the said parties of the second part and duly acknowledged by them and recorded in the Clerk's Office in and for the county of Monmouth in the same manner as deeds for lands are acknowledged and recorded, nor until all mortgages, judgments, liens and other encumbrances upon, against, or in anywise affecting the lot or parcel of land hereinabove described, shall be first duly paid, cancelled, released and discharged of record, nor unless the said Alfred A. Jones be the sole and actual owner of said land, in fee simple, at the time of the execution and recording of these presents.

IN WITNESS WHEREOF, the said party of the first part and the said parties of the second part hereto, have hereunto interchangeably set their hands and seals, the day and year first above written.

SAMUEL H. GILLESPIE (L. S.),
Executor and Trustee.

ALFRED A. JONES (L. S.)

MATTIE E. JONES (L. S.)

Signed, sealed and delivered in
the presence of
B. V. POLAND as to
ALFRED A. JONES and
MATTIE E. JONES
as to S. H. G.

KINSLEY TWINING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

BE IT REMEMBERED, that on this 12th day of June in the year of our Lord One Thousand Nine Hundred and twenty-three (1923), before me, the subscriber a Master in Chancery of the State of New Jersey, personally appeared SAMUEL H. GILLESPIE, sole acting executor and surviving trustee under the last will and testament and codicils thereto of JAMES A. BARDLEY, deceased, who, I am satisfied is the grantor in the within Deed of Release named, and I having first made known unto him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

KINSLEY TWINING,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY }
COUNTY OF MONMOUTH } ss:

BE IT REMEMBERED, that on this 14th day of May in the year of our Lord One Thousand Nine Hundred and twenty-three (1923), before me, the subscriber, a Attorney at Law, of the State of New Jersey, personally appeared Alfred A. Jones and MATTIE E. JONES, his wife, who, I am satisfied are the parties of the second part, named in and who executed the foregoing Instrument, and I having first made known unto them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

AND the said MATTIE E. JONES, wife as aforesaid, being by me privately examined, separate and apart from her said husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

B. V. POLAND,
Attorney at Law of N. J.

Received and Recorded July 23, A. D. 1924, at 8 A. M.

JOSEPH MCDERMOTT,
Clerk.

STATE OF NEW JERSEY, }
MONMOUTH COUNTY, } ss:

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify, that the foregoing copy of Deed:

SAMUEL H. GILLESPIE, EXR., &C.,
TO ALFRED A. JONES, MATTIE E., HIS UX.

is true and correct as the same remains of record in my office in Book 1264 of Deeds, page 411.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this Sixth day of February, A. D., Nineteen Hundred Twenty-eight.

(SEAL)

JOSEPH MCDERMOTT,
Clerk.

EXHIBIT C-3

JAMES A. BRADLEY, & WIFE
To
HUBBARD HURLEY

This Indenture, made the Sixteenth day of October in the year of our Lord one thousand eight hundred and eighty-two (1882) Between James A. Bradley and Helen M., his wife, of the township of Neptune in the County of Monmouth and State of New Jersey, of the first part, And Hubbard Hurley, of the township of Neptune in the County of Monmouth and State of New Jersey of the second part, Witnesseth, that the said party of the first part for and in consideration of Six hundred dollars ($600.00/100) lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns forever, All that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Asbury Park in the County of Monmouth and State of

New Jersey comprising parts of lots designated number Eight hundred and ninety (890), Eight hundred and ninety one (891), and eight hundred and ninety two (892) on a map of Asbury Park made by F. H. Kennedy & Son A. D. 1874. Beginning at a point in the southerly line of Third Avenue distant one hundred and fifty (150) feet westerly from the south west corner of Third Avenue and Bond Street, thence westerly along the southerly line of Third Avenue fifty (50) feet, thence southerly at right angles with Third Avenue one hundred and fifty (150) feet, thence easterly parallel with Third Avenue fifty (50) feet, thence northerly again at right angles with Third Avenue one hundred and fifty (150) feet to the place of beginning. The said premises are hereby conveyed upon the following conditions, to wit: That no house, cottage or other building shall ever be erected thereon nearer to the line of said Third Avenue than twenty five (25) feet therefrom. And also that not more than one house or cottage shall be built upon the said lot of land within the period of five years next after the date hereof. And also upon condition that the said premises shall never be used for the sale of intoxicating liquors or for any manufacturing purposes whatever, and that no hog pens, public laundries, livery stables, meat or fish markets or public gas works shall ever be erected thereon. And that no fence which shall exceed four (4) feet high shall ever be erected upon the said lot of land within the distance of twenty-five (25) feet from the line of said Third Avenue. And that in case the said party of the second part, or his heirs, executors, administrators or assigns or any of them shall violate any or all of the conditions herein contained, then this deed shall be null and void and thereupon the fee of the said land shall revert to the said party

of the first part. Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in any wise appertaining. Also All the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part, of in and to the same, and of in and to every part and parcel thereof. To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever and the said James A. Bradley does for himself, his heirs executors and administrators covenent and grant to and with the said party of the second part, his heirs and assigns that he the said James A. Bradley is the true lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof with the appurtenances thereunto belonging; and that the said land and premises or any part thereof at the time of the sealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation or by any encumbrance whatsoever by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises can or may be changed charged altered or defeated in any way whatsoever; And also that the said party of the first part now have good right full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. And Also that he the said James A. Bradley and his heirs will warrant secure and forever defend the said land and premises unto the said Hubbard Hurley his heirs and assigns forever, against the lawful claims and demands

of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever. In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

JAMES A. BRADLEY (L. S.)

HELEN M. BRADLEY (L. S.)

Signed, sealed and delivered
in the presence of

ISSAC C. KENNEDY.

STATE OF NEW JERSEY
COUNTY OF MONMOUTH } ss:

Be it Remembered, that on this Sixteenth day of October in the year of our Lord one thousand eight hundred and eighty two before me the subscriber, a Master in Chancery of said State, personally appeared James A. Bradley and Helen M. his wife, who I am satisfied, are the grantors in the within Deed of Conveyance named and I having first made known to them the contents thereof, they did each acknowledge that they signed sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said Helen M. Bradley being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely without any fear, threats or compulsion of her said husband.

ISSAC C. KENNEDY,
M. C. C.

Received and recorded October 18th, A. D. 1882.

THOS. V. ARROWSMITH,
Clerk.

STATE OF NEW JERSEY, }
MONMOUTH COUNTY, } ss:

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify, that the foregoing copy of Deed:

JAMES A. BRADLEY & WIFE
To HUBBARD HURLEY

is true and correct as the same remains of record in my office in Book 358 of Deeds on pages 283, &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 30th day of April, A. D. 1929.

(SEAL)

JOSEPH MCDERMOTT,
Clerk.

EXHIBIT C-4

JAMES A. BRADLEY, et ux.,
To
LEMUEL HOWELL

This Indenture made the Sixth day of February in the year of our Lord One Thousand Eight Hundred and Eighty-two (1882), Between James A. Bradley and Helen M., his wife, of the Township of Neptune in the County of Monmouth and State of New Jersey, of the first part; and Lemuel Howell, of the Township of Neptune in the County of Monmouth and State of New Jersey, of the second part; Witnesseth that the said party of the first part, for and in consideration of Four Hundred Dollars, lawful money of the United States of America to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented and paid have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part and to his heirs and assigns forever, All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Asbury Park in the County of Monmouth and State of New Jersey. Be-

ing the westerly half part of a Lot designated Number Eight Hundred and Eighty-Nine (No. 889) on a Map of Asbury Park, made by F. H. Kennedy & Son, A. D. 1874. Beginning at a point in the southerly line of Third Avenue distant one hundred and twenty five (125) feet westerly from the southwest corner of Third Avenue and Bond Street thence westerly along the southerly line of Third Avenue twenty five (25) feet. Thence southerly at right angles with Third Avenue one hundred and fifty (150) feet Thence easterly parallel with Third Avenue twenty five (25) feet thence northerly again at right angles with Third Avenue one hundred and fifty (150) feet to the place of Beginning. The said premises are hereby conveyed upon the following conditions, to wit: That no house Cottage or other building shall ever be erected thereon nearer the line of said Third Avenue than twenty five (25) feet and also upon conditions that the said premises shall never be used for the sale of intoxicating liquors or for any manufacturing purpose whatever, and that no hog-pens, public laundries, livery stables, gas works meat or fish markets shall ever be erected thereon and that in case the said party of the second part, his heirs executors, administrators or assigns or any of them shall violate any or all of the conditions herein contained then this deed shall be null and void and thereupon the fee of the said land shall revert to the said party of the first part.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining; Also all the estate, right, title, interest, property, claim and demand whatsoever, of the

said party of the first part, of, in, and to the same, and of, in and to every part and parcel thereof. To Have and to Hold all and singular the above described land and premises with the appurtenances unto the said party of the second part, his heirs and assigns to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. And the said James A. Bradley doth for himself, his heirs, executors and administrators covenant and grant to and with the said party of the second part his heirs and assigns that he the said James A. Bradley is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof with the appurtenances thereunto belonging; and that the said land and premises or any part thereof, at the time of the sealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever; And also that the said party of the first part now have good right full power and lawful authority to grant, bargain sell and convey the said land and premises in manner aforesaid. And Also that he the said James A. Bradley and his heirs will Warrant, secure and forever defend the said land and permises unto the said Lemuel Howell his heirs and assigns forever, against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

In Witness Whereof the said party of the first part

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

JAMES A. BRADLEY (L. S.)

HELEN M. BRADLEY (L. S.)

Signed, sealed and delivered
in the presence of

ISAAC C. KENNEDY.

STATE OF NEW JERSEY }
COUNTY OF MONMOUTH } ss:

Be it Remembered, That on this Sixth day of February in the year of our Lord One Thousand Eight hundred and eighty two (1882) before me the subscriber a Master in Chancery of said State, personally appeared James A. Bradley and Helen M. his wife who, I am satisfied are the grantors in the within Deed of Conveyance named; and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. And the said Helen M. wife as aforesaid being by me privately examined, separate and apart from her husband she did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

ISAAC KENNEDY,
M. C. C.

Rec'd and Recorded February 9th, A. D. 1882, at 10 o'clock A. M.

THOS V. ARROWSMITH,
Clerk.

STATE OF NEW JERSEY, }
MONMOUTH COUNTY, } SS:

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify, that the foregoing copy of Deed:

JAMES A. BRADLEY, et ux.,
To LEMUEL HOWELL

is true and correct as the same remains of record in my office in Book 345 of Deeds on pages 263, &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 4th day of November, A. D. 1929.

(SEAL)

JOSEPH MCDERMOTT,
Clerk.

EXHIBIT C-5

16

151—N. J. GENERAL WARRANTY.

DEED.

GILES H. HULLFISH, widower

TO

CATHERINE E. LISTER

DATED, April 18th., 1925

RECEIVED in the Clerks Office of the County of Monmouth State of New Jersey, on the 27 day of Apr A. D. 1925, at 8 o'clock in the forenoon, and recorded in Book 1295 of DEEDS for said County, on pages 84

JOSEPH McDERMOTT
Clerk.

Compared

Chg
2.30

BREWER & SMITH, INC.
Real Estate and Insurance
704 Mattison Ave.
Asbury Park, New Jersey

A1569 The W. H. Shurts Co., Law Blank Publishers,
280-284 Plane Street, Newark, N. J.

151—N. J. DEED—GENERAL WARRANTY

THIS INDENTURE

Made the 18th day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-five

Between
GILES H. HULLFISH, widower

of the City of New Brunswick in the County of Middlesex and State of New Jersey, party of the First Part;

And
CATHERINE E. LISTER

of the City of Asbury Park in the County of Monmouth and State of New Jersey, party of the Second Part:

WITNESSETH, That the said party of the First Part, for and in consideration of

ONE DOLLAR AND OTHER GOOD AND VALUABLE CONSIDERATIONS

lawful money of the United States of America, to him in hand well and truly paid by the said party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and

the said party of the First Part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the Second Part, and to her heirs and assigns, forever,

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Asbury Park in the County of Monmouth and State of New Jersey. New Jersey, comprising parts of lots Numbers Eight Hundred and Ninety, Eight Hundred and Ninety One and Eight Hundred and Ninety Two, on the map of Asbury Park, made by F. H. Kennedy & Son, A. D., 1874, bounded and described as follows;

BEGINNING at a point in the southerly line of Third Avenue, distant one hundred and fifty feet westerly from the southwesterly corner of Third Avenue and Bond Street; thence (1) westerly along the southerly line of Third Avenue, fifty feet; thence (2) southerly, at right angles with Third Avenue, one hundred and fifty feet; thence (3) easterly, parallel with Third Avenue, fifty feet; thence (4) northerly, again at right angles to Third Avenue, one hundred and fifty feet to the place of beginning.

THE said premises are conveyed subject to the covenants, conditions and restrictions contained in title deeds of record affecting said premises.

BEING the same premises conveyed to the said Giles H. Hullfish by Charles B. VanCleaf and Abbie S. VanCleaf,

his wife by Warranty Deed dated September 26th., 1919 and recorded in the Monmouth County Clerk's Office at Freehold, New Jersey in Book 1091 of Deeds, page 458 &c.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the First Part, of, in and to the same, and of, in and to every part and parcel thereof.

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the Second Part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the Second part, her heirs and assigns forever:

AND the said GILES H. HULLFISH does for himself, his heirs, executors and administrators covenant and agree to and with the said party of the Second Part, her heirs and assigns, that the said GILES H. HULLFISH is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the Second Part, here-

by made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever, except as aforesaid.

AND ALSO that the said party of the First Part now has good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid;

AND ALSO, that GILES H. HULLFISH will WARRANT, secure and forever defend the said land and premises unto the said CATHERINE E. LISTER, her heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

IN WITNESS WHEREOF, the said party of the First Part has hereunto set his hand and seal the day and year first above written.

GILES H. HULLFISH.
(SEAL)

Signed, Sealed and Delivered in
the presence of

CHARLES W. SEDAM.

Here attached 19 canceled U. S. Internal Revenue stamps ($9.50), with initials and date, "G. H. H., 4/18/25".

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX } SS:

BE IT REMEMBERED, That on this 18th day of April in the year of our Lord, One Thousand Nine Hundred and Twenty Five before me, the subscriber, a Notary Public of New Jersey personally appeared

GILES H. HULLFISH

who I am satisfied is the grantor mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

CHARLES W. SEDAM,
Notary Public of N. J.

AND the said

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

(SEAL)

EXHIBIT C-6

LUTHER ELTING, of the City of Poughkeepsie, State of New York, and SARAH E. W. ELTING, his wife,	: WARRANTY DEED. : Book 230 page 274, : Dated Jan. 24, 1871, : Acknowledged Jan. 30, : 1871
TO	
JAMES A. BRADLEY, of the City of Brooklyn, County of Kings, New York,	: Recorded, Feb. 18, 1871, : Cons. $80,000. :: $80. U. S. Stamps,

Conveys large tract of land of which complainants and defendants lands form a part.

JAMES A. BRADLEY and HELEN M., his wife, of the Township of Neptune,	: BARGAIN AND SALE : DEED. : Book 377 page 392,
TO	: Dated June 13, 1884,
NELSON E. BUCHANON, of the said Township of Neptune, GARRET V. SMOCK, of the Township of Eatontown, and GEORGE A. SMOCK, of said Township of Neptune,	: Acknowledged June 30, : 1884 : Recorded July 3, 1884, : Cons. $5330.24

Conveys defendants' lands.

The said premises is hereby conveyed upon the following conditions, to wit: That no house or cottage or other building shall ever be erected thereon nearer to the line

of the said Third Avenue than twenty five (25) feet therefrom, nor nearer to the line of said Main Street than ten (10) feet therefrom. And also upon condition that the said premises shall never be used for the sale of intoxicating liquors or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, meat or fish markets or public gas works shall ever be erected thereon, and that no fence which shall exceed (4) feet in height shall ever be erected thereon within the distance of twenty five (25) feet of said Third Avenue, nor within the distance of ten (10) feet from said Main street. And that in case the said parties of the second part, their heirs or assigns, or any of them shall violate any or all of the conditions herein contained, then and in that case this deed shall be null and void, and thereupon the fee of the said land shall revert to the said party of the first part, and his heirs.

ALFRED A. JONES and MATTIE E. JONES, his wife, of the Boro of Avon-by-the-Sea,	: WARRANTY DEED.
	: Book 1298 page 375,
	: Dated May 29, 1925,
	: Acknowledged May 29,
TO	: 1925
NATHAN VOGEL, of the City of Asbury Park,	Recorded June 1, 1925,
	: Cons. $1.00 &c.

Conveys defendants' lands.

NATHAN VOGEL, single,	: WARRANTY DEED.
of the City of Asbury Park,	: Book 1298 page 377,
TO	: Dated May 29, 1925,
JASPER C. SILBERGLEIT, of	: Acknowledged May 29,
the City of Asbury Park,	: 1925
	: Recorded June 1, 1925,
	: Cons. $1.00 &c.

Conveys an undivided one-third interest in defendants' lands.

Subject to all of the covenants, conditions and restrictions contained in prior title deeds of record affecting the within described premises, as reference thereto will more fully and at length appear.

NATHAN VOGEL, single,	: WARRANTY DEED.
of the City of Asbury Park,	: Book 1298 page 379,
TO	: Dated May 29, 1925,
AARON GLASER, of	: Acknowledged May 29,
the City of Asbury Park,	: 1925
	: Recorded June 1, 1925,
	: Cons. $1.00 &c.

Conveys an undivided one-third interest in defendants' lands.

Subject to all of the covenants, conditions and restrictions contained in prior title deeds of record affecting the within described premises, as reference thereto will more fully and at length appear.

Exhibit C-8

Exhibit C-9

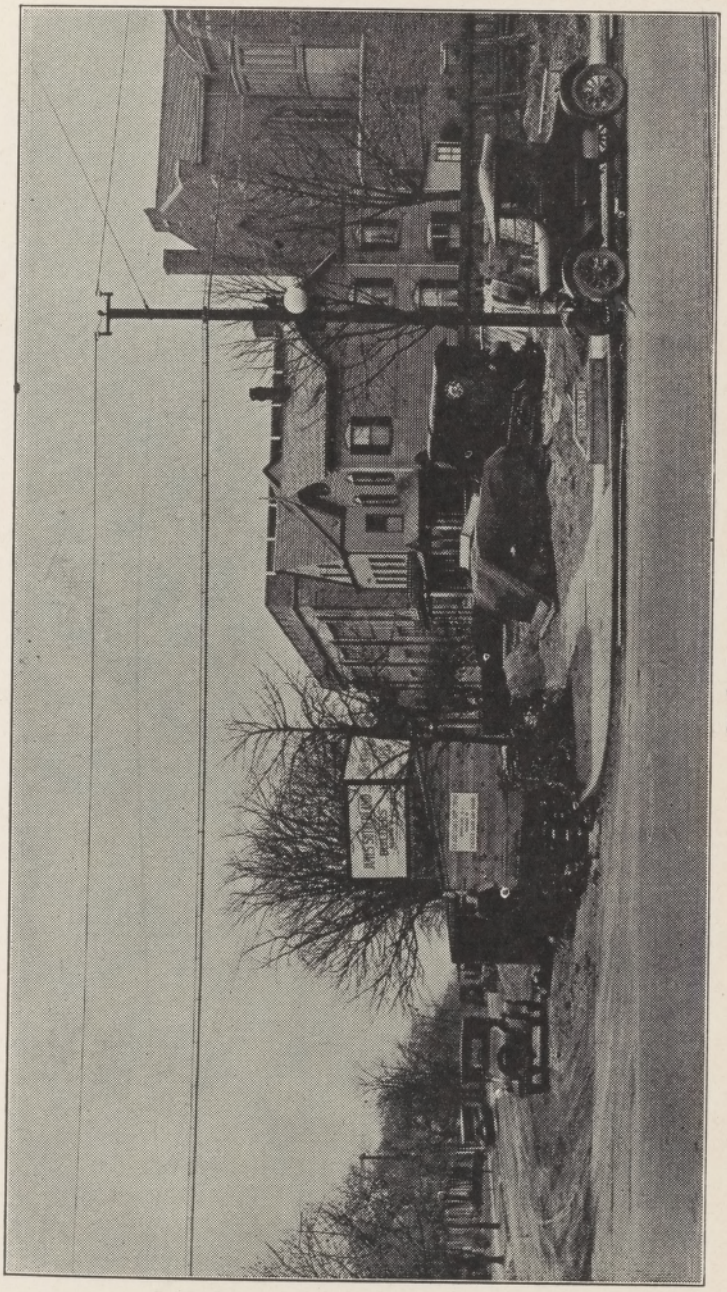

Exhibit C-11

Exhibit C-12

Exhibit C-15

EXHIBIT D-1

SARAH JANE HURLEY and)
JACOB, her husband)
TO)
JAMES A. BRADLEY)

THIS INDENTURE, Made the Seventeenth day of March in the year One Thousand Eight Hundred and Eighty two.

BETWEEN SARAH JANE HURLEY and JACOB HURLEY her husband, of the Township of Neptune in the County of Monmouth and State of New Jersesy, party of the first part;

AND JAMES A. BRADLEY of the same place aforesaid party of the second part;

WHEREAS, the said Sarah Jane Hurley wife as aforesaid is justly indebted to the said party of the second part, in the sum of FOUR THOUSAND FIVE HUNDRED ($4500.) Dollars, lawful money of the United States of America, secured to be paid by their certain bond or obligation bearing even date with these presents, in the penal sum of NINE THOUSAND DOLLARS ($9,000.) lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of FOUR THOUSAND FIVE HUNDRED DOLLARS ($4,500.) lawful money as aforesaid to the said party of the second part, his executors, administrators or assigns, on the Seventeenth day of

March which will be in the year One Thousand Eight Hundred and eighty seven and the interest thereon to be computed from the date thereof at and after the rate of six per cent per annum, and to be paid semi-annually. And it is thereby expressly agreed, that should any default be made in the payment of the said interest or any part thereof, on any day whereon the same is made payable as above expressed, and should the same remain unpaid and in arrear for the space of thirty days, that then and from thenceforth, that is to say, after the lapse of the said thirty days, the aforesaid principal sum of FOUR THOUSAND FIVE HUNDRED DOLLARS ($4,500.) with all arrearage of interest thereon, shall, at the option of the said party of the second part, or his legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof, may not then have expired, anything therein before contained to the contrary thereof in any wise notwithstanding; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

NOW THIS INDENTURE WITNESSETH, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of One Dollar, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, release, convey and confirm unto the said

party of the second part, and to his heirs and assigns, forever.

ALL that certain lot tract or parcel of land and premises hereinafter particularly described, situate lying and being in the Borough of Asbury Park, in the County of Monmouth and State of New Jersey, known as the westerly part of Lots Eight hundred and ninety (890) Eight hundred and ninety one (891) and Eight hundred and ninety two (892) on a map of Asbury Park, made by F. H. Kennedy & Son, A. D. 1874. Beginning at the southeast corner of Third Avenue and Main Street. Thence southerly along the easterly line of Main Street one hundred and fifty (150) feet, Thence easterly parallel with Third Avenue ninety (90) feet. Thence northerly at right angles with Third Avenue, one hundred and fifty (150) feet to the southerly line of Third Avenue, Thence westerly along the southerly line of Third Avenue ninety (90) feet to the place of beginning.

Being the same premises conveyed by the said James A. Bradley and Helen M. his wife to the said Sarah Jane Hurley, wife as aforesaid by deed bearing even date herewith. And these presents are given to secure the payment of the whole amount of the consideration of purchase money of the said premises, to wit: the sum of TWO THOUSAND FIVE HUNDRED DOLLARS ($2500.) and also to secure the payment of TWO THOUSAND DOLLARS ($2,000.) money loaned in addition thereto.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions,

remainder and remainders, rents, issues and profits thereof.

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever.

PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part their heirs, executors, and administrators shall well and truly pay unto the said party of the second part, or to his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and times and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents and the estate hereby granted, shall cease, determine and be void. And the said Sarah Jane Hurley wife as aforesaid for herself her heirs, executors and administrators, doth covenant and agree to pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money, and interest, as mentioned above and expressed in the condition of the said bond. And it is also agreed by and between the parties to these presents, that the said party of the first part, shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss

or damages by fire, by insurers, and in an amount approved by the said party of the second part, his executors, administrators or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof it shall be lawful for the said party of the second part to effect such insurance and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation and secured by these presents payable on demand, with interest at the rate of six per cent, per annum, from the time of payment of such premium or premiums.

IN WITTNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

SARAH JANE HURLEY (L. S.)

JACOB HURLEY (L. S.)

Sealed and Delivered
in the presence of

DAVID HARVEY, JR.

STATE OF NEW JERSEY }
MONMOUTH COUNTY, } SS:

BE IT REMEMBERED, That on this Seventeenth day of March in the year One Thousand Eight Hundred and Eighty two, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Sarah Jane Hurley and Jacob Hurley, her husband, who, I am satisfied are the grantors in the within Indenture of Mortgage named and who executed, the same, and I having first made known to them the contents thereof they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed: And the said Sarah Jane Hurley, wife as aforesaid being by me privately examined, separate and apart from her said husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely and without any fear, threats or compulsion of or from her said husband.

DAVID HARVEY, JR.,
Master in Chancery of New Jersey.

Received and Recorded March 18th, A. D. 1882 at 7 o'clock A. M.

THOS. V. ARROWSMITH,
Clerk.

STATE OF NEW JERSEY }
MONMOUTH COUNTY } ss:

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify that the foregoing copy of Mortgage:

SARAH JANE HURLEY and JACOB, her husband
To JAMES A. BRADLEY

is true and correct as the same remains of record in my office in Book V 4 of Mortgages pages 3 &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 4th day of November A. D. 1929.

(SEAL)

JOSEPH MCDERMOTT,
Clerk.

EXHIBIT D-2

JOHN I. THOMPSON, Sheriff
TO
JAMES A. BRADLEY

To All To whom these presents shall come.

I. JOHN I. THOMPSON,
High Sheriff of the County of Monmouth, in the State of New Jersey, send Greeting.

Whereas, A certain Writ, lately issued out of the Court of Chancery of the State of New Jersey, to the Sheriff of the said County of Monmouth, directed and delivered in the words following to wit: New Jersey To-wit: The State of New Jersey to the Sheriff of the County of Monmouth, Greeting: Whereas on the twenty-eighth day of February in the year of our Lord One Thousand Eight Hundred and eighty four, by a certain decree made in our Court of Chancery before our Chancellor at Trenton, in a certain cause therein depending, wherein James A. Bradley is complainant and Sarah Jane Hurley and Jacob Hurley her husband, Nelson E. Buchanon, Garret V. Smock, George A. Smock, Daniel H. Robbins, George T. Hook and Phineas M. Barber are defendants. It was ordered, adjudged, and decreed, that certain mortgaged premises with the appurtenances, in the bill of complaint in the said cause particularly set forth and described, that is to say;

All the following described tract or parcel of land and premises, situate, lying and being in the Borough of Asbury Park, in the County of Monmouth, and State of New Jersey, known as the westerly part of Lots Eight hundred and ninety (890) Eight hundred and ninety-one (891), and Eight hundred and ninety two (892) on a map of Asbury Park made by F. H. Kennedy & Son A. D. 1874. Beginning at the south east corner of Third Avenue and Main Street, thence southerly along the easterly line of Main Street one hundred and fifty (150) feet thence easterly parallel with Third Avenue ninety (90) feet, thence northerly at right angles with Third Avenue one hundred and fifty (150) feet to the southerly line of Third Avenue, thence westerly along the southerly line of Third Avenue ninety (90) feet to the place of beginning. Being the same premises conveyed by the said James A. Bradley and Helen M. his wife to the said Sarah Jane Hurley wife as aforesaid by deed bearing date the seventeenth day of March A. D. 1882.

TOGETHER with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and remainders, rents, issues and profits thereof.

AND ALSO, all the estate, right, title, interest, use, property, claim and demand of the said defendants of, in, to and out of the same, as may be needful and necessary for the purpose, be sold to pay, and satisfy in the first place unto the said complainant James A. Bradley, the sum of FIVE THOUSAND AND SIXTEEN DOLLARS and SEVENTY FIVE CENTS ($5016.75) the principal and interest secured by a certain mortgage given by the said defendants Sarah Jane Hurley and Jacob Hurley her

husband to the said complainant James A. Bradley bearing date the seventeenth day of March A. D. 1882, together with lawful interest thereon from the sixteenth day of February Eighteen hundred and eighty four until the same be paid and satisfied, and also the costs of the said complainant and in the second place unto the defendants, Nelson E. Buchanon, Garret V. Smock and George A. Smock the sum of THREE THOUSAND SIX HUNDRED and FORTY ONE DOLLARS and SEVENTY FIVE CENTS ($3641.75) together with lawful interest thereon as aforesaid until the same be paid and satisfied, and in the third place unto the defendant George T. Hook the sum of NINETY ONE DOLLARS AND FORTY SEVEN CENTS ($91.47) together with lawful interest thereon as aforesaid until the same be paid and satisfied and in the fourth place unto the defendant Phineas M. Barber the sum of ONE HUNDRED AND NINETY THREE DOLLARS and THIRTY EIGHT CENTS ($193.38), together with lawful interest thereon from the said 16th, day of February A. D. 1884 until the same be paid and satisfied, and that for that purpose a writ of Fieri Facias should issue, directed to the Sheriff of the County of Monmouth, commanding him to make a sale as aforesaid. And that the surplus money arising from such sale if any there be, should be brought into the said Court subject to the further order of said Court, as by the said decree, remaining as a record in our said Court of Chancery at Trenton doth and may more fully appear. And whereas, the costs of the said complainant have been duly taxed at ONE HUNDRED AND TEN DOLLARS and NINE CENTS; Therefore, you are hereby commanded, that you cause to be made of the premises aforesaid, by selling so much thereof as may be needful and necessary for the purpose, the said sum

of FIVE THOUSAND and SIXTEEN DOLLARS and SEVENTY FIVE CENTS ($5016.75) so as aforesaid decreed to be paid to the said complainant, and the same you do pay to the said complainant or his solicitor, together with lawful interest thereon as aforesaid. And also the sum aforesaid of costs. And also to the aforesaid several defendants their said several debts and interest in manner aforesaid, and that you have those moneys before our said Chancellor, in our Court of Chancery aforesaid at Trenton on the Third Tuesday of May next to render to the said complainant and said several defendants, and also the surplus money, if any there be, to abide the further order of our said Court, according to the decree aforesaid. And you are to make return at the time and place aforesaid, by certificate under your hand of the maner in which you shall have executed this our writ, together with this writ, Witness, Theodore Runyon Esquire, our Chancellor at Trenton aforesaid, the Tenth day of March in the year of our Lord One Thousand, Eight Hundred and Eighty four, Isaac Kennedy, Solr. G. S. Duryee Clk. - - Recorded in the Clerk's Office, of the Court of Chancery of the State of New Jersey, at Trenton in Book Y 5, of Executions, page 551 &c., and examined by me - - G. S. Duryee Clk. By virtue of which said writ, I, the said John I. Thompson, Sheriff as aforesaid, did levy on all the land and real estate in the hereinbefore recited writ particularly set forth and described. And to the end that a sale of the said lands should be made pursuant to the statutes in such case made and provided. I, the said John I. Thompson, Sheriff as aforesaid, by public advertisements signed by myself and set up at five or more public places in said County of Monmouth one whereof was in the Township of Neptune

wherein said real estate is situate, at least two months next before the time so appointed for selling the same; And also published in the Monmouth Democrat & The Asbury Park Journal two of the newspapers printed and published in the said County of Monmouth one of which was and is a newspaper printed and published at the County seat of said County, and the other was and is a newspaper printed and published nearest to the place in the said County, in which the said real estate is situate, and circulating in that neighborhood at least four weeks successively, once a week next preceding the said time, did give notice of the time and place when the said lands would be exposed to sale. And I, the said John I. Thompson, Sheriff, as aforesaid, at the time and place so appointed, that is to say, on Friday the Sixteenth day of May in the year of our Lord One Thousand Eight Hundred and eighty four between the hours of twelve and five oclock in the afternoon, at the Court House, at Freehold in the Township of Freehold in said County of Monmouth, did in an open and public manner, expose to sale at public vendue to the highest bidder, all the land and real estate in the hereinbefore recited writ particularly set forth and described. And James A. Bradley, of the Township of Neptune in the County of Monmouth and State of New Jersey, bidding the sum of FIVE THOUSAND THREE HUNDRED AND THIRTY DOLLARS and TWENTY FOUR CENTS for said lots of land and real estate and no person or persons bidding so much or more the same was by me, at the time and place, and between the hours aforesaid, in an open and public manner, struck off and sold to him for that amount he being the highest bidder therefor, And I, the said John J. Thompson, Sheriff as aforesaid, having reported the said sale

to the said Court as required by the statute in such case made and provided and the same having been approved and confirmed as valid and effectual in law, and I having been by rule of said Court directed to make and execute a good and sufficient conveyance in the law to the said purchaser for the premises aforesaid. Now know ye, that I, the said John I. Thompson Sheriff as aforesaid, by virtue of the premises above mentioned, and for and in consideration of the said sum of FIVE THOUSAND THREE HUNDRED AND THIRTY DOLLARS AND TWENTY-FOUR CENTS, the receipt whereof I do hereby acknowledge, have granted, bargained and sold and by these presents do grant, bargain, sell and convey unto the said James A. Bradley his heirs and assigns.

All the following described tract or parcel of land and premises situate, lying and being in the Borough of Asbury Park, in the County of Monmouth and State of New Jersey, known as the westerly part of lots eight hundred and ninety (890) Eight hundred and ninety one (891) and Eight Hundred and ninety two (892) on a map of Asbury Park, made by F. H. Kennedy & Son, A. D. 1874. Beginning at the southeast corner of Third Avenue and Main Street, thence southerly along the easterly line of Main Street one hundred and fifty (150) feet, thence easterly parallel with Third Avenue, ninety (90) feet, thence northerly at right angles with Third Avenue one hundred and fifty (150) feet to the southerly line of Third Avenue, thence westerly along the southerly line of Third Avenue ninety (90) feet to the place of Beginning. Being the same premises conveyed by the said James A. Bradley and Helen M. his wife, to the said Sarah Jane Hurley wife as aforesaid by deed

bearing date the seventeenth day of March A. D. 1882 as in the hereinbefore recited writ particularly set forth and described. Together with the hereditaments and appurtenances to the same belonging, to have and to hold the hereby granted lands and premises, with the appurtenances unto the said James A. Bradley his heirs and assigns forever, according to the force, power and effect of the statutes in such case made and provided.

IN WITNESS WHEREOF, I the said John I. Thompson, Sheriff as aforesaid, have hereunto set my hand and seal this Thirteenth day of June in the year of our Lord One Thousand Eight Hundred and Eighty four.

JOHN I. THOMPSON Shf. (L. S.)

Signed, Sealed and Delivered
in the presence of

J. L. HOWELL

STATE OF NEW JERSEY
MONMOUTH COUNTY } SS:

BE IT REMEMBERED, That on the Eighteenth day of June in the year of our Lord One Thousand Eight Hundred and Eighty four before me the subscriber, one of the Masters in the Court of Chancery of said State, personally appeared John I. Thompson, High Sheriff of the County of Monmouth, well known to me to be the grantor mentioned in the within Deed; and I having first made

known to him the contents of the same, he, the said John I. Thompson, High Sheriff as aforesaid, acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

J. L. Howell
Master in Chancery of N. J.

10

State of New Jersey
Monmouth County } ss:

I, John I. Thompson, High Sheriff, as aforesaid, do solemnly swear that the real estate described in this deed, made by me to James A. Bradley was by me sold by virtue of a good and subsisting execution as is therein recited, and that the money ordered to be made has not been to my knowledge or belief paid or satisfied; that the time and place of sale of said land and real estate was by me duly advertised as required by law; and that the same was cried off and sold to a bona fide purchaser for the best price that could be obtained.

20

John I. Thompson.

30

Sworn and subscribed to this Eighteenth day of June A. D. 1884, before me, one of the Masters of the Court of Chancery of the State of New Jersey. And I having examined this deed do approve the same, and order it

to be recorded as a good and sufficient conveyance of land and real estate therein described.

J. L. HOWELL
Master in Chancery of N. J.

Received and Recorded Aug. 15, 1884.

JAMES H. PATTERSON,
Clerk.

STATE OF NEW JERSEY
MONMOUTH COUNTY } ss:

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify that the foregoing copy of Deed:

JOHN I. THOMPSON, Sheriff,
to JAMES A. BRADLEY

is true and correct as the same remains of record in my office in Book 381 of Deeds pages 390 &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 4th day of November A. D. 1929.

(SEAL)

JOSEPH MCDERMOTT,
Clerk.

EXHIBIT D-3

	)	The original mortgage
ALFRED A. JONES et ux.	)	this day
TO	)	Aug 15 1928
ASBURY PARK B. & L. ASS'N.	)	produced to me by Nat.
	)	Com. Title &c duly
	)	cancelled.

JOSEPH MCDERMOTT,
Clerk.

THIS INDENTURE made the ninth day of May in the year One Thousand nine hundred and twenty four:

BETWEEN ALFRED A. JONES AND MATTIE E. JONES his wife of the City of Asbury Park in the County of Monmouth and State of New Jersey, party of the first part and the

ASBURY PARK BUILDING AND LOAN ASSOCIATION a Corporation of the State of New Jersey party of the second part:

WHEREAS, the said Alfred A. Jones is justly indebted to the said party of the second part, in the sum of Seventeen thousand dollars lawful money of the United States of America secured to be paid by his certain bond or obligation, bearing even date with these presents in the penal sum of Thirty four thousand dollars lawful money as aforesaid, conditioned for the payment of the

said first mentioned sum of Seventeen thousand dollars lawful money as aforesaid, to the said party of the second part, its successors or assigns, in the manner following viz: By the payment of One dollar dues per month on each of 85 shares of the fifty-sixth series of shares of the capital stock of said Association, owned by said party of the first part, and standing in their names on the books of said Association, and assigned to said party of the second part, as collateral security for the payment hereof, and on which this loan is based, on the first Friday of each and every month hereafter, or such other time as may hereafter be appointed for that purpose, until the said shares shall attain the par value of Two hundred dollars each, together with interest on said sum of Seventeen thousand dollars to be computed from and after the day of the date hereof at the rate of six per cent, per annum, and payable monthly at the same time and in the same manner as the stock-payment aforesaid and also all fines that may become due, as provided for by the Constitution and By-laws of said Association, which have been duly assented to by said parties of the first part and are made a part hereof.

AND IT IS HEREBY EXPRESSLY AGREED that should any default be made in the payment of the said installments or premium on said shares, or interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said installments or premium on said shares, or interest or any part of them, or either of them, remain unpaid and in arrear for the

space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge imposition or lien, or any or either of them, remain unpaid and in arrears for the space of thirty days, or should the said parties of the first part refuse or neglect for thirty days after demand to produce and exhibit to the party of the second part the vouchers showing the payments of such tax, assessment, water rent or other lien due and payable, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Seventeen thousand dollars or the residue thereof with all arrearage of interest, premiums and fines, thereon, shall at the option of the said party of the second part, or its legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding; and the said Mortgagee, may, at its option, pay such tax, assessment or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and by this mortgage, and shall be payable on demand with interest at six per centum per annum as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

NOW THIS INDENTURE WITNESSETH, That the said partys of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dol-

lar to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to its successors and assigns, forever. All that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Asbury Park in the County of Monmouth and State of New Jersey, comprising parts of Lots designated as Numbers Eight hundred and ninety (890) eight hundred and ninety one (891) and eight hundred and ninety two (892) on a Map of Asbury Park, made by F. H. Kennedy & Son A. D. 1874.

BEGINNING at a point in the easterly line of Main Street, distant twenty five feet southerly from the southeast corner of Third Avenue and Main Street; thence (1) southerly along the easterly line of Main Street, one hundred and twenty five feet; thence (2) easterly parallel with Third Avenue, ninety feet; thence (3) northerly at right angles with Third Avenue and parallel with Main Street, one hundred and twenty five feet to a point; thence (4) westerly at right angles to Main Street, ninety feet to the point or place of beginning.

BEING part of the same premises conveyed unto the said Alfred Jones by T. Herman Beringer and Estelle Beringer, his wife, by deed bearing date April 1st, 1922 and recorded in the Monmouth County Clerk's Office April 6th, 1922 in Book 1177 of Deeds for said County on paves 244 &c.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. AND ALSO, all the estate, right, title interest, property, possession, claim and demand whatsoever as well in law as in equity, of the said partys of the first part, of, in and to the same and every part and parcel thereof, with the appurtenances;

TO HAVE AND TO HOLD the above granted and described premises, with the appurtenances unto the said party of the second part, its successors and assigns to its and their own proper use, benefit and behoof forever. AND the said party of the first part, and their heirs the above described and granted premises and every part thereof, with the appurtenances, in the quiet and peaceable possession of the said party of the second part, its successors, legal representatives, and assigns, against every person whomsoever will Warrant and forever Defend.

PROVIDED ALWAYS and these presents, are upon this express condition, that if the said party of the first part, their heirs, executors or administrators, shall well and truly pay unto the said party of the second part its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

AND IT IS ALSO AGREED, by and between the parties to these presents, that the said party of the first part, shall

and will keep the buildings erected, and to be erected upon the lands above conveyed, insured against loss or damage by fire, by insurers and in a Company and an amount approved by the said party of the second part, its successors or assigns and assign the policy, and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand with interest at the rate of six per cent per annum, from the time of payment of such premium or premiums.

And the said Alfred A. Jones the owner of the land above described for himself, his heirs and assigns, does further covenant and agree to and with the said party of the second part, its successors and assigns, that he and they will pay in full, all taxes, levied or to be levied upon the lands embraced in this mortgage and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately at the option of the said party of the second part hereto.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ALFRED A. JONES (L. S.)

MATTIE E. JONES (L. S.)

Sealed and delivered
in the presence of

FORMAN T. BAILEY

STATE OF NEW JERSEY
COUNTY OF MONMOUTH } ss:

BE IT REMEMBERED, That on this twelfth day of May in the year one thousand nine hundred and twenty-four, before me the subscriber personally appeared Alfred A. Jones and Mattie E. Jones his wife, who I am satisfied are the Mortgagors in the within Mortgage named; and I having first made known to them the contents thereof they did thereupon each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed;

FORMAN T. BAILEY,
Attorney at Law of
State of New Jersey.

Received and Recorded May 13th, A. D. 1924 at 8 A. M.

JOSEPH McDERMOTT,
Clerk.

STATE OF NEW JERSEY } ss:
MONMOUTH COUNTY }

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify that the foregoing copy of Mortgage:

ALFRED A. JONES et ux
To ASBURY PARK B. & L. ASS'N.

is true and correct as the same remains of record in my office in Book 697 of Mortgages pages 229 &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 4th day of November A. D. 1929

(SEAL)

JOSEPH MCDERMOTT,
Clerk.

CONCLUSIONS OF VICE-CHANCELLOR BERRY

BERRY, V. C.

By this bill the complainant seeks an injunction restraining the defendants from violating a building restriction. Complainant is the owner of a lot of land having a street frontage of fifty feet and a depth of one hundred fifty feet and comprising parts of three lots shown on map of Asbury Park made by F. H. Kennedy & Son, A. D. 1874, and which property was formerly owned by James A. Bradley. The defendants are the owners of an adjoining lot with a street frontage of ninety feet on Third Avenue and a depth of one hundred fifty feet, abutting on Main Street its full depth, and being parts of three lots shown on the same map, also formerly owned by James A. Bradley. Bradley conveyed to the defendant's predecessor in title by deed dated March 17, 1882, containing the following restriction:

> "The said premises are hereby conveyed upon the following conditions to wit: That no house, garage or other building shall ever be erected thereon nearer to the line of the said Third Avenue than twenty-five (25) feet, therefrom, nor nearer to the line of said Main Street than ten (10) feet therefrom."

The deed to the complainant's predecessor in title, dated October 16, 1882, contained the following restriction:

> "The said premises are hereby conveyed upon the following conditions, to-wit: That no house, cottage

or other building shall ever be erected thereon nearer to the line of said Third Avenue than twenty-five (25) feet therefrom."

Both deeds contained the following provision, together with other restrictions not pertinent to this controversy:

"And that in case the said party of the second part or his heirs, executors, administrators or assigns or any of them shall violate any or all of the conditions herein contained, then this deed shall be null and void and thereupon the fee of the said land shall revert to the party of the first part."

Prior to, and at the date of these deeds, Bradley also owned a large number of lots shown on said map, among which was a lot immediately adjoining on the east that of complainant. On February 6, 1882, Bradley conveyed that lot to one Howell, by deed containing the same restriction for a twenty-five foot setback and under a like condition of forfeiture. At the time of the purchase of her lot defendant's predecessor in title gave back a purchase money mortgage. This was subsequently foreclosed and the property conveyed to Bradley by the Sheriff by deed dated June 13, 1884, and on the same date Bradley conveyed that lot to Buchanan and others by deed containing the same provision with respect to the twenty-five foot set back on Third Avenue and the ten foot setback on Main Street. This deed contained practically the same restrictions as the original deed from Bradley to Sarah Jane Hurley and the same condition respecting forfeiture.

It is undisputed that the defendants have built over the

entire restricted area on their lot notwithstanding timely protest by the complainant and prompt application to this Court for relief, and notwithstanding that the order denying preliminary restraint contained the following provision: "if the defendants erect a building which in any way violates the restrictions in the deed to the property at the southeast corner of Third Avenue and Main Street, in the City of Asbury Park, the complainant's rights shall not thereby be prejudiced, but the defendants shall be deemed to have erected such building at their peril." If, therefore, it becomes necessary to issue a mandatory injunction in this cause, the defendants have no cause for complaint on the ground of hardship.

It is admitted that there was no neighborhood scheme, and it is objected on the part of the defendants that as the restrictions were imposed by way of condition instead of covenant, the benefits thereof were personal to the grantor and the restrictions are not enforceable at complainant's suit; also, that the complainant does not stand in the position of a subsequent grantee of the common grantor because the title to the defendant's lot revested in Bradley by virtue of the foreclosure sale prior to the conveyance to complainant's predecessor in title by Bradley. But the form in which the restriction is imposed, whether by condition, covenant or reservation, is not so important, the real question being whether it was *intended* for the benefit of the retained land of the grantor. *Coudert v. Sayre,* 46 N. J. E. 386; *Hayes v. Waverly and Passaic Railroad Company,* 51 N. J. Eq. 345. And while there is no presumption that the restrictions here were imposed for the benefit of lands retained by the grantor. (*McNichol v. Townsend,* 73 N. J. Eq. 277, *Hemsley v. Marlborough,*

62 N. J. Eq. 164) the evidence discloses circumstances from which it might be concluded that that was the grantor's purpose in imposing the condition. In *Leaver v. Gorman,* 73 N. J. Eq. 129, and in *Genung v. Harvey,* 79 N. J. Eq. 57, Vice Chancellor Stevens, in construing a similar restriction imposed by way of condition, seems to have assumed that the restriction was made for the benefit of retained lands, but Vice Chancellor Leaming, in *Sailor v. Podolski,* 82 N. J. Eq. 459, questioned the force of surrounding circumstances to indicate such purpose. Except for the foreclosure and reconveyance to Bradley by the Sheriff, above mentioned, the complainant stands in the position of a subsequent grantee from the common grantor, and the conveyance by Bradley to Buchanan and others on the date of the Sheriff's deed is a circumstance from which the existence of a continuous restriction might be assumed, or a republication or revivor thereof found. *Genung v. Harvey, supra.* However, it is not necessary to here decide these vexing questions, as there are other grounds upon which a decision in favor of the complainant may be based.

On May 14, 1923, an agreement was entered into between Samuel H. Gillespie, Executor of James A. Bradley, the common grantor, and Alfred A. Jones and wife, who were then the owners of the defendant's lots, by virtue of which the right of forfeiture and re-entry reserved in the Buchanan deed were released and quit claimed and instead thereof the following agreement was substituted:

"And the said parties of the second part—do hereby covenant and agree to and with the said Samuel H. Gillespie, sole acting executor and surviving trustee,

as aforesaid, his heirs, legal representatives, successors in office and assigns, that they the said parties of the second part, their heirs and assigns, shall not, nor will, at any time or times hereafter, build or erect, or cause or procure, permit or suffer to be built or erected upon the lot or parcel of land hereinabove described, any dwelling house, or other kind of building (exclusive of ordinary open piazzas) nor any fence which shall exceed four (4) feet in height, nearer to the southerly line of the said Third Avenue than twenty-five (25) feet therefrom, nor nearer to the easterly line of the said Main Street than ten (10) feet therefrom;—

And it is expressly understood and agreed, that the said several covenants on the part of the said parties of the second part, above specified, shall attach to and run with the said land, and that it shall be lawful, not only for the said Samuel H. Gillespie, acting executor and Trustee as aforesaid, his heirs, legal representatives, successors in office and assigns, *but also for the owner or owners of any lot or lots of land adjoining or in the neighborhood of the premises hereby released, deriving or having derived title from or through the said Samuel H. Gillespie, acting executor and trustee as aforesaid, or from or through the said testator, to institute and prosecute any proceedings at law or in equity against the person or persons violating or threatening to violate the same;* it being understood, however, that this covenant is not to be enforced personally for damages against the said parties of the second part, their heirs or assigns, unless they be the owner or owners of the said premises, or of some part thereof, at the time of a violation of the said covenant, or

of a threatened or attempted violation thereof, *but the said covenant may be proceeded on for an injunction of, and for a specific performance and execution thereof against the said parties of the second part, their heirs or assigns,——.*"

There is no doubt but that under the provisions of that agreement, which was duly executed, acknowledged and recorded prior to the acquisition of title by the defendants, the complainant's right to restrain the violation of the covenants therein contained is complete. The conveyance was made expressly for the benefit of the grantees of Bradley and his executor, irrespective of whether or not they were classed as prior or subsequent grantees. The general rule of law is that a third person may enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. 6 R. C. L. 884, Sec. 371. The rule is in force in this state by statute. P. L. 1898, p. 481; P. L. 1902, p. 709; P. L. 1903, p. 541; 3 C. S. p. 4059, Sec. 28; *Holt v. United Security Life Insurance Company,* 76 N. J. L. 585, *Styles v. Long Company,* 70 N. J. L. 301.

"That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use, or abstain from using, the land in a particular way, is what I never knew disputed.——It is said that, the covenant being one which does not run with the land, this court cannot enforce it. But the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by this vendor, and with notice of which he pur-

chased." (Per Lord Cottenham in *Tulk v. Moxhay,* 2 Phil. 774, cited in *Coudert v. Sayre,* supra). The pertinency of that language to the instant case is not difficult to see. And on general principles equity will prevent a party having knowledge of the just rights of another from defeating such rights. *Brewer v. Marshall,* 19 N. J. Eq. 537. To permit the defendants to build upon the restricted area with immunity would be to violate this cardinal principle of equitable jurisprudence. In the agreement of May 14, 1923, it was provided, however, that it was not to become effective until the agreement was signed and acknowledged by the parties of the second part, and recorded in the County Clerk's Office; until all mortgages, judgments, liens and other encumbrances affecting the lots were paid, canceled, released and discharged of record; nor unless Jones, the party of the second part, was the sole and actual owner in fee of the premises described, at the time of the execution and recording of the agreement. The agreement was duly executed on May 14, 1923, and recorded on July 23, 1924. Jones was then the sole and actual owner in fee of the premises and there were no outstanding mortgages, judgments, liens or other encumbrances affecting the lot, so far as the records disclose, at the time the agreement was executed. On May 9, 1924, and before the agreement was recorded, however, Jones executed a mortgage in favor of the Asbury Park Building & Loan Association which was recorded on May 13, 1924, and remained open on the record until cancelled on Aug. 15, 1928, at which time Jones was not the owner. The defendants claim that consequently the agreement never became effective. But this, in my judgment, places a strained construction on the instrument. I think the mortgages and other liens referred to were those exist-

ing at the time of the execution of the agreement and not those which might become liens thereafter. This defense, therefore fails.

I will advise a decree in accordance with these conclusions.

Decided October 3, 1930.

TESTIMONY

Transcript of proceedings in the above entitled cause before the HONORABLE MAJA LEON BERRY, Vice Chancellor, at the Chancery Chambers, Long Branch, New Jersey, on Thursday, November 7, 1929, at 10:30 A. M.

APPEARANCES:

MESSRS. GERAN, MATLACK AND LAUTMAN,
MR. LAUTMAN PRESENT,
SOLICITORS OF COMPLAINANT.

MESSRS. COOK AND STOUT,
MR. O'HAGEN PRESENT,
SOLICITORS OF DEFENDANT VOGEL.

MR. LAUTMAN—This is a bill for an injunction to enforce a building line restriction on defendant's lot. The property of defendant is located at the south east corner of Third avenue and Main Street, Asbury Park, and subject to a building line restriction of twenty-five feet. Defendant owns the building and we obtained an order to show cause as to why they should not be enjoined from building over that line, and your Honor permitted them to proceed at their peril. They have built there approximately twenty-five feet, the restriction is twenty-five feet, and they have built to the limit of their lot.

MR. O'HAGEN—Our defense is, in the first place, there are no restrictive covenants applicable to the lot of which the defendant is the owner. All this property at one time was owned by James I. Bradley, and the original deed of our lot by James I. Bradley contains no restrictions which may be enforced by this complainant. A further defense is that the building—

THE COURT—That is a statement of contention but not a defense. You say it cannot be enforced against this defendant here—

MR. O'HAGEN—The deed is upon condition that certain things mentioned be done by the grantee in that deed, and there is no engagement whatever upon the part of the grantee to do or refrain from doing anything.

THE COURT—Is not the acceptance of a conditional deed in effect an agreement?

MR. O'HAGEN—This particular condition is an unusual form. It is not in the form usually met with in these cases. In most of these cases there is an express grant upon condition and then there is an engagement or agreement upon the part of the grantee to conform to the restriction contained in the deed. In this case there is nothing of that sort. There is a—

THE COURT—Does it resolve itself into a legal proposition?

MR. O'HAGEN—Practically, and then, of course, we have the further defense that there was an acquiescence

by complainant in our building at the place we did prior to the time the defendant started their building. There was a building on this lot. Prior to the time they demolished that they communicated with this complainant and told her of their plans and where they were going to build that building, and she said at that time she would interpose no objection to the new building. Two or three days prior to the actual commencement of the building those things were communicated to the complainant and she said she would interpose no objection.

THE COURT—Why take it up with her if the restrictions were not binding?

MR. O'HAGEN—The reason was they were going to build on almost all of the lot affected, in the rear of which is complainant's lot, and to build the building they wanted to build, it would be necessary to use part of complainant's lot to bring the materials in and for the workmen to use that for the construction of the building. They went there primarily for the purpose of getting her consent to that, and while they were there they explained to her the erection of the building and what they intended to do. The erection started on January 6th. At that time stakes were laid out for the location of the building, excavation was made and all that sort of thing. Complainant came to the lot and wanted to know where that building would be located generally, and the workmen pointed out to her the stake lines where the new building would be erected, and she took no action after that until the injunction, which I think was served on the 26th day of January, after a great deal of materials had been brought to the lot and quite some construction had been erected.

THE COURT—I notice there are two amended bills of complaint. Are they different?

MR. LAUTMAN—One is just an order permitting an amendment.

THE COURT—There are two amended bills, one filed February 27th, 1928, and the other was filed May 3, 1929, and the original bill was filed January 24th, 1928. Which is the bill I am to consider?

MR. LAUTMAN—The amended bill, the last one.

THE COURT—You may proceed with your proofs.

MR. LAUTMAN—I understand from the opening the defendants admit they have violated the covenant, if there is one.

THE COURT—They do not admit that they have violated the covenant, they admit they have built over the twenty-five foot line. There is no necessity of making proof of that fact. I think on Mr. O'Hagen's statement the Court may assume that practically the whole front of the property is built on. Then the whole question is whether or not the covenant is binding. That restriction, whatever it is, is binding on the defendants.

MR. LAUTMAN—I should like to introduce in evidence the original deed and the defendants' contract, the certified copy of the original deed and the defendants' contract, which was admitted in the answer. I would like to show that as the first deed in the chain.

MR. O'HAGEN—We have no objection to the offer as a monument of title.

(Certified copy of deed marked Exhibit C-1)

THE COURT—Was there a community scheme here, is that alleged?

MR. LAUTMAN—It was alleged, but we are not going to press it.

I would like also to offer the agreement between Samuel H. Gillespie and Alfred A. Jones, which is also admitted in the answer.

MR. O'HAGEN—These are not our deeds. We have not the deed to our own clients, you have an abstract of it if you want to put that in.

MR. LAUTMAN—There is no objection to our offering the Gillespie lease.

(Lease marked Exhibit C-2)

That agreement is recorded in Book 1264 of Deeds, page 411.

MR. O'HAGEN—I think at this time we ought to inquire upon what the complainant is proceeding. They have abandoned the idea of a neighborhood scheme, are you proceeding now upon the conditions imposed by the original deed or are you attempting to proceed upon this particular agreement of 1924 which you have just introduced in evidence?

MR. LAUTMAN—Both.

By agreement I am going to read into the record abstracts of the following deeds, instead of producing certified copies:

Deed from Alfred A. Jones and Martha E. Jones, his wife, to Nathan Vogel, dated May 29, 1925, which covers the property now owned by the defendants and which contains the following clause: "Also subject to the covenants, conditions and restrictions contained in former deeds of said property."

We also offer a deed from Nathan Vogel, single, to Joseph C. Silvergleit, dated May 29, 1929, covering a one-third interest in the premises of which the defendants are now the owners, which deed contains, among others, the following clause:

"Subject to the covenants, conditions and restrictions in prior title deeds on record affecting the within described premises as reference thereto will more fully and at length appear."

Also offer a deed from Nathan Vogel, single, to Aaron Glaser, dated May 29, 1925, conveying a one-third interest in the premises of which the defendants are now the owners, which deed contains a clause, among others, as follows:

"Subject to all of the covenants, conditions and restrictions contained in prior title deeds on record affecting the within described premises, as reference thereto will more fully and at length appear."

It is admitted, I think, that those three deeds are on record and are properly recorded.

MR. O'HAGEN—Yes.

THE COURT—I am just reading the conditional clause in the deed. It is in the nature of a forfeiture condition, I notice. Will you let me see the deed from Bradley to Hurley, March 17th, 1882?

MR. LAUTMAN—We wish further to offer a certified copy of the deed from James A. Bradley and wife to Herbert Hurley, dated October 16, 1882, and recorded in Book 358 of Deeds, at page 283.

(Deed marked Exhibit C-3)

covering the premises now owned by the complainant.

THE COURT—What is that deed?

MR. LAUTMAN—The original deed in our chain of title.

THE COURT—What is this one (holding up Exhibit C-1)

MR. LAUTMAN—The original deed in the defendant's chain of title, in other words, showing we are subsequent grantees.

THE COURT—Does that deed which you have just offered contain the same restriction as this?

MR. LAUTMAN—Yes.

THE COURT—Exactly?

MR. LAUTMAN—Yes, there may be some difference in the wording.

THE COURT—Let me look at it? (Deed handed to Court)

MR. LAUTMAN—I wish to offer a certified copy of deed from James A. Bradley and wife to Lemuel Hornell, dated February 6th, 1882, covering property on the south side of Third Avenue, adjoining on the east the complainant's property.

MR. O'HAGEN—We object to the offer of that, if your Honor please. Complainants say they have abandoned the claim of a community scheme. We do not see what the purpose of it would be.

THE COURT—How is it material if you are not basing your action on a community scheme?

MR. LAUTMAN—Merely to show that all of these covenants on this block were made for the benefit of the retained lands of Bradley, the original grantor.

THE COURT—What difference does that make if it is not a neighborhood scheme?

MR. LAUTMAN—One who is a subsequent grantee of Bradley is the only one who can proceed to enforce the covenant, or the assignee of the retained lnads of Bradley. The existence of all these covenants will show that Bradley intended them for the benefit of his retained lands.

THE COURT—The deed to which you now refer, or rather, the grantee in the deed to which you now refer, is not a party in this suit?

MR. LAUTMAN—No, and is not in either of our chains of title.

THE COURT—How, then, is it material whether he is entitled to enforce the covenant or not?

MR. LAUTMAN—Merely as an aid to the Court in considering the covenant in our deed and in the defendants' deed.

THE COURT—I don't think it has much bearing on the case at all. I will permit you to put it in, but I don't see where it has any very great materiality to the issue. The real issue here on your statement, is whether your client took title after the defendant, isn't it?

MR. LAUTMAN—Yes, that is one of our issues, and the second is based on the substitution of covenants in the Gillespie deed.

THE COURT—What I mean is this: You say the condition was imposed for the benefit of the retained lands and that therefore a subsequent grantee may enforce the condition. Now if that is so, if you merely show that your client is a subsequent grantee of the part of the lands for whose benefit this condition was imposed, that is sufficient, and it would not make any difference if you showed a hundred other conveyances subsequent to the conveyance to the defendant, because those conveyances confer no more right on the complainant, so that—

MR. O'HAGEN—We object to the admission of these papers in evidence for the reason stated by your Honor.

THE COURT—There is only one deed that has been offered. I have admitted that I don't see that it hurts you any or that it will help the other man.

MR. LAUTMAN—We have similar deeds to the balance—

THE COURT—I am not going to admit any more. If you are going to offer those, I will rule the other one out.

(Deed from Bradley to Hornell, dated February 6, 1882, marked Exhibit C-4).

MR. LAUTMANN—We also offer a deed from Julius H. Hullfish to Catherine E. Lister, dated April 18, 1925, and recorded in book 1295 of deeds, at page 84, covering the property now owned by complainant.

(Deed marked Exhibit C-5)

MR. LAUTMAN—I think, together with the defendants' admissions, that will close our case.

THE COURT—All right, you rest, then?

MR. LAUTMAN—Yes.

THE COURT—What is this agreement offered in evidence? Is this the agreement referred to in paragraph 6-A of the amended bill of complaint?

MR. LAUTMAN—Yes, in which the third clause was omitted and a clause substituted permitting adjoining owners through Bradley to enforce the covenant. In other words, we come specifically within the terms of that agreement.

MR. O'HAGEN—We offer a certified copy of deed, James A. Bradley and Helen M. Bradley, his wife, to Sarah Jane Hurley, dated March 17, 1882.

THE COURT—Isn't that one already offered?

MR. O'HAGEN—I will withdraw that.

THE COURT—Just one minute, let me get this clear. Is that deed with Mr. O'Hagen just referred to and which is your Exhibit C-1, is that the first deed in the chain of title of the defendant.

MR. O'HAGEN—Yes, the agreement is also in defendants' chain, but the deed to Herbert Hurley, which your Honor, I think, has, is the first deed in our chain.

THE COURT—Now this agreement, Exhibit C-2 recites a conveyance from Bradley to Buchanan et al., dated June 13, 1882.

MR. O'HAGEN—We are about to offer that. Bradley took a purchase money mortgage back from Hurley at the time this mortgage was given, this conveyance, acquired title to the property again and then sold to Buchanan and Smock—

MR. LAUTMAN—We have an abstract showing the

entire chain of deeds, title thereof into Bradley, which I think is as complete as can be.

THE COURT—Why didn't you put it in evidence then? Why not offer the abstract, if you think that will be of any assistance?

MR. LAUTMAN—I think it would be, yes. I would like to get certified copies in first—

THE COURT—Let's put the abstract in as a part of the complainant's case.

(Abstract marked Exhibit C-6)

THE COURT—Then the deed with which we are really concerned is the one subsequent to the foreclosure into Buchanan & Smock, isn't it?

MR. O'HAGEN—Yes, sir.

MR. LAUTMAN—I think not, if your Honor please. It becomes a question of law.

THE COURT—I suppose your contention is Mr. Cook, that defendant's deed was subsequent to the deed of complainant, and therefore complainant has no right to come in and try to enforce the restrictions, is that it?

MR. COOK—That is the point.

MR. LAUTMAN—Unless the release agreement is effectual, in that event—

MR. O'HAGEN—We offer the mortgage made by

Sarah Jane Hurley and Jacob Hurley, her husband, to James A. Bradley, dated March 17, 1882, and recorded in the Monmouth County Clerk's Office in Book B-4 of Mortgages, page 3.

(Mortgage marked Exhibit D-1.)

We also offer deed John I. Thompson, Sheriff, to James A. Bradley, recorded in the Monmouth County Clerk's Office in Book 381 of Deeds, page 390.

(Deed marked Exhibit D-2.)

We also offer mortgage, Alfred A. Jones and Martha E. Jones, his wife, to Asbury Park Building & Loan Association, recorded in Monmouth County Clerk's Office in Book 697 of Mortgages, page 229, on which is endorsed a note by the County Clerk, "The original mortgage this day, August 15, 1928, produced to me by Nat. Com. et al., etc., duly cancelled. Joseph McDermott, Clerk."

(Mortgage marked Exhibit D-3.)

THE COURT—I presume you claim, Mr. Lautman, that this language in the agreement that the "covenant in the agreement was entered into for the owner or owners of any lot or lots of land adjoining or in the neighborhood of the premises hereby released, deriving or having derived title from or through the said Samuel H. Gillespie, acting executor, etc., or from or through the said testator," i. e., Bradley, includes your client?

MR. LAUTMAN—Yes.

THE COURT—All right.

Are you all through now, Mr. O'Hagen?

MR. O'HAGEN—We are through with the exhibits, yes, sir.

THE COURT—You may proceed with your testimony.

NATHAN VOGEL, one of the defendants, being first duly sworn according to law on his oath testified as follows:

DIRECT EXAMINATION

By MR. O'HAGEN:

Q. You are one of the defendants in this suit? A. I am.

Q. You are one of the owners of the southeast corner of Main Street and Third Avenue, Asbury Park? A. Yes, sir.

Q. When did you purchase the property? A. In 1925, I think it was.

Q. 1925? A. I think that is the right date.

Q. What was on that property at the time you purchased it, that is, on the land? A. Oh, some old shacks, some old properties that did not amount to anything. It was known as "Bed Bug Row."

Q. What was the condition of those properties? A. Terrible, very bad condition.

Q. What character of building was it? A. Old frame, there was six small houses all in a row.

Q. They were touching? A. Yes.

Q. In a row there? A. Yes.

Q. You say they were in terrible condition? A. Yes, sir. I think they were the oldest buildings in Asbury Park. I have been told that, I really don't know.

Q. Do you know Mrs. Lister, the complainant here? A. I do.

Q. Did you see her sometime in November 1927? A. I did.

Q. Will you tell us what day? A. On Armistice Day.

Q. On Armistice Day, of what year? A. I think it was '27.

THE COURT—Just one moment, what is the purpose of introducing this mortgage from Alfred A. Jones to the Asbury Park B. & L. Association, Exhibit D-3?

MR. O'HAGEN—Your Honor will note on reading the agreement of 1924 made between Bradley's Executor and Jones and wife, that it provides that the agreement as a condition precedent shall not take effect until all mortgages against the property shall be canceled and this mortgage at the time was of record and was not canceled until 1928.

THE COURT—All right, I had a suspicion that might be the reason, but I wanted to put it on the record.

Q. Did you talk with Mrs. Lister on Armistice Day, 1927? A. I did.

Q. Where did you meet her? A. At her house.

Q. Her house is where with reference to your property at Third and Main Street? A. Next door to the corner of Third.

THE COURT—This was Armistice Day of what year?

WITNESS—1927.

Q. What did you talk about? A. I told her I was going to tear down the old shacks and what I intended to do about putting up a nice building, what a big improvement it would be, and she thought that would be very nice.

Q. Did you tell her where you wanted to erect the new building? A. As nearly as I could explain it to her at that time. I had no plans then.

Q. What did you tell her? A. Just outlined it to her. I had an idea then of a three story building with stores.

Q. What did you tell her specifically about the location of the building? A. I told her about these old shacks. We talked in a general way what a big improvement this new building would be and she agreed with me. I do not know the exact words, only that the conversation, what we intended to do, and she thought that would be a wonderful thing and she said "You ought to have this property then" and said—she says "I have refused $20,000 for this property."

Q. Did you ask her to permit the use of any part of her property in the building? A. No, only talked in a general way, how we was coming up with the building and the suggestion that there would be a boom there, etc., in the building construction way.

Q. What did she say to that? A. She said that would be fine, or words to that effect, it would be a big improvement.

Q. At that time did you have the plans for that building completed? A. No, I did not have my plans then.

Q. Were they completed after that conversation? A. The plans?

Q. Yes? A. Oh, yes.

Q. When were the plans completed, as nearly as you can tell us? A. Well, I would think sometime about the middle of December, I would say. I don't know the exact date.

Q. Did you see Mrs. Lister after that time? A. Well, in our first conversation I told her I would show her the plans, which I did as I agreed to, took them up and showed her the plans after I got them complete, but I don't know what date that was.

Q. Which was some time, what month? A. I would be only guessing at it because I did not pay any attention. In our first conversation I told her I was going to show her these plans when I got them.

Q. Can you locate that day on which you showed the plans to Mrs. Lister, as nearly as you can? A. I would say it would be around the 15th of December. I am basing that on the fact that I gave my contract out in January.

Q. Do you know whether it was before Christmas of 1927 of after Christmas that you showed Mrs. Lister that plan? A. I would say it was before.

Q. What did you say to Mrs. Lister at that time? A. Why, I showed her the plans. It was about the same kind of a conversation, it was very nice and looked

very nice, and then when she saw where the plans went, why she says, "That will give me more frontage on my property" and I said, "Yes, I suppose it will."

Q. I show you these plans, which are entitled "Store and Apartment Building for Nathan Vogel et al, southeast corner of Third Avenue and Main Street, Asbury Park, New Jersey, December, 27, 1927, Arthur F. Cattrell, Architect, 524 Bangs Avenue, Asbury Park" and ask you if those are the plans shown to Mrs. Lister? A. They are.

Q. Is that all of them? A. All of them, we went over all of them. The last three shows the finished building. That is what we looked at in particular because I did not know much about them.

Q. These plans are in five sections? A. Yes.

Q. And you told her how large your building would be? A. I first had an idea of a three story building and then I changed it because it cost too much money.

MR. O'HAGEN—I offer in evidence these plans, if your Honor please.

(Plans marked Exhibit D-4.)

Q. What did you tell her about the building you were going to build at that time? A. Well, if I am not mistaken, I told her I was going to build a three story building then with stores and apartments. We were talking about it and that is how we came to talk about her piece of ground. She said "you ought to have this piece of ground and then you would have as much as the Church has even."

Q. Did you tell her anything about the approximate cost of the building? A. I think I told her it would cost me around $150,000, but I am not positive of that.

Q. Did you tell her where it would be located with reference to Third Avenue? A. Well, I showed her that on the plans, the size of the building.

Q. And does that plan show the location of the building with reference to Third Avenue? A. I would say so.

MR. LAUTMAN—I think the plans speak for themselves.

Q. What did Mrs. Lister say to all this? A. She thought it was a wonderful thing for this beautiful structure to go up in place of the old shacks that was there. Does that answer your question?

Q. Yes, and what did you do after the second conversation with Mrs. Lister in December, 1927? A. Well, I don't just get what you mean by that.

Q. At the time you had this second conversation with Mrs. Lister had you entered into contracts for the erection of the building? A. Oh yes, I was proceeding to build.

Q. When did you enter into your contract for the erection of the building? A. The exact day I signed the contract?

Q. The approximate date as nearly as you can give it to us? A. On January 6th, if I remember the right date.

THE COURT—Was that after or before this conversation with Mrs. Lister?

WITNESS—Well, the first conversation—after I had shown her the plans.

THE COURT—It was after you had shown her the plans and discussed the building with her?

WITNESS—Yes, sir.

Q. With whom did you enter into the contract? A. With James Southerland, Inc.

THE COURT—The contract in this abstract here is dated January 12th and filed January 17th, is that the one, $121,000?

WITNESS—Yes, sir, I think it was the 6th, I was not positive of the date.

Q. Did you know when Southerland began the work of the erection of the building? A. Well, he started a very few days afterwards. We signed the contract on a Thursday or Friday, when we finished it, and he started to work on the following Monday.

Q. The following Monday, two or three days afterwards? At that time was the old "Bed Bug Row" as you call it, on the premises? A. No, we had taken that down. He started on the excavation. We tore the buildings down before he took hold.

THE COURT—When did you tear the buildings down?

WITNESS—Why in September, I think, or October.

THE COURT—That was before you had any talk with Mrs. Lister at all?

WITNESS—Yes, sir.

Q. Did you go to the job after Southerland started work? A. Yes, sir, quite some.

Q. Do you know of your own knowledge that he started work two or three days after the signing of the contract? A. Yes, sir.

Q. What did that work consist of? A. Excavating and laying the walls, cement, and whatever it requires for putting up a building, footings, I think you call them.

Q. Do you know whether or not any materials were on the ground? A. Well, yes, there was quite some materials, as they would have to have material there for to start the work with. As fast as he took these things out he laid in a cement foundation or stone foundation, whatever you call it.

Q. When did you first receive notice Mrs. Lister was going to object to the location upon which you were to place this building? A. The first I heard of it was when I went up with the plans, I would say the first—in the morning, that after—no, I did not receive any, and she asked me if I received notice—

Q. No, when did you first know Mrs. Lister was going to object? A. When the papers were served on us.

Q. What papers were those? A. I cannot term them in the court terms, I don't know what you call them, injunction—I don't know what you call them.

Q. Was that served on you by someone from Geran, Matlack & Lautman's office? A. Yes, sir..

Q. Have you the date of that?

THE COURT—The bill reads in paragraph 12 that on the 24th day of January, 1928, complainant served upon defendants a notice, copy of which is annexed to the bill.

MR. LAUTMAN—Yes, that was before the application for injunction was made.

MR. O'HAGEN—Before the notice?

MR. LAUTMAN—The notice was attached to the bill.

MR. O'HAGEN—The affidavit of service would show that.

MR. LAUTMAN—The answer, I think, admits that this notice was served on January 24th.

THE COURT—Now I notice the bill reads that this building was being erected 24 feet 11 inches from the curb line of Third Avenue, and that defendants contend that that is not the line which was referred to in the covenant.

MR. LAUTMAN—And that is admitted in the answer. I think the line is approximately fifty feet from the curb, the building line.

THE COURT—How is that?

MR. LAUTMAN—The lot line is about twenty-five feet from the curb, then the restriction carries the building line, that line up to which a man can build, twenty-five feet still further back.

THE COURT—You mean the sidewalk is twenty-five feet wide?

MR. LAUTMAN—Yes, approximately, the edge of the lot is twenty-five feet—

WITNESS—The sidewalk is twenty-five feet wide, now, Mr. Lautman.

THE COURT—Well, is it? Let's see?

Q. At the time notice was served upon you do you know how far the work had progressed? A. Well, I could see where quite some work he had progressed, I cannot say definitely about it, it was—it looked like quite a lot of work to me. Not being familiar with building, I think the builder could answer that better than I can, perhaps.

Q. Now at the time that you received that notice, was that the first time that you had received any inkling from Mrs. Lister that she was going to object to the location of your building? A. Yes, I never saw Mrs. Lister between that time, I don't think, only to bid her the time of the day.

Q. Now in any of these conversations which you have testified here you had with Mrs. Lister was any mention made of the sidewalk line or the width of the sidewalk or anything of that kind? A. No, not that I recall.

Q. Are you familiar with that part of Asbury Park on which this property is located. A. Yes, I would say that I am familiar with the whole city of Asbury Park, if that answers your question.

Q. It does. Are you familiar with the property at the southwest corner of Main Street and Third Avenue in Asbury Park? A. Yes, I would say so.

Q. Do you know approximately how far the build-

ing at that corner sits back from the line of Third Avenue? A. I would say ten feet or fifteen.

Q. Do you know whether or not that is on the line with your building? A. I would say that it is.

Q. On the line of your building along the Third Avenue line, is that what you refer to? A. Yes.

Q. Now, do you know anything about the line of the building along Main Street between Second and Third Avenues? A. Well, if there is a building line—

MR. LAUTMAN—If your Honor please, I object to any testimony as to the line in Main Street, which is not in issue in this case at all, the building line in dispute is the Third Avenue building line, not the Main Street line.

THE COURT—The same covenant under which you claim provides for a set back a certain distance from Main Street, doesn't it?

MR. LAUTMAN—Yes.

THE COURT—I will permit it and overrule your objection.

Q. (Question repeated) A. Yes, I know the whole territory. Do you have reference to how far out they are and how far in they are?

Q. Yes. A. Well, there is on the corner of Second Avenue, it is built out within I would say twenty or twenty-five feet of the curb on the corner of Second Avenue and Main, and then there is a small building a little below me there that sets out quite some on Main Street, further out on Main Street than I am. I think

it is beyond me by six inches or more out, a little red building there.

Q. Which side of Main Street is that to which you refer? A. Main Street, north side.

Q. Main Street? A. Well, there is a north and south side.

Q. Not on Main Street, it runs north and south?

MR. LAUTMAN—I think as to other violations the defendant is limited to his bill of particulars showing the alleged violations on Third Avenue and Main Street.

THE COURT—What was that?

MR. LAUTMAN—As to the extent of alleged violations of other properties on Main Street or other properties on Third Avenue, the defendants are bound by the statements made in their bill of particulars in response to a demand on our part.

THE COURT—What bill of particulars? I have not seen anything about a bill of particulars.

MR. LAUTMAN—I am sorry, it is our oversight. We have them in our own file on the original bill.

I would say for the purpose of shortening the proceeding we are willing to admit that the violations set out in your bill of particulars are the maximum violations, that is that the building spoken of may not extend as far as they think they do, but in any event, they do not extend further, if that is agreeable to you?

MR. O'HAGEN— I don't know what that means.

THE COURT—I don't either. You admit that the violations referred to in the bill of particulars exist?

MR. LAUTMAN—Yes, but that they may not extend as far as set out here.

THE COURT—The admission goes no further than the bill of particulars.

MR. LAUTMAN—In other words, we do not wish to be bound in saying that they may not be less than these.

THE COURT—You admit that the violations exist, as set out in the bill of particulars?

MR. LAUTMAN—Yes.

THE COURT—Let it be marked as an exhibit. I will file it also.

(Bill of particulars marked Exhibit C-7)

MR. LAUTMAN—This further stipulation with respect to that is made, the street numbers shown as 100, 200, etc., refer to the number of blocks from the ocean, in other words, the street numbers that are between 1 and 200 are in the first block from the ocean and that the 200s are in the second block, and that our block is the seventh block.

THE COURT—Where is the original of the demand?

MR. LAUTMAN—The original was served on them.

MR. O'HAGEN—I think we gave the original back to you, didn't we?

THE COURT—I guess it is not material anyway. From the looks of the answers, I guess the answers are intelligible.

Q. Mr. Vogel, how long have you lived in Asbury Park? A. Twenty-eight years.

Q. Twenty-eight years, and you have spent most of your time in Asbury Park during these past twenty-eight years? A. Yes, sir.

Q. Are you familiar with the growth of Asbury Park? A. Very much so.

Q. Have you bought real estate there? A. I have.

Q. At various times? A. Yes.

Q. And various kinds of properties, etc.? A. Yes.

Q. Can you tell us what Asbury Park was when you first went there twenty-eight years ago, the character of the town? A. Well, that would be going back, it would be hard to explain that. I just could not tell you. I know that it was much smaller, old buildings, and there has been quite a lot of improvement in this property because Bradley owned a lot of stuff and it was sold and resold and I understand there were several restrictions and a lot of them that has been abandoned.

THE COURT—What has that to do with this?

MR. LAUTMAN——I object to that.

Q. Were you familiar with your lot, the lot you have now on the southeast corner of Main Street and Third Avenue twenty-eight years ago, your surroundings? A. I would not like to say, but I know it has never changed from that time until I took them down.

Q. You mean the old buildings? A. Yes.

Q. How about the other places around there, what sort of a district was it? A. A new building on the opposite corner where the garage is. Wheaton has got a new building on the corner. There was a little old building there. Some vacant ground in that particular lot you have reference to, and on another corner is another generator place built up there.

Q. What are the uses to which these buildings have been put, what uses have these buildings which have recently been erected been put to, what are they used for? A. Well, there is stores and this tire shop store, grocery store, is that what you mean, a general business condition all the way around, fruit store, meat market, grocery store and tire shop.

Q. Tire shop, what else? A. Well, I would call Wheaton's place at that time before it changed to an automobile machine shop, and then the automobile stores, all around, every line of business has gone up there, I would put it that way.

Q. Every line of business has gone up there? A. Practically, different lines.

Q. Is Main Street, Asbury Park, at this time a business street? A. I would say it was very much all the way along Main Street to 15th Street, since I have been here.

Q. Twenty-eight years ago, what was it? A. A mud hole.

Q. The buildings that were there, what were they used for? A. Dwelling houses majority of them, has been changed all the way along Main Street.

Q. What has induced that change? A. I would say business conditions warranted it.

Q. Business conditions warranted it. I suppose you mean by the growth of the town, and all that sort of thing? A. Sure, that is what gave me my idea of buying and building because of conditions in the stores up there. We have got ten or eleven stores there, I just forget the number, I think it is eleven.

Q. What is your tax bill from the City of Asbury Park per year?

MR. LAUTMAN—That is objected to.

THE COURT—What has that got to do with it?

MR. O'HAGEN—I think that would show the conditions in the neighborhood.

THE COURT—No, I don't think that has any bearing.

MR. O'HAGEN—I will withdraw that then.

Q. Your building has been erected and completed. A. Yes.

Q. What is the value of it now?

MR. LAUTMAN—I object to that.

THE COURT—It does not make any difference what the value of it is. It was erected at his own peril

in the face of the Court's statement that if it violated the restrictions he might have to pull it down, so that it does not make any difference what the value of it is.

Q. When was the building completed, Mr. Vogel?

MR. LAUTMAN—That is objected to.

THE COURT—You may answer that.

A. I don't know the exact date, it was, I believe, about, I would say June 28th, if I remember it right.

Q. June, 1928? A. Yes, no—1927—'28, that's right.

Q. Did you have tenants in the building for the summer of 1928? A. Yes.

THE COURT—Well, the important facts are with respect to the building that the contract was entered into on the 12th day of January, it was filed on the 17th of January, on the 24th of January a notice was served upon the defendants that they were violating the covenant; and at that time there was merely some excavation of the ground; on the 27th of January the bill was filed at that time there was very little work done, so that if there was a violation of the covenant, the defendants took their chances, they acted at their peril.

MR. O'HAGEN—Of course the contract had been given out. on January 12th.

THE COURT—That is a different matter. I am not disposing of that question. There may be an estoppel as to this complainant or a waiver. I have not seen any consideration for a waiver, but there may be

an estoppel. I don't know. I am not deciding anything, I am merely directing your attention to what I consider the important features with respect to the building and its completion, of the commencement of the building and its completion.

Is there anything further from this witness?

Q. When was the old building torn down?

THE COURT—He said that was in September, before he saw Mrs. Lister.

WITNESS—September or October.

CROSS EXAMINATION

By MR. LAUTMAN:

Q. How many times, Mr. Vogel, did you see and speak with Mrs. Lister after the conversation in which you showed her the plans? A. Any conversation?

Q. Yes? A. Not any, I don't think.

Q. How many times before then? A. Why, just the visit—before the plans—

Q. Yes? A. The time I went there Armistice Day and told her what my intentions were.

Q. So that visit and the visit you brought the plans over were the only two visits? A. Just as I promised her.

Q. Who was with you when you brought the plans? A. Mr. Glaser.

Q. Who was with you at the first visit? A. Mr. Glaser.

Q. Who was with you when you brought the plans? A. Mr. Glaser.

Q. Where was the first visit made? A. At Mrs. Lister's house or porch, I think that was in the house.

Q. And she thought that would be very nice? A. Yes.

Q. What else took place? A. Just a conversation, Mrs. Lister did say, she told me "Well, if it is as good as the meat you sell, I know it will be all right", something like that.

Q. Would she sign the release at that time? A. I did not have any.

Q. Did you ask her to sign any paper? A. No.

Q. On your second visit? A. No, I did not have any paper with me.

Q. Did Glaser have it? A. Not that I saw.

Q. Did either of you ask her on either of these visits to sign any kind of a paper? A. Not that I know of.

Q. Did you visit any other property owner to get a release? A. No.

Q. You are sure of that? A. Well, now, let me get this right. You say did we visit any other property owners, when we showed Mrs. Lister these plans in our conversation she asked me what did Father Roch say.

Q. I am just asking you whether you asked any other property owners or had anyone do it for you or whether Mr. Glaser did it, to sign a release of any sort releasing these restrictions? A. No, we talked about this at the time she changed her mind about the restrictions.

Q. Well, I am asking you whether you took the matter up with any other property owners? A. I would answer you this way, I went and called on Father Roch.

Q. Did you ask him to sign the release? A. I talked him and he said he would take it up with the Bishop.

Q. You knew it would be necessary to have a release? A. Only after we talked about it.

Q. Then you went to see Mrs. Lister? A. No, saw Mrs. Lister first and she suggested it to me.

Q. Then you went back and saw Father Roch and spoke about a release? A. When Mrs. Lister suggested she would do anything anyone else would or how anyone else felt, then she said in her conversation, this piece of ground, you ought to have as much as Father Roch has and asked me if I had seen Father Roch and I said "no, but I will."

Q. Then you went to Father Roch and talked about getting a release signed? A. Went to Father Roch and asked him if he had any objection to anything from our conversation with Mrs. Lister, and he—

Q. Did the question of signing the release come up? A. I don't think so, Mr. Lautman. We only talked about the objection part, and I asked him if he had any objection. Does that meet your question about the release, by asking him if he had any objection?

THE COURT—No, the release, what he refers to is a release or a written instrument.

WITNESS—We had no written instrument.

Q. When you mentioned the release the first time you ever had any conversation with Father Roch you were not referring to any written instrument?? A. Asked his advice on it.

Q. Asked his advice on what? A. If he had any objection to it. You see that is when Mrs. Lister told us about buying her land. That is when the conversation came up. At first the conversation did not come up.

Q. The Church owns the property next to Mrs. Lister's you say? A. Yes, sir, all the way around the block, I understand.

Q. You went to Father Roch because you knew the Church owned the property next door to it? A. From our conversation with Mrs. Lister.

Q. Did you ask anyone else? A. There was no one else to ask.

Q. Did you send anyone? A. No.

Q. Did you send anyone to Mrs. Lister? A. No one besides myself, that I know of.

Q. Did you send Mr. Ferry to Mrs. Lister? A. No.

Q. Did you send Frederick Smith to Mrs. Lister? A. No.

Q. Did you cause either of those persons to be sent to Mrs. Lister? A. No, Mr. Lautman, I had no connection with anybody outside of what I done myself.

Q. Did you send Frederick Smith or Mr. Ferry to Father Roch? A. No, sir.

Q. Did you send anyone else to Father Roch? A. Well, now, when this thing came about, you say, send them, I cannot answer you that way, I did go to Mr. Carton, the man on Main Street there that has—

THE COURT—That was after suit was begun. You said when this thing came about, what do you mean by when this thing came about?

WITNESS—He asked me if I sent anyone to Father Roch to see him.

THE COURT—Well, I know, was that after suit was begun or before?

THE WITNESS—Now, the nicest way I can explain the whole situation, when we first talked this we talked about building and Mr. Carton is the City Solicitor and I went there and I took it up with Mr. Carton and he said it does not amount to anything because they are building out all over there is a general scheme of business going up that way, etc., and then Mr. Carton, I believe, I don't know what you call it, he is one of the members of the church, and I talked to him about it and he said he would talk to Father Roch and I talked to Dan Hogarty. I understood that he had a talk with Father Roch. That is the only people that I talked to about that that I can recall, your Honor.

Q. What did you want to have a talk with Father Roch about? A. About this objection, wanted to talk to him about the objection.

Q. I see, and that was when Mrs. Lister told you—A. That she would do whatever Father Roch would do.

Q. So you had these people try to persuade Father Roch? A. If that is the way you want to put it.

Q. I don't want to put it any way, I want you to put it? A. I talked with Mr. Carton and he said he would talk with Father Roch, and I also talked about Mrs. Lister's property, talked to Mr. Carton about it and he said the church would have that, and I said, "All right, then I won't have nothing to do with it."

Q. So you had Mr. Carton intercede in your behalf and Daniel Hogarty, now I ask you about James Ferry? A. No, if I did it might have been conversation on the property, but I don't remember, I would not say that.

Q. I don't mean mere casual conversation, Mr. Vogel, did you ask these people to speak up for you? A. No, sir, nothing of that sort.

Q. But you did speak to a number of people about it? A. I would say, yes.

Q. It was troubling you, wasn't it? A. No, it was the conversation that I had, that was after this injunction came up.

Q. I am talking about the period around the time that you had your conversation with Mrs. Lister, just shortly prior to that and shortly thereafter, in November and December of 1927, I think it was, that is the period I am referring to. Now, do you want to change any of your answers because of this change in period, or because of a possible misunderstanding? A. No, that is the time the plans were out I was talking about it.

Q. When did your plans come out? A. We had our plans, I would say I was over to Mrs. Lister's house with the plans around the 15th or 20th of December, if that is the time you are referring to.

Q. That is the second conversation, the first conversation was on Armistice Day? A. Yes.

Q. In and around that period of time, Armistice Day and December 15th, did you cause these people to go to Father Roch? A. No, I never caused anyone to talk about it until after the plans had been shown to Mrs. Lister, and it was the conversation after the plans—

Q. How long after the plans? A. At that time, when I showed her the plans.

Q. That was the time you spoke to these other people? A. I saw Mrs. Lister first and then spoke to these other people when I knew Mrs. Lister had changed her ways of talking about what Father Roch would do.

Q. When did she change her way? A. When I showed her the plans at that time.

Q. That was before the contract was signed? A. I would say so, yes.

Q. Yes. These are the plans, as I understand it, that have been marked in evidence, that you showed them to her? A. Yes.

Q. Now you also remarked when you showed her these plans that you did not know much about the plans themselves? A. That is right, except the final page.

Q. Which page is that that you are referring to? A. The last page, that shows the building.

Q. She thought that looked very nice? A. Well, don't you think so?

Q. Yes, I think it does. Does that plan anywhere show the distance from her house, the distance back from Third Avenue, that picture that you showed her? A. Well, I think it would show.

Q. Does it? A. I would say so.

Q. Just point it out to me? A. Right here (indicating) next to here.

Q. How about the distance back from the curb on Third Avenue, the building line of Third Avenue, where is that shown? A. That is shown in the plans here.

Q. I mean on that page that you said you took up with her, that you both did not know much about the plans? A. I don't know how it shows, only that it covers practically the whole lot.

Q. I know, but does the picture show that, she thought was so fine and that it would be very nice in that lot? A. Yes.

Q. That is the one you are referring to? A. Yes.

Q. You did not take out a rule or refer to a scale or anything of that sort? A. No, sir.

Q. I ask you where on that picture it is shown that this building would come over the twenty-five foot building line? A. I cannot answer that.

Q. Because it is not shown? A. (No answer)

RE-DIRECT EXAMINATION

By MR. O'HAGEN:

Q. When did you send—when was it that you sent Mr. Hogarty to see Father Roch? A. Well, after I talked with Mrs. Lister, and she says "How does Father Roch feel" or had I seen Father Roch about it, and then, I cannot say the time, but it was after that time that I talked to her.

EXAMINATION BY THE COURT

Q. You said Mrs. Lister said she would do whatever Father Roch did? A. Yes, sir.

Q. What did Father Roch do? A. Well, he did not do anything. She sent me over from the time I talked to her when I showed her the plans, she sent me over to see him—if you want to know what our conversation was with Father Roch—

Q. I just want to know whether he objected to the building or whether he did not? A. He said he would take it up with the Bishop; that he had no power, and he would take it up with the Bishop.

Q. Did you ever report to Mrs. Lister what Father Roch said? A. I don't think so.

ALLEN M. GLASER, a witness called in behalf of the defendant, being first duly sworn according to law on his oath testified as follows:

DIRECT EXAMINATION

By MR. O'HAGEN:

Q. Mr. Glaser, you are one of the owners of the building at the southeast corner of Main Street and Third Avenue, Asbury Park, the subject matter of this suit? A. Yes, sir.

Q. Do you know Mrs. Lister, the complainant? A. No, not very much, the only time I met her was when I have been with Mr. Vogel.

Q. When was the first time you went with Mr. Vogel to see Mrs. Lister? A. That was on the 11th of November.

Q. Of what year? A. 1927.

Q. Can you tell us the conversation that took place between Mrs. Lister, Mr. Vogel and yourself? A. The only conversation that Mr. Vogel was talking to her about what we were going to try to erect, a very beautiful structure and take down "Bed Bug Row" and she had no objection at all, she was tickled to death and she says if you will build a building the way you sell meat, she says, I will be perfectly satisfied.

Q. Did you tell her anything about the character of the building to be erected? A. We had no plans yet, only in mind what we were going to build there, the plans were not ready yet.

Q. Did you talk with Mrs. Lister about any use of her land during construction? A. We did not talk anything about it, not that I know of, the first time.

Q. Not at that time. Did you go back and see Mrs. Liser another time? A. Well, when the plans were ready we went over to her again, that was a second time.

Q. Then you had the plans with you? A. Yes, sir.

Q. And Mr. Vogel and you went again? A. Mr Vogel and myself.

Q. What was the conversation that took place then between you three? A. There was no special conversation. We showed her the plans. She thought that was a very beautiful structure and then we explained to her that in case we broke up some ground in the course of trucking the materials there, if we went over the line of the next building and any damage was caused we would make that good, we would put it back again, for instance, the grass might be pulled up and we would fix up everything before we finished.

Q. You told her about that at that time and promised to make good any damage? A. Any damage to the grass, build a fence and everything, told her what kind of a fence we would put up down there and she was perfectly satisfied, no objection at all.

Q. Did you tell her at that time about the size of the building you were going to erect? A. Yes, you can see the size on the plans.

Q. Did you tell her where you were going to put it? A. Yes.

Q. What did you tell her about where you were going to put the building? A. What's that?

Q. What did you tell Mrs. Lister about? A. Nothing to be said, you know you could see it in the plans quite plainly.

THE COURT—What do you mean by that?

WITNESS—Just showed her the plans of the building.

THE COURT—That is all you did?

WITNESS—That is all.

THE COURT—Said nothing about where the building was to be put?

WITNESS—It was understood that—

THE COURT—I am not asking you what was understood. The question is, what did you tell Mrs. Lister?

WITNESS—We did not tell her, we did not say anything; we showed her the plans and she was perfectly satisfied, and that is the building we erected there.

CROSS EXAMINATION

By MR. LAUTMAN:

Q. It would be perfectly all right for these mechanics to come on, she was willing to have that done and you were willing to fix up her land, any damage done to it, all very nice? A. Yes.

Q. And those plans shown to Mr. Vogel were the same plans that you had with you and that you showed to her? A. Just exactly.

Q. Did you show her that page on which the picture of the building is shown? A. Yes.

Q. That is the page that you showed her, isn't it? A. Yes.

Q. And she thought that was a very nice building? A. Yes, sir, a nice building.

Q. What was the reason for that first visit on Armistice Day? A. Just neighborly.

Q. That was the first time you had seen this woman? A. Yes.

Q. Mr. Vogel said it was the first time that he had spoken to her?

MR. O'HAGEN—No, Mr. Vogel did not say that. He knew her for some time.

Q. You were just making a neighborly call? A. That is on November 11th.

Q. You said you had no definite plans in mind as to what you were going to build, you were going to build a nice building and take down "Bed Bug Row", wasn't "Bed Bug Row" already down? A. When we went over the first time, I don't think so.

Q. When did it go down? A. I was very busy at that time on the Board Walk. I did not pay any attention, maybe the houses went down before.

Q. You would have seen it, wouldn't you, walking over to Mrs. Lister's house, which is right across the street? A. I think "Bed Bug Row" was down.

Q. Then there was no need of telling her you were going to take down "Bed Bug Row?" A. No.

Q. The fact of the matter is you went over there to try to get a release, isn't that it? A. No, nothing at all.

JAMES SOUTHERLAND, called as a witness in behalf of the defendant, being first duly sworn according to law on his oath testified as follows:

DIRECT EXAMINATION

By MR. O'HAGEN:

Q. You are engaged in the building business? A. Yes, sir.

Q. You are President of the James Southerland Company? A. Yes, sir.

Q. And that company entered into an agreement with Mr. Vogel, Mr. Glaser and Mr. Silvergleit respecting this building at the southeast corner of Third Avenue and Main Street, Asbury Park? A. Yes, sir.

Q. Do you recall the date on which that contract was made?

MR. LAUTMAN—That is objected to. I think the contract speaks for itself.

THE COURT—Objection overruled. I don't know what the purpose is.

MR. O'HAGEN—No particular purpose.

Q. Was that correct, that the contract was made January 12th?

THE COURT—That is the date of it.

Q. When did you put your men to work on that

building? A. Approximately four or five days after the signing of the contract.

Q. Four or five days after the signing of the contract? A. I could not be sure of the date.

Q. What was the first thing you did? A. We started excavating with a steam shovel.

Q. Before that what did you do? A. Staked the building out.

Q. Who marked the lines of the building, what did you mark them with? A. We had a survey of the land and we staked the building out from the survey.

Q. How did you mark the corners of the building? A. We put a triangular board on each of the four corners.

Q. What sort of a board was this triangular board? A. It was a board probably two feet high and about six feet long, nailed onto a 2 x 4 driven into the ground.

Q. That was at each corner of the building? A. It was on the four corners of the property.

Q. When did you do that? A. Probably the first thing we did on the job before the steam shovel came there.

Q. And then what did you do after that? A. Proceeded to excavate with a steam shovel.

Q. When did you order your material? A. The material, some material was ordered probably three or four days after the signing of the contract to get it on the job.

Q. What particular materials were ordered? A. The mill work was ordered, cinder block was ordered and probably the stone and cement and the structural wall was ordered but was not all delivered.

Q. I see. A. That is about the main things we required to proceed with the job.

Q. Approximately how much worth of materials had been ordered at the time you went on the job?

MR. LAUTMAN—Objected to.

THE COURT—Objection overruled.

A. The material on the job or the material ordered?

Q. No, what you had ordered? A. Probably $22,000 worth of material ordered but not all shipped, approximately $2,000 worth of material. I am talking now from the time I was served with the injunction.

Q. Up to that time? A. Up to that time there was approximately $2,000 worth of material on the site.

Q. Part of that was for the structural wall, you say? A. No, it was cinder block.

Q. You had on the site you say $22,000 worth of material? A. No, $2,000.

THE COURT—He had $2,000 worth of material on the side and $22,000 worth ordered.

Q. Some of the materials you ordered were structural wall, can you tell us approximately the cost of that? A. Approximately $9,600.

Q. And some of the materials you had ordered was mill work, can you tell us approximately the cost of that? A. $7500.

Q. $7500, and were those things ordered specially? A. Yes, to suit that particular job, they were.

Q. To suit that job. What was the condition of the work at the time that you were served with the injunction? A. Well, the lot was approximately ninety-five per cent.

leveled out to the sub-grade when we were served with the injunction and stopped working.

Q. And were any of the footings in? A. We had some concrete footings in in the rear, for the rear apartments. There was probably forty linear feet of foundation in in the rear and we stopped the shovel, we stopped the whole operation I think the day after receiving the injunction, for the reason that when the injunction was served I was not there, it was left in the shanty and when I got there the next day I received the injunction which was handed to me by one of my men.

Q. Now can you tell us how much it would cost to change the plans of that building to have erected the building twenty-five feet shorter and twenty-five feet further away from the Third Avenue line at that time, bearing in mind that you had ordered— A. After the signing of the contract, you are talking about?

Q. No, at the time the injunction was served upon you, how much would it have cost to have changed the plans for the building so as to take off twenty-five feet on Third Avenue side, bearing in mind that you had ordered your structural wall and your mill work and a good deal of the other materials to be used on the job? A. Well, it was probably ordered but it was not manufactured. If it had been manufactured the cost would have been a whole lot more, but at the time of the serving of the injunction there was probably little manufacturing done either on the mill work or the wall work. I would say that to put the building back twenty-five feet with the work already accomplished would have cost in the neighborhood of approximately sixteen to seventeen hundred dollars.

Q. Now, while you were doing the work, after the

signing of the contract and prior to the serving of the injunction, did you see Mrs. Lister on the job at any time? A. I do not know Mrs. Lister, never spoke to the woman.

Q. You do not know who she is? A. No.

Q. Did you receive any complaints from anybody at all as to the erection of this building on the proposed site? A. Nobody made any objections to me at all.

Q. Did you receive any such complaints from your foreman or anyone else in charge of the job? A. No, sir, might have been minor complaints, but they would not have come to me. If they had been anything serious I would have heard about it.

CROSS EXAMINATION

By MR. LAUTMAN:

Q. Mr. Southerland, when you say you commenced work four or five days after the signing of the contract, I suppose you mean you waited until the contract was filed, is that not your practice? A. That is the general practice, but we do not always do it.

Q. Do you recall what you did in this instance? A. I don't recall right now whether the contract—I could not say for sure whether we started before the contract was filed or not. In all probability we started before the contract was filed.

Q. Now you said something about the concrete footing in the rear, what did you mean by the rear of the lot? A. The foundations in the court in the rear of the building where the apartments are.

Q. Now which corner of the lot is the rear, which end of the lot is the rear as you term it, the end next to Mrs. Lister? A. The rear would be the east side of the lot.

Q. How much of the lot is excavated? A. You mean in general excavations?

Q. Yes. A. Down to grade, the foundations.

Q. My point is this, the concrete footings in the rear were built first because there was no need for excavation there or was not need for very much excavation? A. There was some excavation but not as much as on the front.

Q. Mr. Southerland, I show you a picture and ask you if that represents the front of the lot as of the day of the picture, February 11th, and also is that the triangular board you referred to? A. Yes.

MR. LAUTMAN—I ask to have this marked for identification.

(Marked Exhibit C-8 for identification.)

Q. I show you another picture and ask you if that represents the condition as of February 11th? A. Very much like it.

MR. LAUTMAN—I ask to have that marked for identification.

(Marked Exhibit C-9 for identification.)

Q. I show you another picture and ask you if that is a representation of the way things looked on February 11th and whether the cinder block thrown there is the cinder block which you referred to before? A. Yes, that is the cinder block here, and frames and cement.

MR. LAUTMAN—I ask to have that marked for identification.

(Marked Exhibit C-10 for identification.)

Q. I show you another picture and ask you the same question with respect to that? A. Yes.

MR. LAUTMAN—I ask that that be marked for identification.

(Marked Exhibit C-11 for identification.)

Q. On January 27th there would be less work than is shown on these photographs, these being dated February 11th? A. January 27th, no, it would be the same, I don't think we stated until we were told to go ahead the second time. It was not much different February 11th, practically the same, there would be practically no difference.

WILLIAM D. AYERS, a witness called in behalf of the defendant being first duly sworn according to law on this oath testified as follows:

DIRECT EXAMINATION

By MR. O'HAGEN:

Q. You are a licensed civil engineer and surveyor of the State of New Jersey? A. Yes, sir, licensed engineer and land surveyor.

Q. You made certain surveys along Main Street and Third Avenue, Asbury Park, some time ago at the request of Mr. Vogel? A. I did.

MR. LAUTMAN—Has this to do with the violations in the bill of particulars?

MR. O'HAGEN—Yes.

THE COURT—Why, it is already admitted. You were asked, as I understand it, to specify the particulars in which you claim there had been violations of the covenant and you did so in writing and that is in evidence, and the statements of such violations as are therein contained are admitted by the complainant. You are restricted to those, have restricted your self by your bill of particulars.

MR. COOK—I think it is covered, will you let me see the bill of particulars?

THE COURT—If it is not, it does not make any difference. There is no use proving something that is already admitted. There is no use in wasting time.

MR. COOK—Yes, the point I had in mind is already covered.

FREDERICK SMITH, a witness called in behalf of the defendant being first duly sworn according to law on his oath testified as follows:

DIRECT EXAMINATION

By MR. O'HAGEN:

Q. Where do you live? A. 713 Third Avenue.
Q. 713 Third Avenue, Asbury Park? A. Yes.
Q. That is right in the vicinity of the property owned by Mr. Vogel and his associates and Mrs. Lister? A. Right opposite.
Q. Do you know Mr. Vogel and his associates, Mr. Glaser and Mr. Silvergleet, and do you know Mrs. Lister? A. Yes, sir.
Q. Did you ever have any conversation with Mrs. Lister with reference to the building that Mr. Vogel was erecting?

MR. LAUTMAN—That is objected to unless the time is fixed.

MR. O'HAGEN—I am going to fix it .

A. Yes, many.
Q. Can you tell us when that conversation occurred? A. Around January, 1928.
Q. 1928, tell us, please, how you fix your recollection of the time? A. We are neighbors and I am, well, I know that Mrs. Lister, when the place was sold on the corner, I heard they were going to erect an apartment house there and I spoke to Mrs. Lister and I said to her, I hear they are going to build to the full line, the full one

hundred and fifty feet front, so one day, I recollect it was in January, around the last part of January, we met down town on Bangs Avenue and Bond Street, and we started talking and she says, "They are coming out to the line." I said, "Yes, they are going to build out to the line, to the one hundred and fifty foot front." "Well," she says, "If they are going to put up as pretty a building as they sell the meat, it will be a pretty building." Those are just the very words she said.

THE COURT—That was the latter part of January?

WITNESS—Latter part of January.

THE COURT—What do you mean by the latter part of January?

WITNESS—24th or 25th, something like that. Then I seen her occasionally afterwards, many many times, your Honor, almost every day in the week.

THE COURT—Was that the first time that you had discussed with her the fact that that building was to go out to the line?

WITNESS—That is the very first time we spoke about it. After that we saw each other every day in the week.

Q. What did Mrs. Lister say about that, that the building was going out to the street line? A. She said nothing. She made this remark, she said, "If it is going to be as pretty a building as they sell their meat, it is going to be an improvement", that is all she said to me.

CROSS EXAMINATION

By MR. LAUTMAN:

Q. This later part of January that you speak of, the 23rd, 24th or 25th, as you say, that is the first time she spoke?

THE COURT—He already said that.

MR. LAUTMAN—It was not clear in my mind.

THE COURT—He made it clear enough.

MR. O'HAGEN—We are expecting some witnesses who have not yet come. We are somewhat surprised by the short conclusion of the complainant's case.

THE COURT—What is it you want to prove by the witnesses who are not here?

MR. O'HAGEN—The witnesses who are not here had a conversation with Mrs. Lister prior to the location of the building, a long time prior to the injunction that is several days prior, and we want to show what she said to them and what they said to her.

THE COURT—If they are here promptly after the rebuttal is in, if there is any rebuttal, I will hear them, but I am not going to wait here all the afternoon to hear those witnesses. Have you any rebuttal except to call those witnesses? I presume you rest, then?

MR. O'HAGEN—Yes, sir.

THE COURT—Haev you any rebuttal?

MR. LAUTMAN—The only thing we would like to put in rebuttal is as to the conversation with Mrs. Lister. I think we ought to have her testimony.

THE COURT—You do not have to rebut any testimony not already in.

MR. LAUTMAN—Some of the testimony is already in.

THE COURT—Well, what?

MR. LAUTMAN—The testimony of Mr. Vogel and Mr. Glaser, I will have her testify as to that.

CATHERINE LISTER, the complainant, called in rebuttal, being first duly sworn according to law on her oath testified as follows:

DIRECT EXAMINATION

By MR. LAUTMAN:

Mrs. Lister, you are the Mrs. Lister of whom we have been speaking here as the complainant? A. Yes, sir.

Q. Directing your attention to the period around Armistice Day 1927, were you visited by Mr. Vogel and Mr. Glaser or either of them? A. Well, you will have to excuse me on dates, I am not much good. Mr. Vogel called on me once with Mr. Glaser, not twice. I never

seen those twice, just once there before that. I swear they had a piece of paper in their hand and they asked me to sign it, that they were going to put up a very fine building, and that I would be proud of it, they were going to leave me a ten foot alley and they were going to put flower gardens in front of the apartments; there would be no store on Third Avenue, the stores were to be on Main Street, the apartments and their entrance on Third Avenue, the building was to be beautiful and would I please sign this paper, and I said I would speak to Mr. Lister when he came home, which I did and he said "You did not sign that paper, did you?" and I said "No, I signed nothing." And he said, "Please don't sign any paper for anybody." And he said "What did you tell them?" and I said "I told them that I would speak to you; also that the Church had more property there than I did and he should ask them about it" and he said he would go and ask Father Roch himself.

THE COURT—Who?

WITNESS—Mr. Vogel and Mr. Glaser. Mr. Lister said, "Well, that is decided."

THE COURT—Do not recite the conversation between you and Mr. Glaser. We are not concerned in that. You may tell anything that occurred between you and Mr. Vogel or Mr. Glaser, but do not recite any other conversation.

WITNESS—Well, after they explained what a beautiful building they were going to put up, I put on my hat and coat and went around and asked Father Roch what he thought about it.

MR. LAUTMAN—Do not tell what he said now.

Q. Did you ever tell Mr. Glaser or Mr. Vogel or both of them that it would be all right to build over the building line for the building now on the lot? A. I told them I would have to speak to Mr. Lister. I did not tell them it would be all right to go over the line.

Q. I show you a plan marked in evidence and ask you if they ever showed you this or discussed it with you? A. No, they were in my house once, not twice. Never brought any plan, I would not know the plans if I seen the plans.

Q. Did they ever show you this picture? A. I never seen the plans until this morning here. Never seen the plans. They were in my house once.

Q. Did anyone else come to see you concerning this? A. When they asked me to sign the paper I said I would consider about it with Mr. Lister, talk it over, and in a day or two after that Mr. Ferry came.

MR. O'HAGEN—We object, of course, to that, unless the time be shown.

THE COURT—Objection is overruled. You may show that whoever she testifies did come was not authorized to come, if you want to in your cross-examination. I think this testimony is perfectly competent.

Q. How came you to speak about Mr. Ferry? A. Called a day or two after. Mr. Ferry came to have this paper signed and he said this was the paper that Mr. Vogel and Mr. Glaser was talking to me about.

Q. What did you tell him ? A. I told him that we had decided not to sign any paper, and I asked him his

opinion and he said "I am acting as agent and I cannot advise."

Q. Did anyone else come to see you? A. Not in reference to signing, only that one man.

Q. Frederick Smith, when did he come to see you the first time, if you recall? A. The first time he came, or this time, Mr. Lautman?

Q. When was the very first time that you saw him? A. Mr. Smith, oh, I saw him ever yday, a dozen times a day.

Q. I mean with reference to this thing, was it before you started the suit or after? A. No, I had started suit then.

Q. Before he spoke to you the first time concerning the property? A. We had talked about the property and I told him I was not going to have it and he said I would be foolish as it would let them put me in a pocket. He was one of the greatest advisers I had, this same Mr. Smith.

Q. Did anyone else come to see you? A. Not that I recall.

CROSS EXAMINATION

By MR. O'HAGEN:

Q. Do you recall the time Mr. Vogel and Mr. Glaser came to see you? A. No, I cannot recall the time, I know it was the time the houses were still up.

Q. The old houses were still up? A. Yes, the old houses were there.

Q. Do you recall whether it was on a holiday, or Arm-

istice day? A. No, if it was a holiday, Mr. Lister would have been home.

Q. What was Mr. Lister—he was an automobile salesman, was he not? A. Yes, sir, he was—he was not a salesman, he worked at the garage.

Q. He worked at all times? A. Not on holidays and Sundays.

Q. At the time you did see Mr. Glaser and Mr. Vogel was any question raised as to the fence that you had on your property? A. Yes, there was to be a ten foot alley left there when they started to dig.

Q. Did they tell you anything about that fence? A. Never mentioned the fence at all.

Q. Did they tell you that if the fence came down during the excavation or during any part of the work— A. They told me that they were going to leave a ten foot alley, and they asked me for permission to take that fence down and I said I would ask Mr. Lister. When Mr. Lister came home I told him.

THE COURT—Just a minute, you have answered the question.

Q. At the time Mr. Vogel and Mr. Glaser came to see you, did they talk to you about the fence on the property? A. No, sir, they did not.

Q. Didn't they at that time tell you it might be necessary to damage that fence during the course of the construction of the building? A. No, sir, they did not. They told me they would leave an alley there.

Q. Didn't they promise at that time to replace the fence in any way you wanted it? A. No, they did not.

Q. Didn't they at that time talk to you about a brick

walk on the rear of your property? A. No, I had the brick walk laid myself.

Q. It was not there at that time? A. Well, it is there now.

Q. Didn't they tell you if that were damaged during the excavation they would restore it? A. No, they never mentioned no damages.

Q. They did replace the fence there? A. No, they did not put my fence back. They put a fence on their own property. It cost me $75 or $80 to replace the damage.

Q. Didn't they replace the brick walk? A. They used my bricks to build their walk.

Q. They offered to replace the brick walk? A. No, sir, they did not.

Q. They offered to replace the fence? A. No, sir, they did not.

Q. Did you ever ask Mr. Vogel or Mr. Glaser or Mr. Silvergleet to replace any damage? A. I did through Mr. Matlack, asked him to please send a letter and he sent a letter and they did not fix it and I got my man to fix it myself and they paid for it.

Q. Did you ever bring suit on account of the damage? A. Yes, through Mr. Matlack I did, for the damage they done on that property, but I did not get it.

Q. You did not bring a suit, did you? A. I don't know what he brought.

Q. Did Mr. Matlack show you any letters he had received from Cook & Stout with reference to that? A. No, he did not show me no letters.

Q. He showed you none? A. No, he told me that if they did not fix it I would better fix it myself and he would see about that later.

Q. Did he inform you that he had received a letter from Cook & Stout in which an offer was made to repair

any damage? A. He told me he had taken it up, but as long as I could not wait until your people fixed it, to get it myself, and I got it fixed.

Q. Did he tell you an offer had been made to repair that? A. No, he did not tell me any offer was made.

THE COURT—What has that got to do with it?

MR. O'HAGEN—Recollection of the witness, it seems to me—

WITNESS—The witness can understand that, I understand well—

THE COURT—What difference does it make whether he did or whether he did not?

MR. O'HAGEN—Nothing, only it would show that Mrs. Lsiter had forgotten.

Q. Did you ever talk with any of the men on the job? A. No, sir, never a word.

Q. Do you recall a shack built on the job? A. Yes, I do.

Q. Did you ever go down to that shack on the job? A. Never spoke to the workmen there, only told the workmen one day why did he take bricks from my place.

Q. Did you ever go in the shanty? A. Never went in the shanty in my life.

Q. Were you ever shown the plans? A. Never spoke to the foreman on the job.

Q. Were you ever shown by the foreman on the job the corner boards of the building to be erected? A. No, sir, I will tell you how I first found out where the corner was.

Q. Do you recall whether you did? A. I never talked about them, never seen them.

THE COURT—Give the man a chance to ask his question before you answer.

Q. Do you know a man named Franzen? A. No, sir.

Q. Do you know a Mr. Howell who worked on the job? A. No, sir.

Q. Do you know another Mr. Howell, the son of that Howell? A. No.

Q. Do you know Mr. Cosgrave? A. No, I do not know any of those men.

Q. Do not know Mr. Cosgrave? A. Not by name, I may know him by sight.

Q. He boarded with you? A. No, sir, never had a boarder in my life.

Q. You know Mr. Cosgrave, don't you? A. Show me the man, I can tell you if I set eyes on him. Is he here?

Q. Yes, he is here, this gentleman near the back of the window? A. Yes, that is the janitor, certainly I have talked to him.

Q. He is the present janitor of the building, he lived in your house? A. He lived as a boarder with my tenant we rent the house.

Q. You have two house on your lot? A. Yes, I have three of them.

Q. You knew at that time he was living there as a boarder in this house? A. Yes, sir.

Q. Did you ever talk with him? A. Yes, a dozen times.

Q. Did you ever talk with him about where the build-

ing was to be erected? A. That building was nearly up when that man came onto my property.

Q. He was there at the beginning of the work? A. Oh, no, he was not. When that building was started I lived in that house.

Q. Did you ever talk with another workman on the the job about the location of the building? A. No.

Q. Did you see these big boards on the corner piece? A. Yes, sir.

Q. Some workmen pointed those out to you? A. No, sir, never spoke to me.

FATHER THOMAS A. ROCH, called as a witness in rebuttal in behalf of the complainant, being first duly sworn according to law on his oath testified as follows:

DIRECT EXAMINATION

By MR. LAUTMAN:

Q. You are connected with the Church that owns the property adjoining Mrs. Lister? A. Yes, I am the pastor.

Q. Did Mr. Vogel or Mr. Glaser or either of them ever come to see you with respect to this building restriction or releasing that restriction? A. Both of them.

Q. Will you relate the conversation? A. So far as I can remember they came before the building was started and explained to me they were going to put up an apartment house with stores and asked me if I would sign a release that they wanted to go out on the twenty-

five foot restriction on Third Avenue, and I told them that I was against it, but I would take it up with the Bishop, who was the head, and I took it up with him and he was opposed to it.

Q. And you never signed a release? A. No.

Q. And did they speak to you about Mrs. Lister? A. Except that they had asked her to sign a release.

Q. Did they tell you what she had said about signing it? A. No.

CROSS EXAMINATION

By MR. O'HAGEN:

Q. Did you talk with Mrs. Lister about this particular thing? A. I did in a general way, when the building was started she asked me.

Q. Did you talk with her about the desire of Mr. Vogel to build beyond the twenty-five foot restriction? A. Yes.

Q. She knew about that, that is what they had talked with her about, did she tell you that? A. She told me they had asked her to sign the release.

Q. About the twenty-five foot restriction? A. Yes, and then she asked me if I was going to sign and I said "No".

Q. Did Mr. Vogel and Mr. Glaser come to you to get you to consent to the building of their building beyond the twenty-five foot line? A. Yes.

Q. Of course, your property is in the same block as that? A. Yes, we own most of the block.

Q. From Main Avenue right through to Third? A. I mean on Third Avenue we own most of the block. We have one hundred and fifty foot front.

Q. Yes, with the exception of the corner lot, the Lister lot, and the Church is on the corner of Second Avenue and Bond Street? A. Second Avenue and Bond Street.

Q. And that extends over the lines, does it not? A. No.

Q. Extends over the Bond Street line? A. No.

Q. It is on the Bond Street line? A. It is on the line given to us by the City Engineer. The portico extends over also on Second Avenue.

Q. It does not keep back fifteen from the street line, does it, the property line? A. The body of the Church does, but the entrance may not. The front of the Church on Second Avenue, the front line of the Church is within the restriction, and in 1909 when we built on the property the City authorized fifteen, and they told me that the entrance, the vestibule, might be considered the same as the porch of a house, we were considered within the line.

Q. And that was putting the Bond Street side of the building along your property line, wasn't it? A. What do you mean?

Q. The street line along Bond Street, of course, like all the streets in Asbury Park, is inside the sidewalk line, isn't it? A. Yes.

Q. And the Church is built right along the property line, isn't it, on Bond Street? A. It is within the line that is the whole there. I forget the part of the building you have to keep in, but it is within the line.

Q. There is no set-back at all, is there? A. No.

Q. Your school on the corner of Third Avenue and Bond Street, that extends to some degree over the twenty-five foot line, does it not? A. No, not an inch. That was laid out on the line given to us by the City Engineer, Ira Richards, the coping of the window might be an inch

or two out, but the line of the building is twenty-five feet in, according to the covenant in the deed.

THE COURT—Anything further?

MR. LAUTMAN—I would like to offer some photographs of the present condition. I don't know whether they would be consented to or not, I have the man who took them—

THE COURT—Just show them to your adversary.

MR. LAUTMAN—I should like also, if they will consent without making formal proof, to offer the four pictures I had marked for identification.

THE COURT—Offer them first.

MR. LAUTMAN—I will offer the four pictures marked Exhibits C-8, 9, 10 and 11 for identification now.

MR. COOK—I understand, if the Court please, that it was testified to by the contractor that they were a fair representation of the conditions at that time.

(Exhibits C-8, 9, 10 and 11 for identification now becomes Exhibits C-8 9, 10 and 11.)

THE COURT—These photographs are offered by consent as a representation of the present condition of the property, is that right?

MR. LAUTMAN—The condition as of the date they were taken, April 30th, 1929, that is practically the present condition.

(Four photographs referred to marked respectively Exhibits C-12, C-13, C-14 and C-15.)

JOSEPH A. COSGRAVE, a witness called in rebuttal, for the defendant, being first duly sworn according to law on his oath testified as follows:

DIRECT EXAMINATION

By MR. O'HAGEN:

Q. You worked for Southerland at the time he was erecting this building? A. No, sir, I never worked for Mr. Southerland.

Q. Who did you work for? A. I was not working at the time. I was stopping in my brother-in-law's house, in Mrs. Lister's house.

Q. You were not working for him? A. No, sir.

Q. You know Mrs. Lister, don't you? A. Yes, sir.

Q. Were you ever on the job about the time it was started? A. Yes, sir.

Q. Did you ever see Mrs. Lister there? A. I have seen her once, yes, sir.

Q. Did you have any conversation with her at that time? A. Not myself, I heard a conversation, but not myself.

Q. With whom was Mrs. Lister conversing? A. Charley Ferguson.

Q. Who was Ferguson? A. As I understood him to be the foreman, one of the foremen of Mr. Southerland.

Q. Mr. Southerland's foreman, and this conversation was on the job? A. Yes, sir.

Q. How much work was done on the job at that time? A. The building was practically done at that time.

Q. Didn't you hear a conversation with Mrs. Lister and Ferguson or some other man at the time of the commencement of the building? A. No, not at the commencement, no.

THE COURT—Both sides rest?

There is really one question here which should be reserved and that is as to the binding effect of the restrictions as a legal proposition. So far as the defense of waiver or release is concerned, or estoppel, there is nothing to that, and I may as well dispose of that right now. I find as a fact that there was no waiver or estoppel on the part of the complainant which would prevent her from enforcing the covenant or which would prevent her from enforcing the covenant or would be a bar to any relief which she is asking in this Court. The only question is whether as a legal proposition the restrictions are binding on this land. You may brief that question. I think there is practically no dispute as to the facts on which the decision is to be based.

New Jersey Court of Errors and Appeals

CATHERINE E. LISTER, Complainant-Appellee, *and* NATHAN VOGEL, *et als.*, Defendants-Appellants.	On Appeal from Court of Chancery. No. 89, May Term, 1931.

(Italics, etc., ours except where otherwise noted.)

REPLY BRIEF OF APPELLANTS.

I.

Complainant, on pages 32 and 33 of her brief, criticises the statement of defendants that the character of the neighborhood has changed and points to the fact that, in the bill of particulars, paragraph 6, page 35, there are but three violations of the restriction shown upon the block of Third Avenue in which complainant's and defendants' houses are erected.

An inspection of the bill of particulars will show that there are violations in every block of Third Avenue. Complainant ignores the testimony of Vogel, which was not contradicted, page 146, quoted on page 14 of our original brief, which shows that there is a violation directly opposite defendant's property on the southwest corner of Main and Third Avenues, and another a block from defendant's property on the corner of Main and Second Avenues.

However that may be, the change in neighborhood, the lack of uniformity of the restrictions and the violations of the restrictions, or one or

some of them, *induced complainant to abandon any claim of a neighborhood plan* (p. 127). This left the case, so far as the record went, as an attempt to enforce a restriction binding, if reliance is placed upon the conditions imposed in the old Bradley deeds, on *but three pieces of property*—defendants' property, complainant's property, and one other, the Howell property (Exhibit C-4, p. 71; p. 15 of complainant's brief) and, if reliance is placed upon the agreement, Exhibit C-2, page 55, made between Bradley's acting executor and surviving trustee and Jones, predecessor in title of defendants, binding upon *only one property* and that is the property of defendants, for there is no proof that either Howell or complainant made similar agreements with the acting executor and surviving trustee, so that, in the aspect of the case in which reliance is placed by complainant upon *that* agreement, she is attempting to enforce an agreement binding upon defendants' lands without any reciprocal agreement binding upon her lands and without proof of any agreement binding upon the lands of Howell or anyone else. This, of course, destroys any reciprocity which is really the basis of the intervention of equity in cases of this kind.

We have then, to say the best for complainant, three isolated properties restricted and that fact brings into application the principle relied upon by us under Point I, page 12, *et seq.* of our brief and the cases there cited, including those dealing with the enforcement of covenants. *Fort* v. *Field,* 2 Misc. 333 (not officially reported); *Marston* v. *Lentz,* 95 N. J. E. 761; *Klein* v. *Sisters, etc. of St. Elizabeth,* 101 N. J. E. 761 (p. 21 of our original brief).

It also makes applicable the language of this Court in *Jennings* v. *Baroff,* 7 N. J. Adv. Rep.

167, reversing the Court of Chancery and overruling *Winfield* v. *Henning,* 21 N. J. Eq. 188, mentioned on page 51 of our original brief.

These cases are not mentioned in the brief of complainant. Their application does not depend upon laches or estoppel but upon the existence of conditions which, under all the circumstances, would make it inequitable to enforce the covenant notwithstanding any legal rights, and, whatever the *language* of complainant's brief may be, it is clear that complainant *is relying upon a supposed strict legal right without regard to equity.*

The only answer to the contention of defendants that there has been a change in the neighborhood is made in complainant's brief on page 33 to the effect that the testimony of Vogel "referred to Main Street and not to Third Avenue; it referred to the character of the buildings and not to their locations". There was no testimony contradicting Vogel.

We have referred to the testimony as to changes in the neighborhood on pages 9, 10, 11 and 27 of our original brief. It is apparent that the entire neighborhood his changed. Defendants' property is located on the corner of Third Avenue and Main Street. No building restrictions are sought to be enforced on Main Street, although there were building restrictions along the line of that street. It is obvious that the side streets running from Main Street cannot remain residential, and that they did *not* remain residential and are useless for residential purposes is indicated by the admitted fact that the houses which were upon defendants' property when they purchased it were known as "Bed Bug Row", and the fact that there is no denial by anyone that the building of defendants, built at a cost of upwards of $120,000.00, was a betterment not a detriment to the neighborhood.

II.

There is no effective answer, we submit, to the contention of defendants under Point 3 of our original brief that, to say the best for complainant, there was such doubt as to require a denial of relief in equity upon the authority of *Fortesque* v. *Carroll,* 76 N. J. E. 583; *Marsh* v. *Marsh,* 90 N. J. Eq. 244; *Howland* v. *Andrus,* 81 N. J. E. 175 (p. 31, *et seq.,* of our original brief). And in *Roberts* v. *Scull,* 58 N. J. E. 396, quoted by defendants at page 7 of their brief, resulted in a denial of the temporary injunction there asked for and the rule that complainants' right must be clear has as much application to cases of a building line restriction as to restrictions of any other nature and that rule applies to a final hearing as well as to a preliminary application.

In *Am. Plaster Drill Co.* v. *Francisco,* decided May 18, 1931, 108 N. J. Eq. 323, this Court said at page 326:

> "Application for specific performance of a contract for the sale of lands is addressed to the discretion of the Court of Chancery * * *."

III.

At page 25 of her brief, complainant argues that the language of Exhibit C-2, page 55, the agreement between Gillespie, acting executor and surviving trustee, and Jones, the predecessor in title of defendants, should not be construed to mean that the agreement would not be effective unless all mortgages upon the property were canceled at the time of the record of the agreement whether such mortgages were placed upon the property before or after the execution of the agreement.

We have considered this under subdivision D of Point 3 of our original brief (p. 57) and we submit that it will be apparent that our position is sound if one considers what might have occurred had the mortgage which was given by Jones to the Asbury Park Building & Loan Association, almost a year after the execution of the agreement, Exhibit C-2, and which was of record when that agreement was recorded and which was not paid until 1928 (Exhibit D-3), been foreclosed. Had it been foreclosed, if complainant's position be sound, the lands would have been free of the covenants sought to be imposed by the agreement, C-2, for, inasmuch as the mortgage was recorded prior to the record of Exhibit C-2, the mortgagee would not be affected by that agreement and yet the conditions contained in the old Bradley deeds would have been released so that the surviving executor and trustee would have given all rights for no compensation.

We repeat that neither the complainant nor the owner of any other land in the neighborhood were parties to the agreement C-2. If Gillespie, sole acting executor and surviving trustee, desired to withhold that agreement from record complainant cannot complain.

We submit that it is not the fact that the construction which we put upon the agreement "would mean that the agreement was subject to alternate periods of effectiveness and nullity as successive mortgages were placed and cancelled". It is specifically provided in the agreement that it shall not become effective until recorded (Exhibit C-2, p. 61) and not "until all mortgages, judgments, liens and other encumbrances upon, against, or in any wise effecting the lot or parcel of land * * * shall be first duly paid, cancelled, released and discharged of record".

If this means, as we contend it does, that is to say that it refers to mortgages placed either be-

fore or after the date of the agreement, then there would be but one effective date for the agreement, *i. e.*, the date of the record of the agreement if, at that time, there were no mortgages and the like liens upon the property, or the date subsequent to such record when any mortgages and the like liens upon the property at the time of the record had been discharged of record.

It is argued that, had the parties intended to refer to mortgages and like liens upon the property at the time of the record of the agreement, they would have specifically so provided as they did in the provision that Jones must be "the sole and actual owner of said land in fee simple at the time of the execution *and recording* of these presents". But that does not follow for we submit, that, taking the language as a whole, they did specifically provide that the mortgages and the like referred to were such mortgages and the like as might be liens at the time of the record of the agreement and that the language cannot be read in any other way.

Complainant argues, page 25, that "if there is any doubt as to the proper construction of the language of the agreement, it should be resolved in favor of its validity under the theory that equity abhors a forfeiture". If there is any doubt as to the proper construction of the language of the agreement equity will not enforce the supposed covenant.

Again, on page 26 of her brief, complainant goes back to the supposed rights of the complainant under the original Bradley deeds but we repeat, with respect to those supposed rights, what the Vice Chancellor said in his conclusions, page 118, "However, it is not necessary to here decide these *vexing* questions, as there are other grounds upon which a decision in favor of the complainant may be based", and he then bases

his decision solely upon the agreement, C-2, page 55.

If those questions are *vexing,* then certainly the right of complainant is not clear, and, if her right is not clear, there should have been, we submit, a denial of the relief sought.

On page 27 of her brief, complainant states that the defendants raise the point that there was no proof of the authority of Bradley's executor to enter into the agreement with Jones (subdivision D of Point 3, p. 54) for the first time in the case. The point was taken from the brief which was submitted by the defendants to the Court below.

IV.

On page 31 of its brief, complainant says that the location of the line of the restriction is not in doubt and that "trial counsel would not suggest otherwise" (p. 32). It may be that the line is not in doubt but the record seems to throw it in doubt (paragraphs 10, 11 of the bill of complaint, p. 9 and record, pp. 144, 145).

V.

Complainant considers the testimony as to her knowledge that the defendants intended to build in violation of the restriction, but as we pointed out, page 7 of our brief, there is no doubt but that she knew that defendants intended to build in violation of the restriction.

We, of course, do not claim that, because defendants asked complainant for a release (p. 30) she waived her right to enforce the restrictions (p. 30 of complainant's brief) but we *do* urge that the language of complainant and her conduct

when and after defendants visited her must be considered in the light of the fact that she knew, when she spoke and acted or failed to act, that defendants intended to violate the restrictions. When she said, if she did say, that she had no objection and that "she was tickled to death and she says if you will build a building the way you sell meat I will be perfectly satisfied" she knew that to erect that building, which would take the place of "Bed Bug Row", defendants would be obliged to violate the restrictions, and she also knew that defendants had to violate the restrictions to properly use their property when she said to defendants at the time they asked her for a release "You ought to have this property" (referring to her own property then) and "I have refused $20,000 for this property" (p. 138), and when she said, "That will give me more frontage on my property" (p. 140; p. 3 of our brief).

Respectfully submitted,

Cook & Stout.

Merritt Lane,
Of Counsel with Defendants-Appellants.

89

New Jersey Court of Errors and Appeals

CATHERINE E. LISTER, Complainant-Appellee, *vs.* NATHAN VOGEL, *et als.*, Defendants-Appellants.	On Appeal from Court of Chancery. Bill for Injunction to Enforce Building Restriction. Decree for Complainant. Defendant's Appeal. Sat below: Berry, V. C.

(Italics, etc., ours, except where otherwise noted.)

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from a decree of the Chancellor made, on the advice of the Hon. Maja Leon Berry, Vice Chancellor (p. 38) enjoining defendants from violating an alleged building restriction and directing them to remove all parts of a building erected on Third Avenue, Asbury Park, which are nearer than twenty-five feet from the line of Third Avenue, upon conclusions of the Vice Chancellor (p. 115).

The building has been erected twenty-four feet eleven inches from the curb line of Third Avenue or one inch in violation of the restriction if the line referred to in the restriction is the curb line, (Bill of Complaint, p. 9) but complainant charges that the curb line is not the one so referred to "but that the line of Third Avenue referred to is at a point ten or fifteen feet south of said curb line" (par. 11, Bill of Complaint, p. 9; Admitted in Answer, par. 11, p. 16). The location of the line

is not proven in the case (pp. 144, 145). The contention of complainant seems to be that fifteen feet must be taken off of the front of the building (p. 144).

Defendants purchased the property in 1925. At that time some "old shacks" were erected thereon which were in very bad condition, six small houses all in a row known as "Bed Bug Row" (pp. 130, 131). In December, 1927, defendants prepared plans for a three story building (p. 140) and made a contract on January 12, 1928, filed January 17, 1928, for the construction of the building at a cost of $121,000 (p. 142). The old buildings had been demolished in September or October, 1928 (p. 142). The contractor immediately started excavating (pp. 143, 165, 166) marking out the lines of the building with stakes. He had ordered, before the commencement of this suit, January 26, 1928, about $22,000 worth of material, $9,600 worth of which was structural and $7,500 worth of which was mill work, ordered specially to fit the particular job, and, at the time the preliminary injunction was served, the lot was approximately 95 per cent. leveled out to the sub-grade and there was foundation work in the rear (p. 168). The completed building is shown on Exhibits C-8, C-9, C-11 and C-12 and the type of structure and the distance it extends beyond the building of complainant is fairly shown by these exhibits (pp. 86 to 90).

A notice was served by complainant on January 24, 1928, (par. 12, of the Bill of Complaint, pp. 9, 143) on defendants protesting against the erection (Notice, pp. 12, 143), and thereupon, on January 26, 1928, the bill of complaint herein was filed. An application was made for temporary restraint, which was denied, the order denying providing that if the defendants should proceed they shall be "deemed to have erected such building at their peril".

The bill (p. 1) is filed by the owner of adjoining property.

It was contended by defendants that, prior to the commencement of the erection of the building, they had interviewed complainant and that complainant knew that the building was going to be erected as it was, in fact, erected.

Vogel, one of defendants, testified, that: on Armistice Day, November 11, 1927, he met complainant at her home next door to the proposed building and told her that he was going to build "a nice building" and that it would be a big improvement and "she thought that would be very nice"; he spoke about a three story building with stores; he told her about the old shacks and "We talked in a general way what a big improvement this new building would be and she agreed with me"; she said, " 'You ought to have this property then' " (referring to her own property) and "she says 'I have refused $20,000 for this property' "; she said the building proposed by defendant would be a "big improvement"; about the 15th of December, after the plans had been completed, he saw complainant again and showed her the plans (p. 139) and "It was about the same kind of a conversation, it was very nice and looked very nice, and then she saw where the plans went, 'Why,' she says, '*That will give me more frontage on my property*' and I said, 'Yes, I suppose it will,' " (by defendants' building out *she* would be permitted to build out and, inasmuch as the testimony shows that the property in the neighborhood now can only best be devoted to business purposes, her right to build out would be of a considerable advantage to her); he told her he "was going to build a three story building then with stores and apartments. We were talking about it and that is how we came to talk about her piece of ground, she said, 'You ought to have

this piece of ground and then you would have as much as the Church has even' "; he thought he told her that the building would cost approximately $150,000 and "she thought it was a wonderful thing for this beautiful structure to go up in place of the old shacks that was there"; after this conversation, he made the contract on January 12, 1928, which called for the erection of the building at a cost of $121,000 and thereafter the work progressed at once.

He first knew that complainant was going to object when the notice was served upon him on January 24, 1928, just prior to the filing of the bill, and considerable work had been done by that time (p. 145).

The witness, Vogel, one of defendants, is corroborated by the witness Glaser, another of defendants (p. 161). This witness said as to the talk with complainant on November 11th, 1927 (p. 161):

> "A. The only conversation that Mr. Vogel was talking to her about what we are going to erect, a very beautiful structure and take down 'Bed Bug Row' and she had no objection at all, she was tickled to death and she says if you will build a building the way you sell meat, she says, I will be perfectly satisfied."

He said, with respect to the second conversation in the middle of December, when they had the plans with them (p. 162):

> "A. There was no special conversation. We showed her the plans. She thought that was a very beautiful structure and then we explained to her that in case we broke up some ground in the course of trucking the materials there, if we went over the line of the next building and any damages was caused we would make that good, we would put it

back again, for instance, the grass might be pulled up and we would fix up everything before we finished.

Q. You told her about that at that time and promised to make good any damage? A. Any damage to the grass, build a fence and everything, told her what kind of a fence we would put up down there and she was perfectly satisfied, no objection at all."

He said that he did not tell her the size of the building or where it was to be put, but that the plans indicated and they showed her the plans (pp. 162, 163) and she was perfectly satisfied with the building they were going to erect (p. 163).

Frederick Smith, who lived at 713 Third Avenue, Asbury Park, in the neighborhood, had a conversation with complainant in January, 1928, and he relates the conversation as follows (p. 173):

"A. We are neighbors and I am, well, I know that Mrs. Lister, when the place was sold on the corner, I heard they were going to erect an apartment house there and I spoke to Mrs. Lister and I said to her, I hear they are going to build the full line, the full one hundred and fifty feet front, so one day, I recollect it was in January, around the last part of January, we met down town on Bangs Avenue and Bond Street, and we started talking and she says, 'They are coming out to the line.' I said, '*Yes, they are going to build out to the line, to the one hundred and fifty foot front.*' '*Well,*' she says, 'If they are going to put up as pretty a building as they sell the meat, it will be a pretty building.' Those are just the very words she said."

And (p. 174):

"Q. What did Mrs. Lister say about that, that the building was going out to the street line? A. She said nothing. She made this

> remark, she said, 'If it is going to be as pretty a building as they sell their meat, it is going to be an improvement', that is all she said to me."

Complainant said that Vogel and Glaser called on her once, not twice, and (p. 177):

> "I swear they had a piece of paper in their hand and they asked me to sign it, that they were going to put up a very fine building, and that I would be proud of it, they were going to leave me a ten foot alley and they were going to put flower gardens in front of the apartments; there would be no store on Third Avenue, the stores were to be on Main Street, the apartments and their entrance on Third Avenue, the building was to be beautiful and would I please sign this paper, and I said I would speak to Mr. Lister when he came home, which I did and he said, 'You did not sign that paper, did you?' and I said, 'No, I signed nothing.' And he said, 'Please don't sign any paper for anybody.' And he said, 'What did you tell them?' and I said, 'I told them I would speak to you; also that the Church had more property there than I did and he should ask them about it', and he said he would go and ask Father Roch himself."

This is denied by Vogel (p. 154).

She testified that she said to defendants that she would have to speak to Mr. Lister, "and I did not tell them it would be all right to go over the line", and, "When they asked me to sign the paper I said I would consider about it with Mr. Lister, talk it over, and in a day or two after that Mr. Ferry came", and, "Mr. Ferry came to have this paper signed and he said this was the paper that Mr. Vogel and Mr. Glaser was talking to me about" (p. 178), and, "I told him that we had decided not to sign any paper, and I asked him his opinion and he said, 'I am acting as agent

and I cannot advise' ''. She talked with Smith, who was the witness called for defendant who had testified to a conversation with complainant (p. 173), and (p. 179), "We had talked about the property and I told him I was not going to have it and he said I would be foolish as it would let them put me in a pocket. He was one of the greatest advisers I had, this same Mr. Smith''; at the time Glaser and Vogel came to see her there was no talk about a fence (pp. 180, 181); she had some trouble with Vogel and Glaser as to damage to her property (p. 181). She indicates (pp. 182-183, 184) such familiarity with building operations as that there is no difficulty in determining that she knew precisely where this building was to be put.

Father Roch, a witness called by complainant, connected with the Catholic Church owning property adjoining that of complainant, said that defendants came to him (p. 184).

> "A. So far as I can remember they came before the building was started and explained to me they were going to put up an apartment house with stores and asked me if I would sign a release that they wanted to go out on the twenty-five foot restriction on Third Avenue and I told them that I was against it, but I would take it up with the Bishop, who was the head, and I took it up with him and he was opposed to it.''

He testified that complainant spoke with him about the matter and it is clear from his testimony (p. 185) that, when Vogel and Glaser came to see complainant, *she knew that they intended to build without regard to the restriction,* for Father Roch said that *she told him that they had asked her to sign a release about the twenty-five foot restriction and she asked him if he was going to sign and he told her that he was not.* The

Church owns about 150 foot front on Third Avenue.

While Father Roch said that he and his Bishop did not agree to the violation of the restriction, *the Church brought no action for an injunction.*

This testimony makes it clear, if the testimony of complainant left it in any doubt, that, at the time Vogel and Glaser called upon her and before the building was commenced, *she knew that the building was going to be erected without regard to the restriction,* so that whatever complainant may have said as to her contentment with the situation was with full knowledge that defendants intended to disregard the restriction.

She said that she did not consent and in this respect her testimony is opposed to that of the two defendants who were called as witnesses and is also opposed to the testimony of Smith (p. 173), a neighbor, and wholly unprejudiced, and, as she said, "one of the greatest advisers I had" (p. 179), but, whether she expressed her contentment or not, she saw this building commenced on or about January 17th, 1928, knowing that it was to be erected without regard to the restriction and waited until January 24, 1928, before she caused notice of protest to be served on defendants at which time considerable expense had been incurred and she filed her bill on January 26th, 1928.

The claimed restrictions were first imposed in *1882* in a deed from James A. Bradley and Sarah Jane Hurley, *et ux* (Ex. C-1, p. 49), to defendants' predecessor in title, and then read:

> "The said premises are hereby conveyed upon the *following conditions* to wit: *That no house, cottage or other building shall ever be erected thereon nearer to the line of the said Third Avenue than twenty-five (25) feet,* therefrom, nor nearer to the line of said Main Street than ten (10) feet therefrom. And also *upon conditions* that the said premises shall

never be used for the sale of intoxicating liquors or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, butcher shops, barber shops, fish markets or public gas works shall ever be erected thereon. And that no fence which shall exceed four (4) feet in height shall ever be erected thereon within twenty-five feet (25) feet of said Third Avenue and also that no fence which shall exceed four (4) feet in height shall ever be erected thereon within ten (10) feet of said Main Street. *And that in case the said party of the second part or her heirs, executors, administrators or assigns or any of them shall violate any or all of the conditions herein contained then this deed shall be null and void and thereupon the fee of the said land shall revert to the said party of the first part.*''

Since the imposition of these restrictions the character of the neighborhood has completely changed. It has become business. The property involved in this suit and the general neighborhood had so deteriorated as that the buildings erected upon the property were known as ''Bed Bug Row'' (pp. 136, 142, 149, 150). Defendant Vogel came to Asbury Park twenty-eight years ago, about 1900, and he described (p. 150) the general conditions:

''Q. Were you familiar with your lot, the lot you have now on the southeast corner of Main Street and Third Avenue twenty-eight years ago, your surroundings? A. I would not like to say, but I know it has never changed from that time until I took them down.

Q. You mean the old buildings? A. Yes.

Q. How about the other places around there. What sort of a district was it? A. A new building on the opposite corner where the garage is. Wheaton has got a new building on the corner. There was a little old building there. Some vacant ground in that particular lot you have reference to, and on

another corner is another generator place built up there.

Q. What are the uses to which these buildings have been put, what uses have these buildings which have recently been erected been put to, what are they used for? A. Well, there is stores and this tire shop store, grocery store, is that what you mean, *a general business condition all the way around, fruit store, meat market, grocery store and tire shop.*

Q. Tire shop, what else? A. Well, I would call Wheaton's place at that time before it changed to an automobile machine shop, and then the automobile stores, all around, every line of business has gone up there, I would put it that way.

Q. Every line of business had gone up there? A. Practically, different lines.

Q. Is Main Street, Asbury Park, at this time a business street? A. I would say it was very much all the way along Main Street to 15th Street, since I have been here.

Q. Twenty-eight years ago, what was it? A. *A mud hole.*

Q. The buildings that were there, what were they used for? A. *Dwelling houses majority of them,* has been changed all the way along Main Street.

Q. What has induced that change? A. I would say business conditions warranted it.

Q. Business conditions warranted it. I suppose you mean by the growth of the town, and all that sort of thing? A. Sure, that is what gave me my idea of buying and building because of conditions in the stores up there. We have got ten or eleven stores there, I just forget the number, I think it is eleven.''

There is no dispute with respect to these changes or as to the character of the neighborhood at the present time. *While the bill charged a neighborhood plan, the claim was abandoned at the hearing* (pp. 127, 117). It must be conceded, we submit, that, under the original restric-

tions imposed by the deed of March 17, 1882, the owner of other property acquired no rights for the only penalty provided in that deed for a violation of the covenant was that—"*This deed shall be null and void and thereupon the fee of the said land shall revert to the said party of the first part*",—a condition which could not be enforced by a subsequent purchaser of lands retained by the grantor. But it was claimed that complainant was entitled to injunction by reason of an agreement made May 14, 1923 (Ex. C-2, p. 55), to which the executor and trustee of the grantor and the predecessor in title of defendants were parties, and which recited the restrictions as contained in the deed of March 17, 1882 (Ex. C-1, p. 49), and released them as conditions, and provided (p. 60):

> "that the said several covenants on the part of the said parties of the second part, above specified, shall attach to and run with the said land, and that it shall be lawful, not only for the said SAMUEL H. GILLESPIE, acting Executor and Trustee as aforesaid, his heirs, legal representatives, successors in office and assigns, *but also for the owner or owners of any lot or lots of land adjoining or in the neighborhood of the premises hereby released, deriving or having derived title from or through the said Samuel H. Gillespie acting executor and Trustee as aforesaid or from or through the said testator, to institute and prosecute any proceedings at law or in equity against the person or persons violating or threatening to violate the same.* * * *"

We shall insist that the condition or covenant was not binding upon defendants' lands and could not be enforced by complainant, but we also submit that, assuming that the Vice-Chancellor is correct in his conclusions (p. 115) that the covenant *is* binding upon the lands of defendants and that

it *may* be enforced by complainant, it would be grossly inequitable to enforce it by injunction at this time and that complainant should be left to her remedy at law, as it clearly appears in the case that no damage whatever can possibly be suffered by her under the circumstances, and that the interference by a court of equity, its right to interfere resting upon its power to grant specific performance, is wholly unjustified for equity will not grant specific performance unless, under all the circumstances of the case, it is fair and equitable to do so. We further submit that there is sufficient doubt as to the *legal* right of complainant as to require a court of equity to deny the equitable relief of specific performance because of that doubt. And we further submit that there was such acquiescence and delay on the part of complainant as to require a court of equity to deny her the extraordinary relief which she sought.

POINT I.

The court below should have denied relief because it is inequitable to grant the extraordinary relief sought by the bill.

The court below in its conclusions (p. 115) seemed to conceive that, having found that complainant had a *strict legal right* to enforce the covenant and that the covenant was binding upon defendants' lands, it followed, *as matter of course,* that she was entitled to an injunction.

In the application of the principle for which we contend we submit that the fact that, by the agreement between the executor and trustee of Bradley and Jones, a predecessor in title of defendants (Ex. C-2, p. 55), it was expressly agreed between the parties that

> "this covenant is not to be enforced personally for damages against the said parties of the second part, their heirs or assigns, unless they be the owner or owners of the said premises, or of some part thereof, at the time of a violation of the said covenant or of a threatened or attempted violation thereof, *but the said covenant may be proceeded on for an injunction of, and for a specific performance and execution thereof against the said parties of the second part, their heirs or assigns, and for damages against the party or parties violating the said covenant, his or their heirs, executors, administrators or assigns*" (p. 60)

is not entitled to any particular weight. The agreement that the covenant may be enforced by injunction or by specific performance, which is to say the same thing, for in this branch of equitable jurisprudence the use of the writ of injunction is but a means to compel specific performance, does not enlarge the rights of complainant. Without the specific agreement those entitled to enforce the covenant would be entitled to enforce it by specific performance *in a proper case* and their rights are not enlarged by the agreement. A court of equity will not act *except in a proper case* even if the parties agree otherwise, but, in *this* case, the agreement of the parties is to be construed, we submit, *merely as a recognition of the equitable right in a proper case.* Under the terms of the agreement complainant has an action at law against defendants if there has been a breach of the covenant, and we submit that *this is a case in which the complainant should have been left to her remedy at law.*

We have already indicated that it was conceded below that no neighborhood plan or scheme of restrictions had either been intended or effected, and that there was proof uncontradicted of a complete change in the neighborhood, and that the neigh-

borhood had become such as that the buildings which were erected upon the lands of defendants were known as "Bed Bug Row" and that they were an eyesore. It was likewise conceded that there had been violations of similar covenants inserted in other deeds of property in the neighborhood as indicated in defendants' bill of particulars (p. 34). The concession is found on pages 147, 148. Defendant Vogel testified as to the violations (pp. 146, 147).

An inspection of the bill of particulars (p. 35) will indicate that any restriction which may have been imposed on lands in the neighborhood with respect to set-back has been persistently violated (par. 6 of the bill of particulars, p. 35). And defendant Vogel testified (p. 146):

> "Q. Yes. A. Well, there is on the corner of Second Avenue, it is built out within I would say twenty or twenty-five feet of the curb on the corner of Second Avenue and Main, and then there is a small building a little below me there that sets out quite some on Main Street, further out on Main Street than I am. I think it is beyond me by six inches or more, a little red building there.
>
> Q. Which side of Main Street is that to which you refer? A. Main Street, north side.
>
> Q. Main Street. A. Well, there is a north south side.
>
> Q. Not on Main Street, it runs north and south?"

Vogel also testified (pp. 144, 145) to the fact that the building on the southwest corner of Main Street and Third Avenue directly opposite defendants' property was on a line with defendants' building, thus violating the restriction.

Not only has any supposed twenty-five foot set-back restriction as to buildings erected on Third Avenue been persistently violated, as indicated in the bill of particulars (Ex. C-7, p. 35), but any

supposed ten foot set-back restriction on Main Street contained in the same covenants has been persistently violated and Main Street has become almost entirely a business street. It is significant that, although the condition or covenant sought to be enforced by complainant contains set-back restrictions of ten feet from the line of Main Street and defendants' buildings are constructed in violation of *that* restriction as well as in violation of the twenty-five foot restriction on Third Avenue, complainant does not attempt to compel the enforcement of the ten foot set-back restriction on Main Street.

No proof of any kind was offered to show that complainant suffered in any respect as a result of the violation of this twenty-five foot set-back restriction on Third Avenue. On the contrary, the proof is clear that her property was benefited and that she recognized that fact.

Defendant Vogel said (p. 138) that she stated, when advised as to the kind of a building which was to be constructed, that "she thought that would be a wonderful thing" (p. 138), and when she saw "where the plans went" she stated "that will give me more frontage on my property" (p. 140) and that she stated "she thought it was a wonderful thing to have this beautiful structure go up in place of the old shack which was there" (p. 141). And Glaser, another defendant, testified (p. 161) that she stated "she had no objection at all, she was tickled to death * * * she says, I will be perfectly satisfied" (pp. 161, 162), and Smith, a disinterested witness (p. 173), testified that she knew that the bulding was going to be erected in violation of the twenty-five foot set-back restriction and that she stated that she was satisfied (p. 174), and we repeat that the testimony of Father Roch (p. 185) indicates that, at the time of *these* conversations, there was no

doubt but that complainant knew that the building was to be erected in violation of the restriction.

Inasmuch as the right of the Court of Chancery to grant relief in this case rests upon its jurisdiction in specific performance, the rules governing the granting of that extraordinary relief are applicable.

In *Brown* v. *Brown,* 33 N. J. Eq. 650 (at p. 655), this Court said:

> "Where jurisdiction exists (to enforce specific performance) the remedy *is not of right;* the court holds it in judicial discretion controlled by principles of equity and justice. 'The question is not what the court must do, but what it may do under the circumstances.' Radcliff *v.* Warrington, 12 Ves. 332."

Again, this Court, in *Blake* v. *Flatley,* 44 N. J. Eq. 228 (at p. 231), said:

> "But it is also held that courts of equity will not interfere to decree a specific performance except in cases *where it would be strictly equitable to make such a decree.* Whether, therefore, the contract shall be enforced specifically must rest in *the sound and reasonable discretion of the court, depending on the equity of the particular case and the nature of the objections to it.* It must determine what are the objectionable circumstances which will control its jurisdiction in such cases within the established rules of equity, though none of those rules are of absolute obligation or authority in all cases."

In *Page* v. *Martin,* 46 N. J. Eq. 585 (at p. 589), Mr. Justice Garrison, speaking for this Court, said:

> "The attitude of courts of equity upon applications of this character (specific performance) may be summarized in two propo-

> sitions—first, *that the relief invoked is not a matter ex debito justicae, but rests in the sound discretion of the court*, and second, that where a contract is certain in all its parts, and for a fair consideration, and where the party seeking its enforcement is not himself in default, it is as much a matter of course for courts of equity to decree the performance of the contract as it is for courts of law to give damages for the breach of it. That relief rests not upon what the court must do, but rather upon what, in view of all the circumstances, it ought to do, is a distinction which is of little or no practical moment. In every case of this character the court is chiefly concerned *with the equities* of the parties before it."

Subsequent to this decision this language was reiterated by this Court, again speaking through Mr. Justice Garrison in *Murray* v. *Skirm,* 73 N. J. Eq. (at p. 378).

It is significant, however, that this Court, in *Brisbane* v. *Sullivan,* 86 N. J. Eq. 411 (at p. 413), quoted the quotation as follows:

> "Mr. Justice Garrison, speaking for this court in Page *v.* Martin, 46 N. J. Eq. 585, said: 'That relief rests not upon what the court must do, but rather what, in view of all the circumstances, it ought to do. * * * In every case of this character the court is chiefly concerned with the equities of the parties before it'."

Subsequent to the decision of this Court in *Page* v. *Martin,* Vice-Chancellor Van Fleet, in *Ten Eyck* v. *Manning,* 52 N. J. Eq. 47 (at p. 49), said:

> "The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be *granted or denied as the justice and right of the particular case shall seem to the court on full consideration of the rights and equities of the parties, to require.*"

This Court in *Pyatt* v. *Lyon*, 51 N. J. Eq. 308 (at p. 314), said:

> "The relief invoked (specific performance) is not a matter *ex debito justicae;* the bill for specific performance is addressed to the extraordinary jurisdiction of a court of equity to be exercised *according to its discretion* * * *."

Probably the clearest and most succinct statement of the rule is that contained in *Blake* v. *Flatley,* 44 N. J. Eq. (at p. 231), as follows:

> "But it is also held that courts of equity will not interfere to decree a specific performance *except in cases where it would be strictly equitable to make such a decree."*

Mr. Justice Garrison, when he used the term "a matter of course," in *Page* v. *Martin, supra,* could not have meant to overturn the rule that a court of equity *will never make a decree against conscience or equity.*

If, after considering *all* the circumstances proper to be considered, and it *then* appears to the Court that *all the equities* require that there should be a decree of specific performance, of course, as a matter of course, a decree goes. We submit that *Page* v. *Martin* in nowise limits the effect of the prior decisions on the right of the Court to look into *all* the surrounding circumstances.

This Court has often said that before a court of equity will act in a case of this kind the right *must be clear.*

In *Fortesque* v. *Carroll,* 76 N. J. Eq., p. 583, this Court said: "A more practical statement would be that Courts of Equity do not aid one man to restrict another in the uses to which he may put his land *unless the right to such aid is clear,"* and, applying that rule, it reversed

the Court of Chancery in granting an injunction restricting the erection of a structure whose exterior walls, foundation and roof constituted one building, but whose interior arrangements and entrances showed that it was to constitute two residences, alleged to be in violation of a covenant providing that "not more than one building shall be erected upon a single lot.

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

A very clear equity arises *where there is a neighborhood plan.*

This Court, in *Scull* v. *Eilenberg,* 94 N. J. E. 759, said, at p. 762:

> "A neighborhood scheme of restrictions to be effective and enforceable must have certain characteristics. It must be universal, that is, the restrictions must apply to all lots of like character brought within the scheme. Unless it be universal it cannot be reciprocal. If it be not reciprocal, then it must as a neighborhood scheme fall, for the theory which sustains a scheme or plan of this character is that the restrictions are a benefit to all. *The consideration to each lot owner for the imposition of the restriction upon his lot is that the same restrictions are imposed upon the lots of others similarly situated. If the restrictions upon all lots similarly located are not alike, or some lots are not subject to the restrictions while others are, then a burden would be carried by some owners without a corresponding benefit.* 'The burden follows the benefit,' as was said by Judge White in the case of Sanford *v.* Keer, 80 N. J. Eq. 240. *When there is no benefit there should be no burden. If the benefit be destroyed the burden should end.* The requisite

> universality of the neighborhood plan was referred to by the late Vice-Chancellor Green in the case of De-Gray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, in the following language: 'The law deducible from these principles and the authorities, applicable to this case, is that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser, and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof, and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase. * * * *Where the restrictions are not universal or after frequent violations of the restrictions have been permitted, then the neighborhood scheme will be considered abandoned.*' "

This Court, in affirming Vice-Chancellor Fielder in *Klein* v. *The Sisters of Charity,* 101 N. J. Eq. 761, approved his opinion in which he had reiterated what this Court had said in *Scull* v. *Eilenberg,* 94 N. J. Equity, p. 759, and in which case the Vice-Chancellor had also said, page 769:

> "The deeds in which the restriction is found contain no statement that the restriction was for the protection or benefit of adjoining or adjacent land; nor does the covenant provide that it may be enforced by an adjoining or adjacent lot owner, his heirs or

> assigns; nor did the grantor, for himself, or for the owners of adjoining or adjacent land, covenant that he and they would create and enforce similar restrictions against such adjoining or adjacent land."

Under these cases complainant, in the case at bar, *was obliged to abandon any idea of a neighborhood plan but, when she abandoned any idea of a neighborhood plan, she took out of the case that which usually in a case of this kind induces a court of equity to act.*

She left the case with a *bare legal condition or covenant* and called upon a court of equity to enforce that covenant by injunction without a showing that she was in anywise injured by the breach of the covenant; indeed, upon a record which shows that, rather than being injured, she is benefited and after she had expressed the thought to defendants, prior to the commencement of the work, that she would be benefited in two ways—first, she could herself build disregarding the restriction (p. 140), and, second, it removed "Bed Bug Row" (p. 141).

The case of *Fisher* v. *Griffith Realty Co.,* 88 N. J. E. 204 is cited because Vice Chancellor Fielder relied upon it in *Fort* v. *Field,* 2 Misc. 333, at p. 338 (not officially reported), and Vice Chancellor Foster relied upon *Fort* v. *Field* in *Marston* v. *Lentz,* 95 N. J. E. 761, at p. 765, and the decree in that case was affirmed by this Court upon the opinion of Vice Chancellor Foster, 95 N. J. E. 761, and Vice Chancellor Fielder again in *Klein* v. *Sisters, etc. of St. Elizabeth,* 101 N. J. E. 761 at p. 768, relied upon *Fisher* v. *Griffith Piano Co.* and the decree in that case was affirmed by this Court upon the opinion below, 101 N. J. E. 761.

In *Fisher* v. *Griffith Realty Co.,* 88 N. J. E. 204, the right of the complainant was based *upon an*

agreement made in 1894 "between the *then owners of the property* extending from a point one hundred feet south of Elwood Avenue on the westerly side of Lincoln Avenue to a point two hundred feet south of Delavan Avenue and extending for a depth of two hundred feet, *restricting such property to use for the erection of private residences.*" The Court found that the neighborhood had changed and that it "*would be inequitable for this Court to at this time enforce the restrictive agreement and that the case is within that of Page* v. *Murray,* 46 N. J. E. 325."

Observe that in that case the restriction was imposed by *virtue of an agreement between all the property owners.* The restriction enforced in the case at bar was held by the Vice Chancellor to have been imposed *by the agreement of May 14, 1923* (Ex. C-2, p. 55; Conclusions, p. 118), made as the Vice Chancellor holds for the *benefit of all lot owners.* If this be so *then* the reasoning of the cases just considered applies. It more strongly applies because in *this* case there is no proof that any agreement was made binding any number of property owners in the neighborhood. Gillespie as executor and trustee of Bradley could not bind owners of properties already purchased from his testator.

In *Fort* v. *Field,* 2 N. J. Misc. 333 the Court thusly described the situation (p. 336):

> "That the letter of the covenant has been violated must be conceded, but complainants contend that the covenant is a nullity and unenforceable as to the lands in question, because the population of South Orange has greatly increased since the restriction was imposed by the Vose deed in 1873, and the character of the neighborhood has so changed that the original plan or scheme of large country estates which Vose had in mind cannot be carried out, because it would be against

> public policy and in restraint of trade, considering the increase in population, housing conditions and the change in the character of the neighborhood, now to enforce a restriction limiting the use of a plot of land two hundred and fifty feet by two hundred feet to a single dwelling; because persons deriving title through deeds from Vose have indicated no intention to enforce this restriction and similar restrictions affecting their adjacent property and have acquiesced in and permitted a violation of this particular restriction and of similar restrictions affecting adjacent property and because there has been a general violation of covenants and restrictions similar to the one in question, by those entitled to enforce this covenant and a general acquiescence in such violation by those concerned, which violation and acquiescence amount to an abandonment and estoppel."

The Vice-Chancellor relying upon *Page* v. *Murray,* 46 N. J. E. 325; *Ocean City Assn.* v. *Chalfant,* 65 N. J. E. 156; *Chelsea Land &c., Co.* v. *Adams,* 71 N. J. E. 771; *Sanford* v. *Keer,* 80 N. J. E. 240, and *Fisher* v. *Griffith Realty Co.,* 88 N. J. E. 204, denied relief, and Vice-Chancellor Foster followed him in *Marsten* v. *Lentz,* 95 N. J. E. 761, at page 765 and this Court affirmed upon the opinion of the Vice-Chancellor, 95 N. J. E. 761.

In *Klein* v. *Sisters of Charity of St. Elizabeth,* 101 N. J. E. 761, one Jewett owned a tract of land in Jersey City and conveyed portions of it under certain restrictions. In deciding the case Vice-Chancellor Fielder among other things said, at page 768:

> "The neighborhood of complainant's property, therefore, is no longer a neighborhood built up with single-family dwellings each erected on a lot fifty feet or more in width, and since all lots in the William S. L. Jewett tract are not bound by the restriction, com-

> plainant would enforce against defendant's land, *it would be inequitable and unreasonable to enforce such restriction in this suit.* Fisher *v.* Griffith Realty Co., 88 N. J. E. 204."

The decree was affirmed by this Court upon the opinion below, 101 N. J. E. 761.

It may be said that each one of these cases involved a neighborhood plan but in each case there was *also, of course, a personal condition or covenant just as there is in the case at bar,* and, in the case at bar, the agreement upon which the court below rested was one which the Court held looked to a neighborhood scheme for, otherwise, there would be no consideration for the covenant (p. 120). The Court, in *Klein* vs. *Sisters of Charity of St. Elizabeth,* declined to enforce the covenant as part of a neighborhood plan *or as a personal agreement.*

We repeat that, if there be removed the idea of a neighborhood plan, one of the strongest reasons for the interference of equity is taken out of the case. The case, then, becomes, as this is, solely between two parties, one of whom has made a covenant, which the other party may take advantage of. It becomes a case purely of specific performance. If the Court will not enforce a neighborhood plan under the circumstances as indicated in the cases heretofore cited *a fortiori,* conditions having changed since the covenant was made and no damage whatever being shown by the complainant which would flow from a violation of the covenant, the Court will not grant the remedy of specific performance.

We submit that the judicial discretion which always rests in a court of equity in a case in which it is asked for specific performance should have been exercised in this case in favor of denying the relief.

No harm can come to complainant save only that she will be prevented from using the injunction as a weapon to force the purchase of her land by defendants, and we again refer to the fact that defendant Vogel testified that, when the defendants approached her and told her what they proposed doing, she said to them (p. 140) "*You ought to have this piece of property,* and then you would have as much as the Church has even".

We do not find that this testimony of Vogel is denied.

Is it not significant that complainant, who is said to have expressed satisfaction with the erection of the building in violation of the restriction but who is desirous of disposing of her property, should bring this suit and that the Church, the officials of which are said to have expressed dissatisfaction but which has no land to sell, should remain passive?

POINT II.

The conduct of complainant in giving approval to defendants' project and in consenting to the erection of defendants' building on the site selected and the delay of complainant in giving notice of objection and in filing her bill coupled with the fact that defendants relied upon such conduct in making contracts and expending moneys amounted to an election upon her part to waive the provisions of the restrictive covenant or an estoppel.

The rule in regard to proceedings to compel specific performance of restrictive covenants requires the person who believes he is entitled to that remedy to act *promptly* when notice of the intended violation is brought home to him.

In *Ocean City Asso.* v. *Headley,* 62 N. J. E. 322 Vice Chancellor Grey said at p. 334:

> "The evidence shows a substantial abandonment of them by the association, and certainly places it in such a position to Mr. Headley that it would be highly inequitable to permit it specifically to enforce them, when for years it has assented to breaches of them by all his neighbors, thus depriving his lot of the advantages which their enforcement would have given it.
>
> The principle involved has been lucidly expounded by Lord Eldon, in the case of Roper *v.* Williams, 1 Turn. & R. 18, 37 Eng. Rep. 999, 1001. A bill was there filed praying an injunction restraining the erection of a building, *because it was alleged to be in breach of a plan of building which the owner of the land had imposed for the benefit of all the grantees.* The lord-chancellor declared: 'Having long lived in Gower street, I have often been in the habit of illustrating my view of such cases by references to the stipulations contained in the Duke of Belford leases. In the lease of every house on the east side of that street is contained a covenant that there shall be no erection behind them exceeding a certain height. The landlord in such a case is stipulating, not only for his own benefit, but for the benefit of all the tenants in that neighborhood. If, therefore, the landlord, in some particular instances, lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant to whom he has not given such a license. He may have a good case for damages at law; but if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot, with any justice, come into equity for an injunction against those tenants. *It is not a question of mere acquiescence; but in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all.*

> In such cases I have always understood this court will leave the parties to their remedy at law. There *is another view* in which this case may be considered; every relaxation which the plaintiff has permitted in allowing houses to be built in violation of the covenant amounts, *pro tanto,* to a dispensation of the obligation intended to be contracted by it. *Very little, in cases of this nature, is sufficient to show acquiescence, and courts of equity will not interfere, unless the most active diligence has been exerted throughout the whole proceeding.* It is not sufficient to have given notice of the covenant in 1818. In every case of this sort the party injured is bound to make *immediate* application to the court in the first instance, and cannot permit money to be expended by a person, *even though he has notice of the covenant,* and then apply for an injunction.' ''

In the statement of the case we have indicated the facts which call for the application of the principles of law mentioned under this point.

We will summarize the testimony:

The neighborhood had completely changed since the imposition of the restriction; from residential it had become business (pp. 149, 150, 151); it had so deteriorated as that the buildings erected upon defendants' property were known as ''Bed Bug Row'' (p. 136); the restrictive covenants which were imposed upon like properties in the neighborhood had been persistently violated (pp. 146, 147, 148; Bill of Particulars, Ex. C-7, p. 35); the building erected by defendants was substantial and cost upwards of $121,000 (p. 142); it resulted in a betterment to the neighborhood.

The above facts are admitted or not denied.

Prior to the commencement of building operations defendants Vogel and Glaser saw complainant. Vogel testified (p. 127): he saw complainant on Armistice Day, November 11, 1927 (p.

137); he had no plans but he told her that he intended to put up "a nice building" and advised her in a general way what he proposed doing and "she thought that would be a wonderful thing" and she said "You ought to have this property then" (referring to her own property) and said—she says, "I have refused $20,000 for this property"; she said that the construction of the new building would be a big improvement; he saw her again about the middle of December, at which time he had the plans; he showed her the plans which indicated that the building was to be erected in violation of the restrictions and she said, "that will give me more frontage on my property", and he said, "Yes, I suppose it will" (p. 140); he told her that the building would cost about $150,000; "she thought it was a wonderful thing for this beautiful structure to go up in place of the old shacks that was there" (p. 141); he made his contract on January 12, 1927, for the erection of the building at a cost of $121,000; work started almost immediately and excavations had been made and contracts made by the contractor for approximately $22,000 worth of material ($9,600, and $7,500 worth of which were special to suit the particular job); and there was $2,000 worth of material on the site, when, on January 24, 1927, she caused the notice of protest to be served (pp. 143, 144; notice printed, p. 12). Not until January 26, 1928, did she file her original bill of complaint and the amended bill was not filed until May 2, 1929.

Defendant Vogel is corroborated by defendant Glaser (p. 161).

Complainant (p. 176) denied that she had told defendants that she was satisfied and said that they came to her to get her to sign a *release* and that she had told them that she would take it up with Mr. Lister when he came home. Complainant

said that as soon as they left she went around and asked Father Roch what he thought about it (p. 177). Father Roch said (p. 184) that complainant had taken the matter up with him and had asked him if he was going to sign a release of the restrictions and he had told her "no" (p. 185). Complainant said that she told a Mr. Ferry that she had decided "not to sign any paper".

Her testimony is very sketchy and it is significant that, although counsel for complainant, in cross-examining defendant Vogel (pp. 149, 160), intimated that, even if complainant had seen the plans she would not have known that the building was going to be erected without regard to the restrictions and that complainant denied (p. 178) that the plans were ever shown to her,—"I would not know the plans if I seen the plans",—all of which seems to have been designed to indicate that complainant did not know that the buiding was intended to be erected without regard to the restrictions, it appeared from the testimony of Father Roch, her own witness (p. 185), that she *did* know, for her statement to Father Roch was that they had come to get her to *release the twenty-five foot restriction.*

It is true that the defendants are interested witnesses, but so is complainant.

But Frederick Smith, a neighbor, and whom complainant described (p. 173) "as one of the greatest advisors I had," testified that: "she said, 'They are coming out to the line'. I said, 'Yes, they are going to build out to the line, to the one hundred and fifty foot front.' 'Well', she says, 'If they are going to put up as pretty a building as they sell the meat, it will be a pretty building'."

While some question was raised as to when this conversation took place, the witness' recollection being that it was "in January, around the last part of January", "the 24th or 25th, something

like that" it is apparent that the conversation must have taken place before the serving of the notice of protest on January 24, and, even if it had taken place after the notice of protest, it was an indication that, in *reality,* complainant *knew that the erection of this building was a good thing for her.*

The testimony of complainant as to this conversation is (p. 179):

> "A. We had talked about the property and I told him I was not going to have it and he said I would be foolish as it would let them put me in a pocket. He was one of the greatest advisers I had, this same Mr. Smith."

This amounts to an admission of the conversation but it puts a different slant upon what was said.

But Smith is disinterested and complainant is interested.

Complainant did not move as speedily as she might have. She saw the building commenced not later than the 17th of January. She knew that the building was to be built in disregard of the restrictions. *She waited at least a week seeing the construction going on next door to her before she served her notice.*

> *Duffy* v. *Mayor & Aldermen of Jersey City,* 81 N. J. Law 114.

In the light of the opinion of Vice Chancellor Grey in *Ocean City Asso.* v. *Headley,* 62 N. J. E. 322, quoting Lord Eldon in *Rober* v. *Williams,* 1 Turn. & R., p. 18, 37 English Reprint, 999, at p. 1001:

> "*Very little* in cases of this nature is sufficient to show acquiescence and courts of equity will not interfere, unless the *most ac-*

> *tive diligence* has been exerted throughout the whole proceeding."

and

> "* * * the party injured is bound to make *immediate* application to the court in the first instance. * * *"

We submit that equitable relief should have been denied for the reasons hereinabove stated under this point.

POINT III.

The supposed restrictions were not binding upon defendants' lands and complainant had no legal or equitable right to enforce them or, to say the best for complainant, there was such doubt as to require a denial of the relief in equity.

We have already mentioned *Fortesque* v. *Carroll,* 76 N. J. E., p. 583, and *Marsh* v. *Marsh,* 90 N. J. E. 244, both in this court and *Howland* v. *Andrus,* 81 N. J. E. 175, in the Court of Chancery, in which the Courts held that, before equity can intervene to aid another in restricting one from the use of his lands, *the right must be clear.*

James A. Bradley by deed dated March 17, 1882 (Ex. C-1, p. 49) conveyed the premises of which defendants are now the owners, to Sarah J. Hurley. The deed contained the following condition:

> "The said premises are hereby conveyed upon the *following conditions,* to wit: That no house, garage, or other building shall ever be erected thereon nearer to the line of the said Third Avenue than 25 feet therefrom, or nearer to the line of said Main Street than 10 feet therefrom, and also *upon conditions* that the said premises shall never be used for

the sale of intoxicating liquors or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, butcher shops, barber shops, fish markets, or other public gas works shall ever be erected thereon within 25 feet of said Third Avenue, and also that no fence which shall exceed 4 feet in height shall ever be erected thereon within 10 feet of Main Street. *And that in case the said party of the second part or her heirs, executors, administrators or assigns, or any of them shall violate any or all of the conditions herein contained; then this deed shall be null and void and thereupon the fee of the said land shall revert to the party of the first part.*"

By mortgage bearing even date with the deed aforesaid, the said Sarah Jane Hurley and husband mortgaged said lands to Bradley for $4,500.00 (Ex. D-1, p. 91). The mortgage was given partly to secure the whole of the purchase price.

James A. Bradley foreclosed that mortgage and received a deed from the Sheriff dated June 13, 1884 (Ex. D-2, p. 98).

Bradley by deed dated October 16, 1882, conveyed the lands of which complainant is now the owner, to Hubbard Hurley, upon the following condition (Ex. C-3, p. 65):

"The said premises are hereby conveyed subject to the following *conditions,* to wit: That no house, cottage or other building shall ever be erected thereon nearer the line of Third Avenue than twenty-five feet therefrom; *and also that no more than one house or cottage shall be built upon said lot of land within the period of five years next after the date hereof;* and also subject to the condition that the said premises shall not be used for the sale of intoxicating liquors or any manufacturing purpose whatever; and that no hog pens, public laundries, livery stable,

meat or fish markets or public gas works shall ever be erected thereon, *and that no fence which shall exceed four feet high shall ever be erected upon the said lot of land within the distance of twenty-five feet from the line of said Third Avenue,* and that in case the said party of the second part, or his heirs, executors, administrators or assigns or any of them shall violate any or all of the conditions herein contained then this deed shall be null and void, and thereupon the fee of the said land *shall revert* to the said party of the first part."

Some time after the foreclosure Bradley conveyed the premises, of which the defendants are now the owners, to Nelson E. Buchanan, Garret B. Smock and George Smock, by deed dated June 13, 1884, upon the following condition (Ex. C-6, p. 83):

"The said premises is hereby conveyed by the following *conditions,* to wit: That no house, cottage or other building shall ever be erected thereon nearer to the line of the said Third Avenue than twenty-five (25) feet therefrom, nor nearer the line of said Main Street than ten (10) feet therefrom. And also *upon condition* that the said premises shall never be used for the sale of intoxicating liquors or for any manufacturing purpose, whatever. And that no hog pens, public laundries, livery stables, meat or fish markets or public gas works shall ever be erected thereon. And that no fence which shall exceed four feet in height shall ever be erected thereon, within the distance of twenty-five feet of said Third Avenue nor within the distance of ten feet from said Main Street. And that in case the said parties of the second part, their heirs or assigns or any of them shall violate any or all of the conditions herein contained then and in that case *this deed shall be null and void and thereupon the fee of the said land shall revert to the said parties of the first part and his heirs.*"

It will be noted that in none of the conveyances was there any agreement or covenant upon the part of the grantees to comply with or respect the conditions.

The lands of which defendants are now the owners were formerly owned by Alfred A. Jones, who received from Samuel H. Gillespie as sole *acting* executor and surviving trustee under the last will and testament of James A. Bradley deceased, a release of the conditions reserved in the deed to Buchanan and Smock above mentioned, and Gillespie and Jones (and Jones' wife) agreed that, after the taking effect of the instrument, the same restrictions as set out in the conditions, should be considered as covenants, binding upon the lands of Jones. That instrument also contained the following provision (Ex. C-2, p. 55):

> "And it is further mutually understood and agreed by and between the said parties to these presents, *as a condition precedent* (and not merely as a covenant) that the foregoing release by the said Samuel H. Gillespie, sole acting Executor and surviving Trustee as aforesaid, shall have no force or effect, and shall be for nothing holden until these presents shall be signed by the said parties of the second part and duly acknowledged by them and recorded in the Clerk's Office in and for the County of Monmouth, in the same manner as deed for lands are acknowledged and recorded, *nor until all mortgages, judgments, liens and other encumbrances upon, against or in anywise affecting the lot or parcel of land hereinabove described,* shall be first duly paid, cancelled, released and discharged of record, nor *unless the said Alfred A. Jones, be the sole and actual owner of said land, in fee simple, at the time of the execution and recording of these presents.*"

This agreement was *recorded* in the Monmouth County Clerk's Office on July 13, 1924, in Book 1264 of deeds, page 411.

There was no proof showing that Bradley's acting executor and surviving trustee had power or authority to release the conditions and agree that they should be considered covenants.

At the time of the recording of the instrument there was open of record a mortgage made by Alfred A. Jones and wife to the Asbury Park Building and Loan Association, dated May 9th, 1924, and open of record and unpaid until August 15th, 1928, when it was cancelled, Ex. D-3, p. 107. *At that time defendants' building had been fully completed.*

A.

The conditions imposed by Bradley in his deed to Sarah Jane Hurley, Book 347-33 (Ex. C-1, p. 49), conveying defendant's property cannot be enforced by complainant for the reason that a purchase money mortgage for the full purchase price was given simultaneously therewith, which mortgage was foreclosed and title revested in Bradley (Ex. D-1, p. 91; Ex. D-2, p. 98).

Since Bradley took back a purchase money mortgage for the whole purchase price on the same day on which the deed to Sarah Jane Hurley for defendant's lots was dated, he thereby retained, or, with the delivery of the deed there was simultaneously re-conveyed to him, legal title to the fee of the lands described in the mortgage and deed.

That a mortgagee holds the legal title to the estate for the purpose of his mortgage, is well settled by a number of decisions in this state. Mr. Justice Depue in *Woodside* v. *Adams,* 40 N. J. L. 417, says (at 422):

> "The consequence of these decisions is the separation in legal contemplation of the estate of the mortgagor from that of the mortgagee and the recognition of an actual and *distinct legal estate in each*".

To the same effect are *Stewart* v. *Fairchild-Baldwin Co.*, 91 N. J. Eq. 86 and numerous other cases.

An extension of the same rule is recognized by this Court in *Champion* v. *Hinkle*, 45 N. J. Eq. 162, as follows:

> "In a strict foreclosure suit at common law, the decree simply cut off the equity of redemption and foreclosed the mortgagor from redeeming the estate by payment of the mortgaged debt; and thereafter, the mortgagee was in, as of the estate granted and conveyed by the mortgage discharged from the condition of defeasance and he held the estate as if the original conveyance had been absolute."

and continuing:

> "The purchaser at a foreclosure sale of the mortgaged premises takes the place of the mortgagee in strict foreclosure at common law. His title relates back to the time of the execution of the mortgage. He succeeds as well to the title and estate acquired by the mortgagee, by the delivery of the mortgage deed, as to the estate the mortgagor had at the time of the execution of the mortgage".

Therefore, when Bradley took the purchase money mortgage at the same time that he gave the deed to Hurley for defendant's lands, he at once acquired a legal estate in the land. When Bradley foreclosed that mortgage and purchased at the Sheriff's Sale, he acquired the title which the mortgagor had at the moment of the giving of the mortgage, as well as the title which he (Bradley) had at the moment of the giving of the mortgage. These rights combined were the same rights Bradley had before he gave the deed or in other words an absolute unencumbered and unrestricted fee. At the time that Hurley gave the mortgage, Hurley had an interest in the land, subject to the condition imposed in the deed, and subject to the

conditions of the mortgage. Whatever rights existed to enforce the condition of the deed reposed in Bradley and he was also the holder of the mortgage.

When Bradley acquired title at the foreclosure sale, his title related back to the giving of the mortgage, and he took the same rights he had before giving the deed to Hurley. It would have been impossible for him to enforce *against himself* the conditions imposed in his deed to Hurley, under the doctrine laid down in *Genung* v. *Harvey,* 79 Eq. 57. Since Bradley could not enforce that condition, his subsequent grantee, complainant, could not enforce it.

Therefore defendant's title starts not with the deed to Sarah Jane Hurley, but with the deed, Bradley to Buchanon, dated June 13, 1884 (Ex. C-6, p. 83) and consequently *defendants are subsequent grantees* against whom complainant cannot enforce restrictions.

It is admitted by complainant that *no neighborhood scheme was effected or created by Bradley.* If the conditions imposed by Bradley in the deed to Hurley were intended for the benefit of Bradley's retained lands, (and of this we shall speak later), it would seem that the result arrived at above must necessarily follow, particularly because it will be noted that *no condition is imposed by or referred to in the mortgage,* except, of course, the conditions of defeasance.

The Vice-Chancellor in his conclusions in considering this matter (pp. 117, 118), seemed to think (p. 118) that the conveyance by Bradley to Buchanan & Smock on the date of the Sheriff's deed to himself "is a circumstance from which the existence of a continuous restriction might be assumed, or a republication or revivor thereof found" and therefore that, notwithstanding the fact that the deed to complainant's predecessor in

the title had been given before the Buchanan and Smock deed, nevertheless, as to the restrictions, complainant might be considered as holding under a grant subsequent to the grant to defendant's predecessor in the title. He cites *Genung* v. *Harvey,* 79 N. J. E. 57. That case is not authority in the case at bar that there was any republication or revivor.

Vice-Chancellor Stevens in that case denied relief and the facts are succinctly stated in the headnote as follows (79 N. J. E. 57):

> "B. conveyed to G., by separate deeds at different times, two adjoining lots, each deed providing that the lot covered by it was conveyed subject to the condition that no building should be erected thereon nearer to the street line than fifteen feet. This restriction is not shown to have been part of any general scheme; and B. is not shown to have had any remaining lands. G., while owner of both lots, gave a mortgage on the lot first conveyed, which did not reimpose the restriction; and after the giving of the mortgage, but before its foreclosure, under which defendant acquired title to the mortgaged lot, complainant became the owner of the other lot under deed from G.—Held, that B., by conveyance of the second lot, having no lands remaining, having lost the right to enforce in equity the restriction on the first lot, G., by reason of this and because of the uniting in her of the ownership of the two lots also lost it; so that, she not having revived such right *by reimposing such restriction in her mortgage,* complainant, who had only such rights as she had, could not enforce it."

There is no proof in the case at bar which would indicate that the original conditions in the deed from Bradley to Hurley were inserted "for the benefit of Bradley's retained lands" or that, when Bradley made a deed to Buchanan and Smock,

the conditions therein were imposed for the benefit of Bradley's *retained lands. There is no evidence that Bradley had any retained lands.*

In *Sailor* v. *Podolski,* 82 N. J. E. 459, also mentioned by the Vice-Chancellor, Vice-Chancellor Leaming said, at page 462:

> "As complainant's right to enforce defendant's covenants cannot be sustained as a right emanating from a general scheme of development, it follows that it can only be sustained upon the claim that defendant's covenant was entered into for the benefit of subsequent owners of the lot subsequently conveyed by the common grantors to complainant's predecessor in title and thereafter conveyed to complainant. The deed from the common grantor to defendant's predecessor in title was dated December 16th, 1901; the deed from the common grantors to Complainant's predecessor in title was dated May 19th, 1902. In Hemsley *v.* Marlborough Hotel Co., 62 N. J. Eq. (17 Dick.) 164, 170; affirmed in 63 N. J. Eq. (18 Dick.) 804, it is held that in a case of the nature stated the *burden rests upon complainant to establish that the covenant was made by the prior grantee of the common grantor for the benefit of the subsequent purchasers of the lot owned by complainant.* In McNichol *v.* Townsend, 73 N. J. Eq. (3 Buch.) 276; Hemsley *v.* Marlborough Hotel Co., *supra,* was followed, and it is there also pointed out that *no presumption arises from such a covenant that it is for the benefit of subsequent purchasers of the remaining land of the common grantor,* and that in the affirmance of Renals *v.* Cowlishaw, reported in 11 Ch. Div. 866, 868, it is stated that to enable the subsequent purchaser to take the benefit of restrictive covenants of a prior purchase, there must be something in the deed containing the covenants to define the property for the benefit of which the covenants were entered into. The covenants contained in the deed of conveyance from the common grantors

to defendant's predecessor in title are solely covenants of the grantee; grantors neither bind themselves to enforce or perpetuate the covenants against their grantee and his assigns nor to create or enforce similar or any covenants against subsequent purchasers of other parts of their land, nor do the covenants in any way state that they are for the benefit of subsequent purchasers of all or any part of the unsold lots of grantors; *the covenants are in form purely personal covenants of the grantee to his grantors, restricting the manner in which the grantee should use the land granted.* If these covenants were intended by the parties to embody stipulations which were not expressed, if they were intended by the parties to include by implication the stipulation that they were for the benefit of the purchasers of all or some particular portion of the unsold lots of the grantors, or were to be enforceable at the instance of subsequent grantees of remaining lots, the accurate ascertainment of that intention is clearly necessary to clothe the subsequent purchaser with the right of enforcement of the covenants. This has been the view uniformly accepted by the courts of this state from Coudert *v.* Sayre, 46 N. J. Eq. (1 Dick.) 386, and De Gray *v.* Monmouth Beach, 50 N. J. Eq. (5 Dick.) 329, to the present time.

Where the restrictive covenant of the prior purchaser expressly provides that it is intended for the benefit of subsequent purchasers of the remaining and of the common grantor or so declares by providing that it may be enforced by such subsequent purchasers, it may be enforced by such subsequent purchasers against such prior purchasers. This is clearly pointed out in Coudert *v.* Sayre, 46 N. J. Eq. (1 Dick.) 386, 392, and has been at all times uniformly recognized as the settled law of this state.

And where a general building or development scheme has been adopted by the common owner and perpetuated through the medium of uniform restrictive covenants in all deeds

made by such common owner, each purchaser may enforce the uniform covenants against all other purchasers irrespective of the time of order of their respective purchasers, because such a general scheme can only exist as such by reason of its necessary comprehension of the plan to subject the entire tract to the operation of the uniform covenants.

But where there is no such general scheme and where neither the instrument containing the covenant nor any other instrument provides that similar covenants shall be inserted in subsequent deeds to be made by the grantor of his remaining land nor in any other way restricts the grantor in the use or disposition of his remaining land, nor provides that the covenant is for the benefit of subsequent purchasers of all or any part of the unsold land of the grantor, nor that it may be enforced by such subsequent purchasers, *it may well be doubted whether any satisfactory ground can be found to support a claim of right of a subsequent purchaser from the grantor to enforce the covenant.* As already suggested, to sustain such claim of right there must be read into the written contract by way of construction from the light of surrounding circumstances an engagement or stipulation or purpose which the parties to the contract did not express. It seems at least clear, upon principles which scarcely need be stated, *that the subsequent conduct of the grantor in inserting a similar covenant in a subsequent conveyance of a part of the tract cannot be properly regarded as a circumstance in aid of the intention or purpose of the parties to the prior deed.* Nor does it seem to me that the circumstance that the grantor retained a lot adjacent to and similar to the lot conveyed can justify the conclusion that the covenant was mutually intended by the parties for the benefit of and to be enforceable by a subsequent purchaser of the lot so retained. The prior purchaser may well have refused to enter into a covenant broader than that contained in his deed, and

the grantor may well have had no purpose to exact a covenant other than one purely personal to himself. The mutual purpose that the covenant should import no more than it expressed and should be purely personal and should not inure to the benefit of or be enforceable by a subsequent purchaser of the remaining adjacent lot, may well have entered into the consideration price of the purchase. Reported cases are to be found in which the writers of the opinion appear to have suggested the possibility of the existence of surrounding circumstances adequate to justify a judicial determination that a restrictive covenant of the nature of the one here in question was intended by the parties for the benefit of the unsold land of the grantor and could, in consequence, be enforced at the instance of subsequent purchasers of a part of the unsold land; but *I have found but one adjudicated case in which that view has been made the basis of relief except in that class of cases already referred to in which a general scheme of development has been sustained.* I refer to the case of Childs *v.* Douglas, Kay 560; but the subsequent history of that case, as is pointed out in Keates *v.* Lyon, L. R. 4 Ch. App. Cas. 218, destroys the value of that case as a precedent.

But assuming that such an implied purpose may be established by circumstances surrounding the parties to the deed in the absence of some stipulation in the deed indicating the existence of such a purpose, I am convinced that no circumstance exists in this case to justify the affirmative conclusion that the restrictive covenants in the deed of defendant's predecessor in title were for the benefit of subsequent purchasers of the lot now owned by complainant. *The lot now owned by complainant is indeed adjacent to the lot of defendant, but in the absence of a general scheme of development that circumstance cannot, in my judgment, be deemed operative to enlarge or define the covenant of the parties in such manner* that it can *with certainty*

> be said to have been made for the benefit of subsequent purchasers of such adjacent lot. *In Fortescue* v. *Carroll, 76 N. J. Eq. (6 Buch.) 583, our court of errors and appeals has pointed out with the greatest emphasis that in cases of this class the right of complainant must be entirely clear before a court of equity can be justified in restricting another in the uses to which he may lawfully put his property.*"

Vice Chancellor Leaming in that case was dealing with a COVENANT, whereas, what we have in the case at bar in both the Bradley and Hurley and the Bradley and Buchanan and Smock deeds are *conditions,* the very language of which indicates that the conditions were imposed for the personal benefit of the grantor and not for the benefit of any retained lands.

The Vice Chancellor leaves this point undecided at page 118 and calls it a "vexing question" because he bases his decision upon the agreement of May 14, 1923 (Ex. C-2, p. 55).

B.

The restrictions and limitations upon the grant of the fee from Bradley to Sarah Jane Hurley, Book 347-333 (Ex. C-1, p. 49), and in the deed, Bradley to Buchanan and Smock, Book 377-392 (Ex. C-6, p. 83), are by way of condition and cannot be construed as covenants.

The condition in the deed, Bradley to Sarah J. Hurley is as follows:

> "Said premises are hereby conveyed upon the following *conditions,* to wit: That no house, cottage or other building shall ever be erected thereon nearer to the line of said Third Avenue than twenty-five feet therefrom, nor nearer to the line of said Main Street than ten feet therefrom, and also upon the *conditions* that the said premises shall

never be used for the sale of intoxicating liquors or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, butcher shops, barber shops, fish markets or public gas works shall ever be erected thereon and that no fence which shall exceed four feet in heighth shall ever be erected thereon within twenty-five feet of said Third Avenue, and also that no fence which shall exceed four feet in heighth shall ever be erected thereon within ten feet of said Main Street. And that in case the said party of the second part, or her heirs, executors, administrators or assigns, or any of them, shall *violate any or all of the conditions herein contained, then this deed shall be null and void and thereupon the fee of the said lands shall revert to the party of the first part.*"

It was contended below that conditions imposing restrictions upon the use of lands as distinguished from covenants imposing restrictions, may be enforced in equity by injunction. Two or three cases are found in this state which contain the statement that a condition may be so enforced. One of these is *Coudert* v. *Sayre,* 46 N. J. Eq. 386, but in that case, Vice-Chancellor Van Fleet refers at several points to the "covenant" sought to be enforced and it appears (p. 388) that the complainant *covenanted* for himself, his heirs and assigns with respect to the restrictions. There are no cases mentioned in the decision in *Coudert* v. *Sayre* in which a condition as distinguished from a covenant was enforced. We submit, therefore, that *Coudert* v. *Sayre* is not authority for the proposition that a *condition* may be enforced by injunction.

The opinion in *Hayes* v. *Waverly & Passaic Railroad Co.,* 51 N. J. Eq. 345, also contains the statement that a condition may be so enforced. An examination of the case, however, reveals that

the restrictions there considered were in the form of *covenants* which the party of the second part "for herself, her heirs and assigns covenants to keep and observe". No cases are cited in that opinion bearing specifically on the enforcement of *conditions* and all the cases cited in the opinion, to which we have had access, deal with *covenants* and not with conditions. We have examined a great number of cases dealing with the general subject of an enforcement of *conditions* by injunction in a court of equity. In no instance do we find any case where a *condition* has been enforced by injunction. We *do* find a number of instances in which the language used is that of a condition but there was no provision for reverter or there was a covenant joined, and the Courts have held that the "conditions" amounted to covenants or declarations of trust. Some of these instances are found in *Woodruff* v. *Woodruff*, 44 N. J. Eq. 349; *MacKenzie* v. *Trustees of the Presbytery of Jersey City*, 67 N. J. Eq. 652.

The only case directly in point which we have been able to discover in this state is *Woodruff* v. *Trenton Water Power Co.*, 10 N. J. Eq. 489. In that case the defendant was the grantee named in a deed which contained the following condition: "subject, nevertheless, to the following proviso: that if the said main race way shall not be made on said premises in conformity to the act incorporating said company, the said lands and premises shall revert to the said George Woodruff, his heirs and assigns."

This Court, holding that the proviso was a condition and not a covenant, said:

> "A condition is quite distinct from a covenant. The language in this deed is appropriate to create a condition, and, as if to avoid any doubt, the legal consequences of a breach or violation of the condition is in-

> serted. Upon covenants, the legal responsibility of their nonfulfillment is, that the party violating them must respond in damages. *The consequence of the non-fulfillment of a condition is a forfeiture of the estate.* The grantor may re-enter at his will and possess himself of his former estate. The grantees were to make the raceway in conformity to their act of incorporation; they were to erect, maintain and keep in good repair a safe and substantial bridge over the race way; they were to make a landing place on the river Delaware, and to make and maintain the fences. But they entered into no covenants to do these things. They were to enjoy the land, provided they did perform these stipulations; and they accepted the deed, and entered upon the land upon the condition, that if they did not perform them, they should forfeit all the benefits of the grant. Unless these are conditions, then there exists no distinction between a condition and a covenant. *Nicoll* v. *The N. Y. & Erie R. R. Co.,* 12 Varb. S. C. Rep. 460; *Coke upon Litt, by Thomas,* 4; *Com. Dig.,* Condition 1, A. 2; *Co. Litt.,* 216; *C. Hamilton* v. *Elliott,* 5 Serg. & Rawle (375; *Platt on Cov.,* 36, 37; *Bouv. Law Dict., Title Proviso.*"

In *Southward* v. *Central Railroad Co.,* 26 N. J. L. 13, the following was recognized as a condition:

> "Provided, nevertheless, and it is hereby expressly covenanted and agreed that the said parties of the second part are to use and occupy the said lots and premises hereby granted for the sole and only use of a depot. . . . And it is hereby expressly understood and agreed by and between the said party of the first part and the said parties of the second part, that if at any time forever hereafter the said company shall cease to use and occupy the above described lands and premises for the sole and only purpose of a depot & . . . that then, and in that case, the right and title hereby conveyed shall cease, and

> the said parties of the second part shall forfeit all the right, title and interest conveyed &c., or intended to be conveyed hereby to them in the above described land and premises and the same shall revert to and be in the said party of the first part, their heirs and assigns, as if this conveyance had never been made and no title had been given or intended to be given to the said parties of the second part."

In *Bouvier* v. *Baltimore & N. Y. Railroad Co.*, 67 N. J. L. 281, this Court held a clause to be a condition. The clause is set up in the report as follows:

> "And in consideration of the premises, it is hereby mutually agreed and covenanted by the respective parties hereto that the grant of land herein contained is made and received upon the following conditions—that is to say: First . . . Second . . . Third . . . Fourth . . . Provides for re-entry by the grantors, their heirs, executors, administrators or assigns in case of refusal or neglect 'to lay, make, construct and keep in repair and thereafter maintain a double-track railway over and upon said lands', or 'to locate, build and maintain thereafter a passenger station upon the portion thereof as above described and required'."

The cases in other jurisdictions and the text book authorities are in line with those in this State.

> *Papst* v. *Hamilton*, 133 Cal. 631, 66 Pac. 10;
>
> *Clapp* v. *Wilder*, 176 Mass. 332, 57 N. E. 692;
>
> *Brown* v. *Chicago & N. W. R. Co.* (Iowa, 1900), 82 N. W. 1003 (not officially reported).

Gray v. *Blanchard,* 8 Pick. 284, 25 Mass. 283;
Langley v. *Chapin,* 134 Mass. 82;
Marshalltown v. *Forney,* 61 Iowa 578, 16 N. W. 740;
Blanchard v. *Detroit R. Co.,* 31 Mich. 43;
Rose v. *Hawley,* 118 N. Y. 502;
Adams v. *Valentine,* 33 Fed. Rep. 1;
8 R. C. L., p. 1100, sec. 158, p. 1102.

We submit that the language contained in the deed Bradley to Sarah Jane Hurley dated March 17, 1882 (Ex. C-1, p. 49) and in the deed, Bradley to Buchanan & Smock dated June 13, 1884 (Ex. C-6, p. 83), creates *conditions* and cannot be construed as creating covenants, particularly because of the fact that no agreement on the part of the grantees for themselves or their heirs is found in the deeds and because of the provision that a violation of any condition shall cause the termination of the estate granted by Bradley and reversion to Bradley and his heirs.

We have already pointed out that the only cases that we can find bearing *directly* on the question of whether a violation of condition may be restrained by injunction are, *Woodruff* v. *Trenton Water Power Co.,* 10 N. J. Eq. 489; *Southard* v. *Central Railroad Co.,* 26 N. J. L. 13, and *Woodruff* v. *Woodruff,* 44 N. J. Eq. 349, all holding that violations of restrictions set up in a condition will *not* be restrained in equity and holding that the consequence of a non-performance of a condition is forfeiture of the estate.

If the restrictions are imposed by condition, the persons in whom the right of reversion is vested have a remedy for a violation of the condition much more effective than any remedy by way of injunction to restrain violation. Even if the Court can decide that the owner of the reversionary in-

terest had any rights which could be protected by injunction, there is nothing in the case to show that *this* complainant has any interest in the condition or the reversionary interest. As was pointed out in *Southard* v. *Central Railroad Co.*, 26 N. J. L. 13, she is neither an heir nor a devisee of Bradley and she has not shown any manner in which she has acquired any interest in the reversionary right.

C.

If the language in the deeds from Bradley to Sarah Jane Hurley and to Buchanan and Smock (Ex. C-1, p. 49, Ex. C-6, p. 83) could be construed as a covenant and not as a condition, that covenant was not made for the benefit of lands of which complainant is the owner.

Complainant at the hearing abandoned her position that a neighborhood scheme had been created and, so far as the conditions set out in the deeds are concerned, her position must be that the conditions, if they can be construed as covenants, were imposed by Bradley for the benefit of lands of which complainant is now the owner. It will be recalled that the only evidence that was introduced on this point was the deed of Bradley to the defendants' grantors (Ex. C-1, p. 49), the deed to complainant's grantors (Ex. C-3, p. 49) and the deed to one other person (Ex. C-4, p. 71). It will be noted that the deeds themselves contain no internal evidence that Bradley intended to impose restrictions for the benefit of any one but himself. He exacted no agreement from the grantee in the deed of defendants' land binding upon such grantee and her successors in title to observance of the restrictions; Bradley considering, undoubtedly, that the provision for reverter upon violation was sufficient to protect whatever interest he had in the observance of the restrictions. Bradley

did not bind himself or his assigns to observe the restrictions in the use of the adjoining lot owned by him, and there was no statement in the restrictive clause that the restrictions were for the protection of any lands.

As has been pointed out in a large number of cases decided by our courts, there is no presumption that such restrictions are imposed for the benefit of *lands* retained by the grantor, the presumption being the contrary, *i. e.*, that the restrictions are imposed for the *personal benefit* of the grantor.

As was held in *McNichol* v. *Townsend*, 73 N. J. Eq. 277:

> "The Graham deed, so far as the record discloses, contains no statement that the restrictive clause now in question was for the protection of any part of Brown's unsold property and contains no engagement upon the part of Brown, and the adjudicated cases do not appear to have recognized that a stipulation or covenant of this nature will be presumed to have been made for the benefit of the remaining land of the grantor in the absence of some evidence of the fact. In *Master* v. *Hansford*, 4 Chanc. Div. 718-724, and again in *Reynolds* v. *Cawlishaw*, 9 Chanc. Div. 125 & 129. It is recognized that such restrictive covenants may be intended for the benefit of remaining land of grantor or may be intended only to enable the grantor more advantageously to deal with his property. In the affirmance of the latter case on appeal it is also suggested that there should be something in the deed containing the restrictive covenant to define the property for the benefit of which it was entered into."

The proof necessary to establish the fact that restrictions contained in the deed to defendants' grantor was intended for the benefit of complainant is indicated in *Sailer* v. *Podolski*, 82 N. J. Eq.

459; *Hemsley* v. *Marlborough Hotel Co.*, 62 N. J. Eq. 164, aff. 63 N. J. E. 804, and in numerous other cases. We have quoted from *Sailer* v. *Podolski* at page 39 of this brief.

In *Jennings* v. *Baroff*, 7 N. J. A. Rp. 167, this Court, reversing the Court of Chancery, said (p. 168):

> "The grantor, Oliver, did not covenant to subject his other and adjoining land to like restrictions, nor did it appear that he represented in any way to any one that he would do so. In fact there was no evidence except this one lone covenant itself, that at the time it was imposed it was intended to comprise a part of a neighborhood improvement scheme. Under such circumstances, and in the absence of language indicating that the benefit of such covenant was intended to become appurtenant to and to run with the title to the grantor's remaining land (in which case not a neighborhood scheme, but a burden in the nature of an equitable easement would result (Hemsley *v.* Marlborough Hotel Co. (second case) 68 N. J. E. 596; Renals *v.* Cowlishaw, 11 Ch. Div. 866), *the covenant must be construed to have been reserved for the personal benefit and convenience of the grantor in his use or disposition of his remaining ground, and to terminate with his death or by virtue of an earlier release by him, or upon an earlier termination of his interest in its performance.* Hemsley *v.* Marlborough Hotel Co., (first case), 62 N. J. E. 164; affirmed, 63 N. J. E. 804.)"

We are aided in determining whether the conditions were imposed for the benefit of Bradley or for the benefit of Bradley's successors in ownership of the adjoining lot by the practical construction upon the effect of these conditions made by Bradley himself. After it became necessary for him to foreclose the purchase money mortgage given him by Hurley, defendants' predeces-

sor in the title, and after he had purchased at the Sheriff's Sale on foreclosure he dealt with the land as free from conditions and he conveyed defendants' lot to Nelson E. Buchanan and others, (Ex. C-6, p. 83), and inserted in the deed a restriction against meat markets, which did not appear in the deed to Sarah Jane Hurley (Ex. C-1, p. 49), and left out of the Buchanan deed the restriction against barber shops which appeared in the Hurley deed and also inserted in the Buchanan deed the provision that violation would cause the fee to revert "to the said parties of the first part (Bradley) and *his heirs*", in place of the provision that upon violation, the fee should revert to "the said party of the first part (Bradley)" which was found in the deed to Hurley. These differences indicate that Bradley and the persons with whom he dealt, *considered the conditions to be for the benefit of Bradley alone.* Likewise, the terms of the release made by Bradley's executors to Jones in 1923 (Ex. C-2, p. 55) respecting defendants' lot, wherein the executor quit-claimed the reversionary right and attempted to create restrictive covenants, when certain contingencies were performed, for the benefit of other owners of property in the block, certainly indicated that Bradley's executor, and the owners of complainant's lot and defendants' lot, viewed the conditions imposed by the deeds made by Bradley to be *for the personal benefit of Bradley.* It is significant in this connection to note that the agreement made Bradley's executor and Jones of 1923 quit-claimed and released not the conditions imposed by the deed from Bradley to Sarah Jane Hurley, but the conditions imposed in the deed from Bradley to Buchanan. This practical construction by the predecessors in interest of complainant and defendants to the effect that the conditions imposed by Bradley in the deed to de-

fendants' predecessor and in the deed to complainant's predecessor were intended not for the benefit of successors in ownership under Bradley, but for the benefit of Bradley himself, should be given great, if not controlling weight, by the Court.

It was contended below that *Leaver* v. *Gorman*, 73 N. J. Eq. 129, and *Genung* v. *Harvey*, 79 N. J. Eq. 57, are controlling in this case and that those cases hold that the conditions imposed in the Bradley deeds were for the benefit of his retained land, but, those cases have no application to the instant suit because the parties to this case are not in the same privity as were the parties in those cases. *Leaver* v. *Gorman* is not authority for the proposition that Bradley inserted conditions in the deed to defendants' predecessor in title for the benefit of his adjoining land, because in the first place, the restriction there construed was in the form of a covenant in the following language: "the said party of the second part for himself, his heirs, executors, administrators and assigns covenants that he and they shall never use the said premises or cause the same to be used for the sale of intoxicating liquors or for any manufacturing purposes whatever, and that no hog pen shall ever be erected thereon"; and in the second place, because, as the opinion indicates, a great deal of proof was introduced to establish the fact that the covenant there involved was intended for the benefit of the grantor and subsequent owners of adjoining lands, which proof is absent in this case.

Genung v. *Harvey* is not authority for the reasons given above as the restriction there was in the form of a covenant, as the Court found (and the record in that case will so disclose, the covenant not being set up in the report of the decision). The language of that restriction followed the language used in the Leaver case more closely

than the language used in the defendants' deed in the instant case.

The Vice Chancellor left undecided all of these what he called "vexed questions" because he held that the right of complainant might rest upon the agreement of May 14, 1923, the agreement made between the executor and trustee of Bradley and Jones, who was then the owner of the defendants' lots (Ex. C-2, p. 55) and we will now consider that agreement or instrument.

D.

There was no proof that Bradley's acting executor had authority to enter into the agreement made by him with Jones and that agreement (Ex. C-2, p. 55), according to its terms, did not become effective until after defendants' building was completed, and the agreement was not made in pursuance of a neighborhood scheme of restriction, and there was no privity between Bradley's executor and defendants' predecessor in title and complainant, and the restrictions contained in said agreement were unreasonable restrictions upon the use of defendants' land.

Samuel H. Gillespie was the sole acting executor and surviving trustee of the last will and testament of James A. Bradley, according to the recital in the instrument (Ex. C-2, p. 55). The will was not proven and there is no proof that he was in fact the acting executor or surviving trustee. There was no proof whatsoever that, if he was such executor and trustee, a power to release the possibility of reverter and impose such covenants was given to him under the will of Bradley. An executor or trustee has no power to deal with lands or interests therein, except to sell to provide funds for the payment of debts, unless specific authority is given him in the will which he is appointed to administer. The will was not in-

troduced in evidence, nor was there any proof that powers to release the reversionary right and impose covenants was given to Gillespie in any manner.

The agreement of 1923 (Ex. C-2, p. 55) between Bradley's executor and Jones provided for a release of the conditions and the right of reversion specified in the deed from Bradley to Buchanan and Smock and attempted to substitute in the place of those conditions, covenants containing similar restrictions against the use of the property which is now defendants, and provided, among other things, "as a condition precedent (and not merely as a covenant)", that the release "shall have no force or effect, and shall be for nothing holden until these presents shall be signed by the said party of the second part and duly acknowledged by them and *recorded* in the Clerk's Office in and for the County of Monmouth in the same manner as deeds for lands are acknowledged and recorded, nor *until all mortgages,* judgments, liens and other encumbrances upon, against, or in anywise affecting the lot or parcel of land hereinabove described, shall be first duly paid, *cancelled, released* and *discharged of record,* nor unless the said Alfred A. Jones be the sole and actual owner of said land, in fee simple, at the time of execution and *recording* of these presents."

The release was recorded in the Monmouth County Clerk's Office on July 23, 1924 in Book 1264 of Deeds, page 411. At that time there was in existence and open of record a mortgage made by Alfred A. Jones and wife to the Asbury Park Building & Loan Association which had been recorded in the said Clerk's Office on May 13, 1924 in Book 697 of Mortgages, page 229 (Ex. D-3, p. 107). The proofs showed that this mortgage was open and uncancelled of record until August 15, 1928 and that it was cancelled on that day.

If competent at all for the executor and trustee to make that release, it was competent for him to impose any reasonable condition to be performed before the release was to take effect. The condition imposed in the release was undoubtedly intended to secure to Bradley's executor and trustee any advantage he might gain from the existence of the covenant, and the condition precedent named upon which the release was to take effect was well calculated to secure whatever benefit there was in the covenant to Bradley's executor. The reason that such condition precedent was imposed was undoubtedly to meet a situation which would arise upon judicial sale of the premises at the instance of a mortgagee or judgment creditor whose lien existed at the time of the *recording* of the release, for a mortgage *recorded* or a judgment recovered before the *record* of the release would take precedence of the release.

If there were no time limited for the taking effect of the release, then, after the release was recorded, a mortgagee or judgment creditor might cause a sale of the lands and the purchaser at such sale would take free of the condition imposed in the deed, because that condition had been released. That purchaser would also take free of the covenant because the covenant was imposed after the lien of such mortgage or judgment had accrued. As the facts were, if the Asbury Park Building & Loan had been compelled to foreclose its mortgage, the purchaser at the foreclosure sale would have taken the land free of the condition in the deeds and without any burden of covenant under the agreement, unless Bradley's executor was protected by the conditions precedent named in the release.

That these considerations were in the mind of the executor and trustee when he made the quit-claim of the reversion, it appears by analysis

of the quit-claim deed quoted above. That provides that the instrument shall be null and void, unless three separate situations shall occur.

First: That the instrument shall be properly signed, acknowledged and *recorded.*

Second: That all mortgages, judgments and other encumbrances "upon, against or in anywise affecting the lot or parcel of land" shall be paid and discharged of record.

Third: That Jones, the grantee, be the actual owner at the time of the execution and *recording* of the instrument.

That the mortgages referred to in the second situation were those existing at the time of the *recording* of the instrument of release and not those existing at the time of its execution, is gathered from an analysis of the instrument and the inclusion of the provision that Jones must be the owner of the premises at the time of *recording,* as well as at the time of the executing of the instrument. The reason clearly appears. A purchaser from Jones after the instrument of release was executed, but before it was recorded, would stand in the same position as a purchaser on foreclosure sale of a mortgage which had been executed and *recorded* after the execution of the instrument of release by Jones but before the latter was recorded. Indeed, a purchaser at foreclosure sale of a mortgage which was executed and recorded before the release was executed by Jones or recorded, would have exactly the same rights as a purchaser on foreclosure of a mortgage recorded between the times of executing and recording of the instrument of release. If the executor and trustee desired protection of the rights and benefits he gained against the purchaser from Jones who took after the instrument of release was executed and before it was re-

corded, he desired the same protection against a mortgagee whose rights were acquired at a corresponding time. The executor and trustee must have desired protection of his rights against *all* mortgagees and purchasers at execution sale, whether the mortgages were placed before or after the execution of the release, since the rights of all mortgagees, whose mortgages were existing at the time of *recording,* would be exactly the same.

As the conditions precedent to the taking effect of the agreement did not occur, the covenants by the very terms of the instrument in which they are contained, are null and void.

The Vice Chancellor in his conclusions (p. 121) holds that the mortgages and other liens referred to in the agreement, cancellation of which was required before the instrument took effect, were those in existence "at the time of the execution of the agreement and not those which might become liens thereafter" (p. 121). But this holding ignores the reason for the provisions in the instrument that it should, in the first place, be *recorded* and that it should not take effect until all mortgages, judgments, liens and other encumbrances upon, against, or in anywise affecting the lot or parcel of land hereinabove described, shall be first duly paid, cancelled, released and discharged of record" (p. 161).

It would not answer the purpose of the executor and trustee to provide for the cancellation of mortgages and other liens which were in force at the time of the *execution* of the instrument, for the instrument would not take effect as against mortgagees, subsequent purchasers or judgment creditors until it was *recorded.* The construction put upon the instrument by the Vice Chancellor wholly ignores the reason for the insertion of the provision which, by the very terms of the instru-

ment, is made "a condition precedent (and not merely as a covenant") (p. 60).

As we have heretofore stated, before the instrument took effect, if it is to be construed as we insist, the building of defendants had, in fact, been completed.

E.

The covenants contained in said agreement made by Bradley's executor and Jones were not made for the benefit of complainant and there was no proof that said covenants were made for her benefit.

The release itself, must have been intended to secure to Bradley's executor and trustee the benefit of the covenants in connection with his ownership of land in the vicinity of the defendants' lot, such benefits being secured to him by the condition until the covenant became effective. The proof does not disclose however, that Bradley's executor and trustee owned any land in the vicinity of defendants' lot and it is questionable, whether equity would restrain violation of the covenants contained in that release at the instance of Bradley's executor and trustee for whose benefit the agreement was undoubtedly intended. Equity restrains violations of covenants of this character on the ground that such violation will work an injury to the person for whose benefit the covenant is made, as the owner of lands, which injury cannot be adequately compensated by damages recoverable in an action at law. If Bradley's executor and trustee owned no lands in the vicinity, violation of these covenants in equity would give him no right in equity.

If Bradley's executor and trustee for whose benefit the covenant was *primarily* made could not restrain the violation of the covenants of the 1923 release, it is difficult to understand how complain-

ant could maintain a bill to enforce such violation, notwithstanding that the 1923 release recited "it shall be lawful, not only for the said Samuel H. Gillespie, acting executor &c. . . . but also for the owner or owners of any lot or lots of land adjoining or in the neighborhood of the premises hereby released deriving or having derived title from or through the said Samuel H. Gillespie, acting executor &c. or from or through said testator to institute and prosecute any proceedings &c".

There is nothing in the release of 1923 to show that Bradley's executor and trustee was the agent of or was acting in concert with other owners of lands in the vicinity to impose restrictions on defendants' lot for the benefit of those other persons. Indeed, there is nothing to show that these owners knew anything about the release. *There is nothing to show that the owner of defendants' lot received any benefit by way of impositions of the same restrictions on the other lots in the neighborhood to compensate him for the burden thus attempted to be imposed upon his lot.* These restrictions for the benefit of owners of adjoining lot or lots in the neighborhood must have been intended to create, and could be supported only by the creation of, a neighborhood scheme of restriction. Such scheme must be universal. The same restrictions must be imposed upon all lots similarly situated. If the restrictions upon all lots similarly located are not alike or some lots are not subject to restrictions, while others are, then the neighborhood scheme fails. If there is a burden upon one lot and no corresponding proof of a similar burden upon the other lots in the neighborhood, then there can be no neighborhood scheme. *DeGray* v. *Monmouth Beach,* 50 N. J. Eq. 329; *Scull* v. *Eilenberg,* 94 N. J. Eq. at 759; *Sanford* v. *Keer,* 80 N. J. Eq. 240, and the cases following those decisions.

No evidence was introduced at the hearing to show that other lots in the vicinity were similarly restricted for the benefit of these defendants and nothing was shown upon which a neighborhood scheme could be based; and it will be remembered that complainant specifically abandoned any attempt to prove that a neighborhood scheme existed.

One of the grounds on which violations of these restrictive covenants are restrained is that there is a privity between the owner of adjacent lands acquiring title through the same grantor. But there is no privity between the complainant and defendants so far as the 1923 release is concerned, for the reason that their respective predecessors in title had long before acquired lands from Bradley. As was said in *Seidel* v. *Mills,* 84 N. J. Eq. 285; Aff. 84 N. J. Eq. 507, Stephenson, V.-C., said, at p. 292: "The idea that after a deed has been made the grantee can, through a course of years, get the benefit of restrictions which the grantor sees fit to insert in subsequent conveyances is novel and quite untenable."

Conclusion.

It is respectfully submitted that for the reasons above argued, the supposed restrictions were not binding upon defendants' lands and that, in any event, the right to enforce such restrictions was not so clear as to warrant a court of equity in granting injunctive restraint in a case where it appeared that great harm would be occasioned to defendants and no benefit to complainant except such incidental benefit as she might possibly obtain by being supplied with a weapon whereby she might compel defendants to purchase her lot.

To enforce these restrictions by injunction in this neighborhood which has so changed from the condition in which it was at the time that the restrictions were imposed, the idea then being that it would develop as a residential neighborhood whereas, in fact, it has become business, *would prevent not only defendant but the other owners of lots in the neighborhood from using their property for the only purpose for which the properties can reasonably be used.*

Equity and good conscience in this case required the denial, not the granting of relief and we submit that the decree below should be reversed and the record remitted to the Court of Chancery with instructions to dismiss the bill.

Respectfully submitted,

COOK & STOUT,
MERRITT LANE,
Of counsel with Defendants-Appellants.

(7978) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

89

New Jersey Court of Errors and Appeals

Between CATHERINE LISTER, Complainant-Appellee, *and* NATHAN VOGEL, *et als.*, Defendants-Appellants.	On Appeal from Court of Chancery. Bill for Injunction to Enforce Building Restriction. Decree for Complainant. Defendant's Appeal. Sat Below: Berry, V. C.

(Italics ours.)

BRIEF FOR APPELLEE.

This is an appeal from a decree restraining the violation of building restrictions.

Facts.

Defendants are the owners of three lots at the southeast corner of Main Street and Third Avenue, Asbury Park. Complainant is the owner of the lot adjoining on the Third Avenue side. Both the complainant's and defendants' lands were originally owned by James A. Bradley, who on January 24, 1871, obtained title to a large tract of land (Exhibit C-6) in the vicinity of the property in question. By deed dated March 17, 1882 (Exhibit C-5) Bradley conveyed the premises of which defendants are now the owners to one Sarah Jane Hurley. That deed contained the following restrictions:

> "The said premises are hereby conveyed upon the following conditions, to wit: That no house, cottage or other buildings shall ever

be erected thereon nearer to the line of the said Third Avenue than twenty five (25) feet therefrom, nor nearer to the line of said Main Street than ten (10) feet therefrom. And also upon conditions that the said premises shall never be used for the sale of intoxicating liquors, or for any manufacturing purpose whatever. And that no hog pens, public laundries, livery stables, butcher shops, barber shops, fish markets or public gas works shall ever be erected thereon, and that no fence which shall exceed four (4) feet in height shall ever be erected thereon within twenty five (25) feet of said Third Avenue; and also that no fence which shall exceed four (4) feet in height shall ever be erected thereon within ten (10) feet of said Main Street. And that in case the said party of the second part, or her heirs, executors, administrators or assigns, or any of them, shall violate any or all of the conditions herein contained, then this deed shall be null and void, and thereupon the fee of the said land shall revert to the said party of the first part."

Sarah Jane Hurley gave a purchase money mortgage to James A. Bradley for said premises (Exhibit D-6). This mortgage was later foreclosed and by deed dated June 13, 1884, the Sheriff conveyed the premises to James A. Bradley, who the same day by bargain and sale deed conveyed to Nelson E. Buchanon and others. This latter deed contained restrictions similar to those in the Sarah Jane Hurley deed.

By various mesne conveyances one Alfred A. Jones became owner of the premises and on May 14, 1923, Samuel H. Gillespie, Executor of the Estate of James A. Bradley, entered into an agreement with Jones. This agreement quit claimed and released the right of entry and forfeiture contained in the deed from James A. Bradley to Buchanon and others, and substituted therefor a clause giving the right to all neighboring lot

owners deriving title through Bradley to enforce the covenant.

This agreement provided that it was not to become effective until three conditions precedent were performed.

Prior to the erection of the building defendants sought to obtain a written release of the restrictions from complainant (pp. 176, 177), but she refused to sign it (p. 178, ll. 34-35), on the advice of Father Roche (p. 177, ll. 30-35; p. 185, ll. 15-30) whose church owned most of that block (p. 185, ll. 30-35).

Defendant Vogel admits he talked to complainant "in a general way" about the building to be erected (p. 138, l. 23). He attempts to give the impression that he described the proposed violation to complainant and she consented to it (pp. 138-141) but never says so explicitly.

When his own attorney asked him point blank whether he told complainant where the building would be erected with respect to Third Avenue, he dodges by saying he showed her the plans (p. 141, ll. 1-10).

His co-defendant, however, was not so wary. He lets the cat out of the bag (p. 163, ll. 1-21) in response to the Court's questions and says they said nothing to complainant about the location of the building.

It is perfectly clear from the testimony that complainant had refused to sign a release of her right to enforce the restrictions. No amount of argument can spell a consent out of that refusal.

On May 29, 1925, the premises were conveyed to defendant Nathan Vogel "subject to the covenants, conditions and restrictions contained in former deeds of said property" (Exhibit C-6). Vogel thereafter conveyed a one-third interest to each of the other defendants making his convey-

ances subject to the covenants, conditions and restrictions of record (Exhibit C-6).

James A. Bradley conveyed to complainant's predecessor in title, Hubbard Hurley, on October 16, 1882 (Exhibit C-3). The deed contained restrictions similar to those in the Sarah Jane Hurley deed.

On February 6, 1882, prior to the conveyance to either complainant's or defendants' predecessors, James A. Bradley had conveyed the property adjoining complainant's on the east to one Lemuel Howell (Exhibit C-4). This deed contained restrictions similar to those in the deeds for complainant's and defendants' premises.

Defendants admit having built on the entire restricted area (p. 125, ll. 12-20; p. 126, ll. 20-27); a depth of some twenty-five feet over the line contemplated by the restrictions (see Description in Exhibits C-1 and C-2).

The Court decided that defendants' contention that complainant was estopped had no foundation in fact, and also decided that there had been no waiver of the restrictions (p. 189, ll. 12-27).

Points.

Complainant contends that:

1. As owner of James A. Bradley's retained lands she can enforce the restrictions placed in the deed from James A. Bradley to Sarah Jane Hurley for the benefit of those lands.

2. The agreement between Bradley's executor and Jones expressly gives her the right to enforce the restrictions contained in defendants' deeds.

ARGUMENT.

POINT ONE.

Complainant as the grantee of retained land of the common grantor can enforce the restrictions.

It is well settled that 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 covenantor but against all subsequent purchasers with notice of the covenant.

Tulk vs. *Moxhay,* 2 Phil. 774;
Mann vs. *Stephen,* 15 Sims. 376;
Bristow vs. *Wood,* 1 Coll. 480;
Brewer vs. *Marshall,* 19 N. J. Eq. 537;
Coudert vs. *Sayre,* 46 N. J. Eq. 386.

This is on the principle, according to *Brewer* vs. *Marshall* (*supra*), that a party having knowledge of the just rights of another will be prevented from defeating such rights. It is not based upon the idea that the restriction which is enforced created an easement or is of a nature to run with the lands.

A subsequent grantee of the covenantee's land can enforce such restrictions against a prior grantee of another lot of the common grantor.

In the case of *Coudert* vs. *Sayre,* 46 N. J. Eq. 386, the Court says at page 391:

> "Covenants of this kind, which either add to the value or desirability of the land retained or conveyed, and which do not in any way impose an unreasonable restraint upon trade or industry, have, as I think an examination of the authorities clearly shows, uniformly been upheld and enforced. * * * It is well settled, that a covenant of the kind just men-

tioned will, whether it runs with the land or not, be enforced, not only against the covenantor, but also against any person claiming under the covenantor with notice of the covenant."

And again at page 392:

"It would appear, then, to be entirely clear that the validity of the covenant under consideration, both as against the complainant and any person who may succeed to his title with notice of the covenant, is free from the least doubt. It follows, necessarily, that the making of the covenant was effectual in putting a burthen on the land conveyed for the benefit of the land retained. This being so, it would seem to follow as a logical sequence, that the defendant by the acquisition of a part of the land benefited by the covenant has succeeded, in respect to that land, to the covenantee's right under the covenant."

And again at page 393:

"The law is well settled, that the rights created by such covenants are transferable as part of the land to which they are attached, and where, as in this case, a grantor restricts the use of the land which he conveys, for the benefit of land which he retains, his subsequent conveyance of the land retained will pass such benefit to this grantee."

And again at page 395:

"The doctrine now in force on this subject I understand to be this: that when it appears by the true construction of the terms of a grant that it was the well understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of the other land owned by the grantor, *no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant, or reservation, or exception,* such right, if

not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burthen thus created and imposed will pass with the lands to all subsequent grantees. 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."

In *Hayes* vs. *Waverly and Passaic R. C. Co.,* 51 N. J. Eq. 345, at page 348, the Court says:

"It is settled by adjudication in this state, as a general rule that where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee, *whatever may be its form, whether covenant, condition, reservation or exception,* which restricts the enjoyment of the portion of the land which is conveyed, in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, whether it runs with the land and is binding at law or not, it will be enforced in equity against the grantee and any one subsequently acquiring title to the land with notice of it, at the instance of the grantor or of the subsequent owner or owners of parts of the remaining land, when its violation results in material detriment to the portion of the remaining land, which the complainant in the suit holds."

In *Roberts* vs. *Scull,* 58 N. J. Eq. 396, at page 401-402, the Court says:

"The principle upon which a person not a party to a restrictive covenant is permitted to enforce it, is based upon the idea that the subsequent purchaser of lands to be benefitted by the enforcement has made his purchase and paid his consideration in the expectation of the benefit to accrue to the land bought, from the observance of the restrictions imposed by his grantor upon the use of the lot previously conveyed to the covenantor, and *no injustice is worked upon the covenantor or his assigns with notice of the covenant by restraining them from using the land in a manner inconsistent with the contract under which they obtained the title* and which fixed the price they paid with relation to the restrictions imposed. Tulk *vs.* Moxhay, 2 Phil. 774. That is, the prior purchaser from the common grantor, by reason of the restrictions imposed paid less price for his land; the party who subsequently purchased from the common grantor a part or the whole of the land to be benefited by the restrictions, bought in consideration of the benefits coming to his lot because of the restrictions. This relation is such a privity as supports an equity in the subsequent purchaser of the lot benefited by the covenant to enforce it."

In *Ocean City Asso.* vs. *Headley,* 62 N. J. Eq. 322, at pages 335-336, the Court says:

"The rule allowing a purchaser of a lot of land benefited by the covenant to enforce it, though he may not be a direct party to it, is only applicable when a subsequent purchaser seeks to enforce it against a prior purchaser who made it and against his assigns who took with notice of it. The purchaser who bought subsequently to the covenant took his lot in expectation of the benefit to be derived from the restrictions imposed by the prior deed, and is presumed to have adjusted his consideration-money in view of the benefits to his lot which were derived from the observance

by the prior purchaser of the restrictions imposed. The prior purchaser did not buy in expectation of any benefit to be derived by him from any subsequent covenant not yet in existence, nor did the subsequent purchaser make his covenant with the common grantor with relation to lands which the latter had previously conveyed and in which he had no interest. It is only when there is a general plan imposed upon the lands sold, under which each purchaser buys, that a prior purchaser may enforce against a subsequent purchaser who violates it. Mulligan *vs.* Jordan, 5 Dick. Ch. Rep. 363; Roberts *vs.* Scull, 13 Dick. Ch. Rep. 401."

In the case of *Hemsley* vs. *Marlborough Hotel Co.,* reported in 62 N. J. Eq., at page 163, Vice Chancellor Reed says, at page 167:

"It is entirely settled that where an owner sells a portion of his land, he can impose a restriction, not obnoxious to public policy, upon the use of his remaining land (Brewer *vs.* Marshall, 40 E. Gr. 537), or upon the portion sold (Coudert *vs.* Sayre, 1 Dick. Ch. Rep. 386), which covenant the owner of his grantee can enforce."

"When such a covenant is included in the deed to a grantee and such covenant is made for the benefit of the remaining land of the vendor, the right to enforce the covenant passes to a subsequent grantee of the vendor. The questions primarily propounded are, does the complainant stand in the attitude of a subsequent purchaser from the vendor, with whom defendant's predecessor in title made his or her covenant; and secondly, was such covenant made for the benefit of the land subsequently sold to the complainant's predecessor in title?"

In McNichol *vs.* Townsend, 73 N. J. Eq. 276, at page 277, the Court says:

"One owning a tract of land may convey a portion of it and by appropriate covenant or agreement may lawfully restrict the use of the part conveyed for the benefit of the unsold portion, providing that the nature of the restricted use is not contrary to principles of public policy. In such a case a subsequent purchaser of all or a part of the remaining land, for the benefit of which the stipulation was made, may, in equity, enforce the observance of the stipulation against the prior grantee upon the principle that the rights created by such a stipulation are transferable as part of the land to which they are attached."

In *Bowen* vs. *Smith,* 76 N. J. Eq. 456, at pages 458-459, the Court says:

"*I think it unnecessary, however, to here consider the evidence in this case to determine to what extent rights may have arisen through any scheme adopted* by either the Chelsea Beach Company or the Chelsea Land and Improvement Company *for the development of their tract along the lines of a defined general plan, for the deed made to William T. Runkle* by the Chelsea Land and Improvement Company, *which deed contains the covenants now in question and under which deed defendant derives his title, was made prior to the conveyance* by that company to Edward Geschke, *under which complainant now holds* through sundry mesne conveyances. In such case the right of the subsequent purchaser of all or a part of the remaining land of the common grantor for the benefit of which the covenant was made to enforce the covenant against the prior grantee and his grantees with notice has long been recognized in this state. I think the law of this state in the aspect last referred to is accurately summarized by me in McNichol *vs.* Townsend, 73 N. J. Eq. (3 Buch.) 276, as follows:

"The equitable grounds on which restrictions of this nature may be enforced at the instance of a subsequent grantee of the common grantor are well defined. One owning a tract of land may convey a portion of it, and by appropriate covenant or agreement may lawfully restrict the use of the part conveyed for the benefit of the unsold portion, providing that the nature of the restricted use is not contrary to principles of public policy. In such case a subsequent purchaser of all or a part of the remaining land for the benefit of which the stipulation was made may in equity enforce the observance of the stipulation against the prior grantee upon the principle that the rights created by such stipulation are transferable as part of the land to which they are attached (Coudert *vs.* Sayre, 46 N. J. Eq. (1 Dick.) 386) and such subsequent purchaser may in equity enforce the stipulation against a person who holds title under the prior purchaser, who has acquired title, with notice of the restriction, upon the principle which prevents a party having knowledge of the just rights of another from defeating such rights. Brewer *vs.* Marshall, 19 N. J. Eq. (4 C. E. Gr.) 537. As no privity exists between the subsequent purchaser from the common grantor and the original grantee or the persons holding under him, the right of action is necessarily dependent upon the existence of the fact that the stipulation was originally made for the benefit of the remaining land of the common grantor." Rogers *vs.* Hosegood (1900), 2 Ch. 388, 404.

In *Beattie* vs. *Howell,* 98 N. J. Eq. 163, at page 165, the Court says:

"Without retracing the history of the rule as was done so elaborately by Vice Chancellor Green in De Gray *vs.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 A. 388, it is sufficient to say that, if the original grantor does not bind himself by a covenant

> such as the one under consideration, then his grantee, having no right of action against the grantor, cannot pursue any other grantee to whom the latter may subsequently convey the remaining land, either in whole or in part. A subsequent grantee can enforce such a covenant against a prior grantee of another lot, but a prior grantee cannot enforce the covenant against a subsequent grantee. Leaver *vs.* Gorman, 73 N. J. Eq. 129, 68 A. 111."

Defendants quote at length from *Sailer* vs. *Podolski,* 82 N. J. Eq. 458, and apparently deem the case of great importance. That case merely holds, as a number of other cases in this state hold, that the complainant in seeking to enforce a right which exists for his benefit has the burden of proof in any given case. *Sailer* vs. *Podolski* had to do with a restriction which prevented the erection of a porch higher than nine feet above the grade of the lot, which prohibited the erection of a building nearer to the front line of the lot than twelve feet and which permitted only certain types of buildings to be built on the lot. An attempt was being made to build a porch higher than nine feet above the grade of the lot, though it was not intended that this porch should be built over the building line. The Court held it doubtful that the building of this porch would be a violation, since it was not going to be built over the building line. *This ruled the whole question of the enforceability of the building line restriction out of the case.* The only point left in the case for the decision of the Court was whether the use of the property for an apartment house was a violation of the other restriction. The Court in its decision said that the complainant had not shown that the restriction allowing the erection of only a cottage, hotel or drug store had been made for the benefit of the lands of which he was now the owner, and went on to say, at page 462:

> "In Hemsley *vs.* Marlborough Hotel Co., 62 N. J. Eq. 164, 170, affirmed in 63 N. J. Eq. 804, it is held that in *a case of the nature stated* the burden rests upon the complainant to establish that the covenant was made by the prior grantee of the common grantor for the benefit of the subsequent purchasers of the lot owned by complainant."

The nature of the case stated in *Hemsley* vs. *Marlborough Hotel* was as follows:

It had to do with a restriction against the erection of a building for use other than a dwelling-house. The defendant's property was across the street and some distance down the block from the property formerly owned by the common grantor. In that case, too, it was said that it was necessary for complainant to show that the restrictions had been entered into for the benefit of the land of which he was the owner.

The *Sailer* vs. *Podolski* case then goes on to say that *Hemsley* vs. *Marlborough Hotel* was followed by *McNichol* vs. *Townsend,* 76 N. J. Eq. 276. In the *McNichol* case, complainant's property was on the opposite side of and some distance down the street from defendant's property. The covenant involved was a building line restriction. Obviously in the absence of some special showing, a building line restriction cannot be said to benefit property across the street and some distance away from the land burdened. The *Sailer* vs. *Podolski* case then cites *Renals* vs. *Cowlishaw.* That case also had to do with the use of property and not with the location of buildings upon it. There the covenant prohibited the use of the property for business purposes. There was some evidence that the covenant had been imposed to facilitate a sale by grantor, of his remaining property and the Court held that since there had been no showing whatever that the covenant had

been entered into for the benefit of the complainant's land, it could not be enforced. None of the cases cited in *Sailer* vs. *Podolski* had to do with a building line restriction, except *McNichol* vs. *Townsend* and in that case as we have pointed out, the physical conditions were such as made it extremely doubtful that the restriction was for the benefit of complainant's land.

The distinction between the quantum of proof necessary to prove that a building line restriction for the benefit of complainant's land and that necessary where a covenant concerning the type of building to be erected on such land is concerned, is clearly shown by the difference in the reasoning of the Court in the second *Hemsley* vs. *Marlborough Hotel* case, 68 N. J. Eq. 596 (E. & A.), reversing 62 N. J. Eq. 167 (Ch.). *In both Hemsley* v. *Marlborough Hotel cases the same deed was the subject matter of the suit.* In the first case the complainant was attempting to restrain the erection of a hotel. In the second case the complainant was seeking to prevent the breach of a building line restriction. *The properties concerned in both cases were the same.* Apparently no difference in the evidence adduced was important enough to merit discussion by the Court. *The construction of a hotel was permitted in the first case. The violation of the building line restriction was prohibited in the second case,* the Court in the course of its opinion saying (68 N. J. Eq. at p. 599) that the building line restriction was obviously beneficial to complainant's property protecting the light, air and prospect, and that *therefore,* "although the clause does not say, in terms, that the right of consent is reserved to Mrs. Disston and her heirs as owners of this property, it seems to us that this is the necessary implication."

In the case at bar, Bradley, the common grantor, was the owner of three lots shown on a certain map as numbers 890, 891 and 892. A glance at the description contained in the deed from Bradley to Sarah Jane Hurley (Exhibit C-6) (original grantee of defendant's lands) and in the deed from Bradley to Hubbard Hurley (Exhibit C-3) (original grantee of complainant's lands) shows that although these lots, as shown on the map, originally faced on Main Street, after the conveyance of the front part of them to Sarah Jane Hurley, Bradley had remaining to himself the rear fifty feet of each of those three lots. He subsequently conveyed this rear portion to complainant's predecessor in title (Exhibit 3). Thus complainant's predecessor became the grantee of the retained portion of those three lots and the lot which he received, made out of the rear portions of the other three lots, was fronted on Third Avenue. Prior to all these conveyances, Bradley had conveyed the property to the east of these lots to Lemuel Howell (Exhibit C-4) subject to a similar building line restriction. Thus the Howell lot, and the front portions of the three lots (which portions are now owned by defendants) were conveyed subject to a building line restriction which would only benefit the land located *between* those two parcels. This land is now complainant's. Having retained the rear part for himself; having imposed a building restriction on the lots adjoining his on the east and west, it is clear that the restriction was imposed for the benefit of his remaining lot, of which complainant is now the owner. Had Bradley intended the restriction for his own personal benefit, had he intended it to exist only during his lifetime, he would have inserted in the deed words to that effect. He would not have said, as he did say in his deed, that no building shall *ever* be erected nearer to the line of

Third Avenue, than twenty-five feet. He would have used words less indicative of perpetuity.

The physical layout of the property points strongly to the fact that the covenant was imposed for the benefit of the retained rear portion of the lots. There is no need to argue in the case at bar as was argued in the case of *McNichol* vs. *Townsend,* that since plaintiff's and defendants' property were so far distant from each other, some strong showing must be made that they were for the benefit of complainant's lands. It is entirely competent for the Court to take into consideration the physical layout of the land and the obviously resultant benefit to retained lands of grantor.

Clough vs. *Mesnick,* 96 N. J. Eq. 482, affirmed in 98 N. J. Eq. 706;
Sanford vs. *Keer,* 80 N. J. Eq. 240;
Meaney vs. *Stork,* 80 N. J. Eq. 60.

The case of *Welitoff* vs. *Kohl,* 103 N. J. Eq. 454, affirmed in 105 N. J. Eq. 181, clearly indicates that a building line covenant is of no personal benefit to a covenantee except in his capacity as the owner of neighboring lands. The benefit of such a covenant is to the land and not to the person. There the grantor had owned but one piece of property in the neighborhood and had conveyed it subject to a building line restriction. Complainant sought the cancellation of the covenant in a suit to quiet title. The Court held that since grantor had no property in the vicinity, he was deriving no benefit from the covenant; nothing of his was being protected by the covenant. If a building line restriction could be of any personal benefit to a grantor, the Court in all probability would not have quieted the title. If he had had property in the vicinity the benefit, if any, would have accrued to him in his capacity as owner of

land; would be derived through his ownership of land; it would benefit him because it benefitted the land and he, or the then owner of the land could have enforced it. Not having owned any other property, he could not enforce.

Restrictions similar to the restrictions in the case at bar were considered in the cases of *Leaver* vs. *Gorman,* 73 N. J. Eq. 129, and *Genung* vs. *Harvey,* 79 N. J. Eq. 57. Both those cases had to do with Bradley restrictions. The earlier case, *Leaver* vs. *Gorman,* very emphatically held that a covenant restrictive of the use of land will be enforced against the covenantor and subsequent purchasers with notice, whether the covenant runs with the land or not; that in the absence of a neighborhood scheme the owners of lands the title to which is the earlier out of the common grantor cannot enforce a covenant imposed on lands title to which was conveyed away by the common grantor at a later date. The complainant in the case of *Leaver* vs. *Gorman* was permitted to enforce the restriction in favor of the lot, title to which was later out of Bradley, but was not permitted to enforce the restriction in favor of the lot which was the earlier out of Bradley.

Defendants argue that the case of *Leaver* vs. *Gorman* is not controlling because the parties there were not in privity with the parties in the case at bar. No claim is made that the case is *res adjudicata.* The claim is made, and soundly we believe, that that case concerned a restriction similar to the restriction in the deed in the case at bar; that it was inserted by the same grantor who was the grantor in our case; that the same intention probably prevailed; that the reasoning in that case is clearly applicable to the case at bar and that in enforcing the restriction there the principle that it was for the benefit of retained lands of the common grantor was adjudicated. Such a case is of great weight.

The case of *Genung* vs. *Harvey* (*supra*), was concerned with a covenant contained in a deed of Asbury Park property made by James A. Bradley to Mary A. Genung reading as follows:

> "Said premises (a lot 100 feet square at the southeast corner of Grand and Monroe Avenues) are hereby conveyed subject to the following *conditions;* that no house, cottage or other building shall ever be erected thereon nearer to the line of the said Monroe and Grand Avenues than 15 feet."

This, except for the change in street names and the difference in the location of the building line, *is in precisely the same language as the covenant in the case at bar.*

The Court reiterated and upheld the rule laid down in the earlier cases that the subsequent grantee may enjoin a violation by a prior grantee. The complainant, however, was not permitted to enforce the covenant even though he owned lands, title to which was the later out of Bradley. This was solely because of the peculiar coincidence that Bradley conveyed to Mrs. Genung title to both the complainant's and defendants' lands, and that title to both at one time vested in Mrs. Genung. The Court concluded that Mrs. Genung, when once she became the owner of both lots could have violated the covenant with impunity because she could not have sued herself as owner of one lot in her capacity as owner of another.

The Court further said that complainant could have enforced the covenant if he had shown that it was in some way revived after the unity of ownership in Mrs. Genung. There was no evidence of revivor in the case. On the contrary, the evidence showed that Mrs. Genung mortgaged the lot of which defendant became the owner and not only did not reimpose the covenant for the protection of the lot which later became complainant's,

but inserted in the mortgage a covenant of warranty of peaceable possession.

Defendants contend that *Genung* v. *Harvey* is not controlling because the restriction there was in form a condition and not a covenant. They state that the report of the decision does not set up the language of the covenant (Brief, p. 53). *That is not the fact.* The restrictions in *Genung* vs. *Harvey* was in form a condition with a provision for re-entry for breach. The restriction was precisely like the one in the case at bar. It is to be found in the report of the case, 79 N. J. Eq., at page 57. The Court (at p. 59) states clearly that the building line covenant was of advantage to the owner of nearby lands; that the owner of such lands could enjoin violations and that the complainant there could enjoin except that it so happened that at one time complainant owned *both* lots. "* * * unity of ownership in Mrs. Genung extinguished her right to sue—she could not, in her character of owner of one lot, sue herself for violating the covenant as owner of the other."

In the case at bar there never was unity of ownership in Bradley, for when title to defendants' land revested in him as a result of the foreclosure, he was no longer the owner of complainant's lands. Every element that prevented enforcement in *Genung* vs. *Harvey* is absent in our case; every element that would have permitted enforcement there is present in our case. And this stands out so forcibly that defendants are compelled, in attempting to weaken the effect of this precedent, to argue that it is not controlling because the parties there were not in privity with the parties in the case at bar.

Defendants introduce the mortgage given by Sarah Jane Hurley to James A. Bradley, which was later foreclosed, and contend that the Sheriff's

deed to James A. Bradley operated to release the covenant or to result in making Bradley's grantees, Buchanon and others, subsequent grantees to the owners of the complainant's lot. Certainly in view of the opinion in the *Genung* case that the covenant can be enforced where there is evidence of revivor; and in view of the facts in our case that James A. Bradley after receiving title from the Sheriff retained it only momentarily and then conveyed to Buchanon subject to the reimposition of the same building restriction, and in view of the significant evidence that the later conveyance not only reimposed the covenant for the protection of the lot which later became complainant's, but also did not have inserted in it a covenant of warranty of peaceable possession or any other covenant of warranty, there is ample evidence of revivor, if it is at all necessary to look for a revivor. There is no need, however, to look for a revivor, for when Bradley conveyed complainant's lot to Hubbard Hurley, the benefit of the restriction on defendants' lot attached to complainant's lot and James A. Bradley could not in any way deprive complainant's lot of that benefit. Even if he had executed a complete release to Sarah Jane Hurley or any of her successors, the release would have been ineffectual as against the already existing rights of the owners of complainant's lot.

In *Laverack* vs. *Allen,* 2 Misc. 637, 130 Atl. Rep. 615, the Court said (no official citation):

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

In the case of *Jennings* vs. *Baroff,* Judge White speaking for the Court of Errors and Appeals,

7 N. J. Adv. Rep. 167, 144 Atl. Rep. 717 (no official citation), holds that a restrictive covenant may be released by a grantor only if it is made for his personal benefit. Where it has been made for the benefit of retained lands he cannot release as against a subsequent purchaser of such lands.

Defendants argue at length that in New Jersey the mortgagee holds legal title to the estate *for the purposes* of his mortgage. It is, of course, the rule that the mortgagee has a lien for securing his debt.

The case of *Champion* vs. *Hinkle,* 45 N. J. Eq. 162, cited by defendants at page 35 of their brief, however, had to do merely with the availability to a mortgagor of the right to redeem after the foreclosure of a mortgage. The mortgage in that case had been executed prior to the passage of the act concerning proceedings on bonds and mortgages. This is the act which opened foreclosure proceedings and gave to mortgagors the right to redeem if suit were brought on the bond to recover a deficiency. The purchaser at the sale got the title of both mortgagor and mortgagee free of any right to redeem. The acts of 1880 and 1881 subjected the estate of a mortgagee to this right of redemption and hence were held unconstitutional so far as they attempted to affect mortgages executed prior to the passage of the statutes. The Court went on to say (at page 165):

> "The acts of 1880 and 1881 subjected the estates of mortgagees to conditions of redemption which did not previously exist. As applied to antecedent mortgages these acts are unconstitutional and void, in that they subject the purchaser's title to redemption after sale, thereby diminishing the vendible value of the mortgage estate, and impairing the obligation of the contract contained in the mortgage. Baldwin *vs.* Flagg, 14 Vr. 495,

> 504; Coddington *vs.* Bispham, 9 Stew. Eq. 574, 580; Morris *vs.* Carter, 17 Vr. 260. A purchaser at a foreclosure sale, under a mortgage prior to the passing of these acts, succeeds to the original estate of the mortgagee, and acquires an estate unaffected by the condition of redemption created by these acts. The value of the mortgage estate can be preserved unimpaired in the hands of the mortgagee only by investing the purchaser at the foreclosure sale with the mortgagee's original estate unimpaired by the newly-added condition of redemption."

The case concerned title to land only as it was affected by the mortgagor's right to redeem. It has nothing to do with the rights raised by restrictive covenants.

These rights do not flow from the creation of an estate in the servient land, but are the rights given by equity to enforce a contractual status.

> *Brewer* vs. *Marshall,* 19 N. J. Eq. 537;
> *Hayes* vs. *Waverly and Passaic Railroad Co.,* 51 N. J. Eq. 345, and similar cases above cited.

This status, not being an estate inland, is unaffected by the giving of a mortgage or the foreclosure of a mortgage, and the mere technicality that a mortgagee was not made a party defendant was held, in *Renals* vs. *Cowlishaw,* 11 Ch. Div. 866 (Eng.), of no importance in a suit to enforce a restrictive covenant.

POINT TWO.

The Gillespie-Jones agreement expressly confers on complainant the right to enforce the covenants.

On May 14, 1923, Gillespie, executor and surviving trustee of the estate of James A. Bradley, entered into an agreement with Alfred A. Jones and wife, the then owners of defendants' lands. That agreement recited the restrictions contained in the deed from James A. Bradley to Buchanon and others and recited further that the said Jones had requested Bradley's executor to "release to the said Alfred A. Jones, his heirs, and assigns, all the estate, right, title and interest, vested or contingent, which the said James A. Bradley at the time of his death had or could have had (in the premises owned by defendant) for or by reason of the above recited conditions. * * *".

The agreement then contains a quit-claim of the property by Gillespie as executor and a *habendum* free and discharged of all rights of entry for conditions broken, etc., and *the said Jones agrees for himself, his heirs and assigns, among other things, that he will not build any kind of building nearer the southerly line of Third Avenue than 25 feet therefrom.* It is then agreed that the covenants shall run with the land and that the owner of any lots adjoining his, deriving title through the testator, may institute proceedings against the persons violating the covenant.

The agreement then provides as a condition precedent that the agreement must be signed and acknowledged by the parties and recorded in the Clerk's Office before it shall have any force or effect.

It further provides as a condition precedent that all mortgages and other liens existing against the premises must first be paid, cancelled, released and discharged of record before the agreement shall have any force or effect.

It further and finally provides as a condition precedent that Alfred A. Jones must be the sole and actual owner of the land in fee simple, both at the time of the execution and at the time of the recording of the agreement in order for it to have any force or effect.

The agreement specifically permits complainant as the owner of adjoining lands, deriving title through James A. Bradley, to institute and prosecute proceedings in equity against the violators of the covenant. It is effective unless some one of the three conditions precedent mentioned in the agreement has not been fulfilled.

The first condition is that the agreement must be signed, acknowledged and recorded. An examination of the agreement (Exhibit C-2) shows that this condition has been fulfilled and there was no effort made on the part of defendants to show that it had not been.

The second condition is that all mortgages, judgments and other liens against the property must be first duly paid and discharged. An examination of the abstract of title (Exhibit C-6) will show that every mortgage, judgment, lien, or other encumbrance affecting the premises at the date of the agreement was discharged or cancelled.

The third condition, namely, that at both the time of the execution of the agreement and at the time of its recording Alfred A. Jones must have been the sole and actual owner in order for the agreement to have been effective is shown by an examination of the abstract to have been performed and there was no contention made at the

trial that at both those times the said Jones was not the owner.

At the trial a mortgage executed by Alfred A. Jones to the Asbury Park Building & Loan Association, *made almost a year after the Gillespie agreement,* was introduced in evidence. This mortgage was cancelled of record August 15, 1928 (Exhibit D-3).

It is defendants' contention that the creation of this mortgage lien on the premises was a bar to the effectiveness of the Gillespie agreement. That might be true if the language of the agreement "nor until all mortgages * * * affecting the lot" were construed to mean "all mortgages *hereafter* to be placed affecting the lot." This interpretation is a strained one. *It would mean that the agreement was subject to alternate periods of effectiveness and nullity as successive mortgages were placed and cancelled.*

The language must be construed in its ordinary meaning. It is written in the present tense and clearly refers to mortgages affecting the premises at the time of the execution of the agreement. If the parties to the agreement had intended that all mortgages existing *both* at the time of the execution of the agreement and at the time of the recording of the agreement must first be paid and cancelled, they would have said so, just as they did in the provision that Alfred A. Jones at the time of the execution and recording, must be the sole and actual owner in fee simple.

If there is any doubt as to the proper construction of the language of the agreement, it should be resolved in favor of its validity under the theory that equity abhors a forfeiture. This agreement was one releasing the possibility of a reverter or forfeiture of the fee.

Defendants contend that the provision that all liens must first be cancelled was for the protection

of the right to enforce those restrictions as against possible purchasers at a foreclosure sale of the building and loan mortgage. This argument is not sound. No matter what kind of a release was executed by James A. Bradley or his executor, the rights of adjoining land owners to enforce the conditions had long since vested and could not in any way be impaired.

Leaver vs. *Gorman,* 73 N. J. Eq. 129;
Jennings v. *Baroff,* 7 N. J. Adv. Rep. 167, 144 Atl. Rep. 717 (no official citation);
Laverick vs. *Allen,* 2 Misc. 637, 103 Atl. Rep. 615 (no official citation);
Muller vs. *Weiss,* 91 N. J. Eq. 29, affirmed in 91 N. J. Eq. 321;
Coudert vs. *Sayre,* 46 N. J. Eq. 386.

The only thing that Bradley or his executor could release was his own right to re-enter.

The agreement between Jones and Bradley's executor was merely a bargain in which Bradley's executor, on behalf of the Bradley estate gave up the right of re-entry in exchange for the express conferring upon all neighboring land owners, deriving title through the Bradley estate (whether they were subsequent or prior grantees) of the right to enforce the restrictions existing on defendants' property. In other words the right of re-entry for breach of condition broken was given up and as compensation Jones agreed that all persons deriving title through Bradley could enforce the covenant. Nothing that was done could affect the rights of complainant or her predecessor in title, since the rights were fixed at the moment Bradley originally conveyed to complainant's predecessor in title.

Defendants object to the validity of the release of 1924 on the ground that there was nothing to show that other owners of land in the vicinity

were acting in concert through Bradley's executor to impose restrictions, nor to show that Bradley or those owners covenanted in any way to create or enforce similar restrictions. Such proof is needed only when an attempt is made to establish the existence of a neighborhood scheme and no such attempt is being made in the case at bar. *Bowen* v. *Smith*, 76 N. J. Eq. 456.

Defendants cite *Sidel* vs. *Mills*, 84 N. J. Eq. 285, in which Stevenson, V. C., said:

> "The idea that after a deed has been made, the grantee can, through a course of years, get the benefit of restrictions which the grantor sees fit to insert in subsequent conveyances is novel and untenable."

That case did not concern a deed which expressly gave to adjoining land owners the right to enforce. Persons can, of course, contract between themselves in any way that they see fit, provided it is not against public policy. If an owner of land is willing to agree that owners of land in the neighborhood of his may enforce certain restrictions as against him such agreement, by its terms, confers upon such neighboring owners the right to enforce.

Defendant raises the point that there was no proof of the authority of Bradley's executor to enter into the agreement with Jones (Exhibit C-2, p. 55).

This is raised for the first time in the case. Trial counsel, who was familiar with the terms of the Bradley will, as is every lawyer practicing in the vicinity of Asbury Park knew that the will expressly conferred upon the executor the right to enter into such an agreement, and therefore, made no objection to the admission of the agreement (p. 127, l. 20). The answer filed by him (p. 15, ll. 5-20) raised only the issue that the

agreement by its terms "has never become operative", and the case was tried on the theory that there was no need to present proof of the executor's authority.

Trial counsel will not deny that the executor had the authority and power to enter into the release agreement.

Rebuttal.

Defendants contend that the restrictions in their deeds, being in the form of conditions, cannot be enforced by injunction; that the only remedy is re-entry for condition broken.

That is not the rule.

The learned author of Tiffany on Real Property states the true rule as follows:

> "That the grantor of land is expressly given a right of forfeiture in case of the breach by the grantee of a provision restrictive of the use to be made of the land does not itself preclude the enforcement of such a provision by injunction",
>
> 2 Tiffany on Real Property (1920 ed.), page 1427, and the cases there cited.

The author is further borne out by the cases of *Hayes* vs. *Waverly and Passaic R. R. Co.*, 51 N. J. Eq. 345, 348, and *Coudert* vs. *Sayre*, 46 N. J. Eq. 386, 395, both quoted from elsewhere in this brief and *both expressly stating that restrictions may be enforced no matter in what form they are drawn, whether as covenant, condition, reservation, exception, etc.*

It will be noted that defendants' entire argument under this head is devoted to cases holding that there is a distinction between covenants and conditions. *Not one case is cited however, which holds that a condition is not enforcible by injunction.*

Defendants argue that the testimony shows a waiver and estoppel, and that complainant's case is not an equitable one. To make a basis for their argument they proceed on the assumption that all the testimony adduced on the part of complainant is false and that only the testimony on the part of defendants should be believed. The Vice Chancellor's decision on the facts, however, is fully borne out by the testimony.

The testimony of the defendants Vogel and Glaser was evasive, self-contradictory and incapable of belief.

Complainant's testimony was straightforward and she was corroborated by the witness, Father Roche.

She testified that the defendants requested her to sign a release of the restrictions (p. 177); that she sought the advice of Father Roche (p. 177, ll. 30-35) and refused to sign (p. 178, l. 34). Defendants seek to convert this refusal to sign a release into a consent to release. Father Roche also refused to sign a release (p. 185, ll. 1-10). Defendants built in spite of both refusals to release; and in spite of the order of the Court of Chancery that they were erecting a building "at their peril."

Defendants' contractor filed the building contract on January 17th. Excavation was commenced at the rear of the lot (p. 168, ll. 2-10). Complainant gave notice dated January 23rd, and served January 24th that she objected to any violation of the restriction (Admitted in Answer, p. 19, l. 18).

She could not know that defendants were building in violation of the restrictions until she saw the excavation at the *front* of the lot. The excavation was begun at the rear and some time must have elapsed before the violation became noticeable. Her notice was given only three or four

days after the work commenced. According to the calendar, a Saturday and Sunday intervened between the commencement of the work and the service of the notice, so that there were only one or two working days between the commencement of work and the service of the notice.

That she was innocent of laches and that no estoppel existed was correctly decided below.

The witness Smith to whom complainant sarcastically referred as "* * * one of the greatest advisers I had, this same Mr. Smith," testified that in the latter part of January, the complainant in a conversation with him indicated that she knew the defendants were violating the restriction (pp. 173-174). Counsel stresses this (Brief, p. 5) in attempting to show a waiver or estoppel. But the conversation took place *after* the notice was drawn (p. 174), and, according to complainant, after suit was started (p. 179, l. 11).

Defendants (Brief, p. 7) state that complainant was so familiar with building operators that she knew precisely where the building was to be put. They refer to pages 182, 183 and 184 of the testimony. The testimony there has no relation whatever to any knowledge of building operations on the part of complainant.

Great stress is laid on the fact that she had told Father Roche (Brief, p. 7) that defendants had asked her for a release. We fail to see how it follows from this that complainant waived her right to enforce the restrictions; neither do we see how it makes any difference that the church brought no action for an injunction. One suit is enough to determine the matter.

The Court found as a fact that there was no waiver by complainant; that she was not estopped; and that she was not guilty of laches. These conclusions are amply borne out by the

testimony, and a lengthy review of the testimony would serve no useful purpose.

Defendants state (Brief, pp. 1 and 2) that the location of the building line is not proved.

The location of that line is not in doubt. It is a line 125 feet north of the southerly line of defendants' land. That is clearly shown in the descriptions contained in the original deed from James A. Bradley to defendants' predecessor, Sarah Jane Hurley (Exhibit C-1). The description is as follows:

> "Beginning at the southeast corner of Third Avenue and Main Street, Thence southerly along the easterly line of Main Street, one hundred and fifty (150) feet, thence easterly parallel with Third Avenue ninety (90) feet; *thence northerly* at right angles with Third Avenue *one hundred and fifty (150) feet to the southerly line of Third Avenue,* thence westerly along *the southerly line of Third Avenue* ninety (90) feet to the place of beginning."

The building line in that deed is described as follows:

> "That no * * * building shall ever be erected thereon nearer *to the line of the said Third Avenue* than twenty five (25) feet, therefrom, nor nearer to the line of the said Main Street than ten (10) feet therefrom."

This obviously is the line mentioned in the description as the southerly line of Third Avenue. The set back provision cuts twenty-five feet off the lot conveyed in the deed. The same description is contained in the Gillespie-Jones release agreement (Exhibit C-2).

The sidewalk, commencing at the curb line, is twenty-five feet wide (p. 145, l. 5) and counsel himself states that the line on all streets in As-

bury Park is *inside* the sidewalk line (p. 186, ll. 22-24).

It is admitted that the entire restricted area is built upon (p. 126, ll. 20-25).

The witness Smith speaks of the building being built to the full line "the full one hundred and fifty foot front" (pp. 173-174); and defendants in their bill of particulars use the line fifty feet south of the curb line as the basis for the measurement of the violations (pp. 35, 36).

The case was tried by both sides on the understanding that the building line is fifty feet from the curb (p. 144, ll. 20-25). Trial counsel would not suggest otherwise. The statement in defendants' brief that the violation amounts to one inch is misleading.

Defendants repeat time and time again the statement that the character of the neighborhood had changed. The bill of particulars conclusively shows that the restrictions were substantially complied with along the whole length of Third Avenue. Defendants are bound by the bill of particulars.

There are seven blocks from the ocean to complainant's block on Third Avenue. The first block contains street numbers from 100 to 200, the second from 200 to 300, and so on (p. 148), complainant's property being known as number 706 (Bill of Complaint, p. 1, l. 10).

Demand number six (page 32) requested defendants to specify the buildings and structures which defendants claimed were erected on Third Avenue less than twenty-five feet from the building line. The bill of particulars discloses only three violations in the seventh block. These are across the street from complainant at numbers 707, 709 and 711 Third Avenue (complainant is number 706), and consist of 5, 5 and 6 inch encroachments respectively (page 36). The nearest

violations on complainant's side of the street are in the sixth block at numbers 600, 612 and 614 and 616, and consist of 5, 1½, 5 and 5 inch encroachments, respectively.

These violations are too insignificant in extent to have any weight. They do not amount to a change in the character of the neighborhood. They do not affect complainant's property and hence are not material in this case. The reasoning applied to such violations is well illustrated in the following cases:

Morrow vs. *Hasselman,* 69 N. J. Eq. 612;
Barton vs. *Slifer,* 72 N. J. Eq. 812;
Newbury vs. *Barkalow,* 75 N. J. Eq. 128;
Laverack vs. *Allen,* 2 Misc. 637, 130 Atl. Rep. 615 (no official citation);
Polhemus vs. *DeLisle,* 98 N. J. Eq. 256.

Vogel's testimony that the neighborhood has become a business neighborhood is greatly stressed in defendants' brief. That testimony referred to Main Street and not to Third Avenue; it referred to the character of the buildings and not to their *location.*

Defendants contend that it is inequitable to enforce the restrictions.

The photograph (Exhibit C-12) is rather poorly reproduced and a very careful examination is needed in order to see defendants' building. The brick building on the left of the picture is the parochial school building at the corner of Bond Street, a block east of defendants' building.

The camera is pointed along the building line, looking from Bond Street toward defendants' building. Next to the school building stands a small house belonging to the church and occupying the lot which was conveyed by Bradley to Lemuel Howell. Next to that stands complainant's dwelling and then comes defendants' build-

ing. The wall is white and it is difficult to see the edge of the building. Upon careful examination, the outline of the building can be seen. The front of the building is obscured by the foliage of the trees. Some persons are pictured standing under the marquee at the door of the building.

The other buildings in the picture are all on the building line and it can be seen instantly how far out defendants' building is built and how completely it cuts off the light, air and view of complainant's building. The point to which defendants built is shown also in Exhibit C-8 by the triangular board in the lower center of the picture.

Third Avenue is not a business street. Complainant's property has no value as a business property. The violation of the restriction by defendants renders complainant's property unsuitable for residential purposes. The Vice Chancellor who heard the case, familiar with the physical layout of the property and familiar with the entire neighborhood involved, decided there had been no abandonment of the restrictions and no change in the neighborhood which would render the enforcement of the restrictions inequitable. It can not be said his discretion was abused.

Defendants argue that the abandonment by complainant of the theory that a neighborhood scheme existed meant that no equity remained in favor of complainant. The fact that she was the successor of the subsequent grantee of retained lands of the common grantor made it unnecessary for her to prove the existence of a neighborhood scheme. *Bowen* vs. *Smith* (*supra*).

Summary.

1. Complainant feels that she has fairly and clearly proven that she is the subsequent grantee of a common grantor; that restrictions were imposed upon defendants' lands for the benefit of lands of which complainant is now the owner; that those restrictions have been violated and that her property has been damaged thereby.

2. Complainant has shown that she comes specifically within the terms of an agreement made between Alfred A. Jones, one of the defendants' predecessors in title, and the executor of the common grantor; that that agreement is operative; that it has been breached by defendants; that she has been damaged thereby and that, therefore, she can enforce that agreement.

For these reasons it is respectfully submitted that the decree of the Chancellor entered on the advice of Vice-Chancellor Berry, should be affirmed.

Respectfully submitted,

GERAN, MATLACK AND LAUTMAN,
Solicitors for and of Counsel with
Complainant-Appellee.