REAL PROPERTY—DEEDS—RESTRICTIVE COVENANTS—COVENANTS IN A DEED RESTRICTING CERTAIN PROPERTY FOR RESIDENTIAL PURPOSES AND FORBIDDING ITS USE FOR ANY OFFENSIVE BUSINESS HELD TO INCLUDE A PRIVATE HOSPITAL.—Pierce et al. v. St. Louis Union Trust Co. et al., 278 S. W. 398 (Mo. 1925).

Plaintiff, a resident and treasurer of Vandeventer Place, a private residential place in the city of St. Louis, brought this action to prevent the defendant trust company from leasing a residence in the Place to the other defendants for use by them as a private hospital for incurable diseases. Vandeventer Place was platted as a high class residential addition to the city of St. Lous in 1870 and each lot was restricted to a single one-family residence. The deed, after specifically naming certain prohibited uses of the lots, prohibited their use for "any trade or business of any kind, dangerous, noxious or offensive to the neighboring inhabitants." Since that time the surrounding district has become very largely a business district. Defendants insisted that the proposed use did not come within the restrictions, or, if it did, they had become a nullity. *Held,* that the clear intention of the original grantors had been to create a district reserved for private single family dwellings only, which excluded such a hospital as the one proposed; and that the restrictions were still valid.

The Court based its reasoning as to the first point on the general rule in the interpretation of a deed that the intention of the grantor should be gathered from the whole instrument (Koehler v. Rowland, 275 Mo. 573; Kitchin v. Hawley, 150 Mo. App. 498; Simonds v. Simonds, 199 Mass. 552, 19 L. R. A. (N. S.) 686) plus such surrounding circumstances as he can be presumed to have considered in drawing up the instrument (Kitching v. Brown, 180 N. Y. 414). Where it is necessary to get at the intention when it does not plainly show, parol evidence may be admitted (Peters v. McLean, 218 Fed. 410), and the whole instrument is to be read in the light of all the facts and circumstances under which it was written (Wise v. Watts, 239 Fed. 207). Applying this rule, it was the clear intention of the grantors to restrict this property to a high class residential district, as the deed conveyed the notion that each lot was limited to a home; that is, the dwelling place of a single family, according to Sanders v. Dixon, 114 Mo. App. 247. Moreover, where doubt is cast on the meaning of any words in such an instrument, it is to be presumed that they were used in their ordinary interpretation (Sanders v. Dixon, supra; Easterbrook v. Hebrew

Ladies Orphan Society, 85 Conn. 302). Too, the practical construction given by the owners of the lots themselves will be taken into account, as to what is or is not forbidden by the restrictions (James v. Irvine, 141 Mich. 376; Underwood v. Hermann Co. 82 N. J. Eq. 353).

In holding that the use of the premises for such a hospital violated the restrictions as to "any trade or business of any kind, noxious, dangerous or offensive," the Court followed Hartwig v. Grace Hospital, 198 Mich. 725; Barnett v. Vaughn Institute, 119 N. Y. S. 45; and Smith v. Graham, 147 N. Y. S. 773, all similar cases against hospitals or sanitariums. The St. Louis Court of Appeals has even gone so far as to hold that the use of a room in a doctor's home for consultation with patients was a violation of a similar restriction (Semple v. Schwarz, 130 Mo. App. 65). However, there is authority to the contrary, for in Carr v. Riley, 198 Mass. 70, a private hospital whose appearance had not been altered from a private residence was held not to be a violation of such a restriction, nor was the use of a basement as a market for food stuffs in a house otherwise unaltered. The fact that the outward appearance of the house is not changed seems to have much weight in these cases. A boarding house (Biggs v. Seagate Assoc., 211 N. Y. 482) and an Old Ladies Home (Easterbrook v. Hebrew Ladies Orphan Soc., 85 Conn. 289) were also permitted in a restricted district. The point on which all these cases seem to hinge is the interpretation of the words "business" and "mercantile establishment." In Rowland v. Miller, 139 N. Y. 93, the words "noxious or offensive" were held to apply to persons of an ordinarily sensitive disposition, and not to those who were supersensitive.

As to the second holding that the restrictions were still valid, they were held to be removed from the rule against perpetuities because the fee to the public part of the Place was vested in the plaintiff treasurer and his successors in office, persons now in being (Noel v. Hill, 158 Mo. App. 426; Koehler v. Rowland, 275 Mo. 573). Grey on Perpetuities, Sec. 280, regards such restrictions as a present vested interest in the adjoining lot owners. Nor will minor and unimportant violations of the restrictions by the plaintiffs be considered as a waiver of the restrictions (Newberry v. Barkalone, 75 N. J. Eq. 128; Bacon v. Sandberg, 179 Mass. 396).

The mere fact that conditions around the restricted neighborhood have changed so as to surround it with the noise and bustle of a commercial district, destroying the peace and seclusion of a residential neighborhood will not justify the court in annulling the restrictions (Spahr v. Cape, 143 Mo. App. 114; Evans v. Foss, 194 Mass. 601;

Thompson v. Landell, 172 Mo. App. 64); even though the property is more valuable for business purposes than for residences (Reed v. Hazard, 187 Mo. App. 547); or the restrictions are harmful to the neighborhood (Noel v. Hill, 158 Mo. App. 426); or even retard the growth of the city (Landell v. Hamilton, 175 Pa. St. 327). So long as there is a substantial benefit from them to the adjoining property owners the restrictions will be enforced (Brown v. Huber, 80 Ohio St. 183), unless conditions have changed so greatly and obviously that it is apparent that the enforcement of the restrictions will benefit no one and is being attempted merely for the purpose of annoying some of the property owners (Lattimer v. Livermore, 72 N. Y. 114).

W. T., '27.