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BILL OF COMPLAINT.

(Filed Nov. 14, 1922.)

IN CHANCERY OF NEW JERSEY.

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

John R. Neison, of Philadelphia, Pennsylvania,
complains and says:

10

1. He is the owner and in possession of a tract of
land in Atlantic City, New Jersey,

BEGINNING in the Westerly line of Kings-
ton Avenue (formerly Millidgeville) 119 feet
North from the northerly line of Atlantic Ave-
nue (1) West parallel with Atlantic Avenue 72
feet to the East line of Aberdeen Place; (2) 20
North along the same 39 feet; (3) East parallel
with Atlantic Avenue 72 feet to the West line
of Kingston Avenue, and (4) South along the
same 39 feet to beginning.

2. That Lillian S. Goldsmith and Yetta K. Marcus
are the owners and in possession of the tract of land
in Atlantic City, New Jersey, at the corner of Kings-
ton Avenue, Atlantic Avenue and Aberdeen Place,
which property adjoins the property of complainant. 30

3. That all the land in the block bounded by At-
lantic Avenue, Ventnor Avenue, Kingston Avenue
and Aberdeen Place, together with other land ad-
jacent was owned by Bradford Wright who plated
and mapped the same and caused the map to be

filed in the clerk's office of Atlantic County, New Jersey.

4. That in plating and mapping said land and in making conveyance thereof it was the intention and purpose of said Bradford Wright to create a general plan and scheme touching the construction of buildings thereon and in all deeds made by him to his respective grantees for land in said block and
10 all other blocks owned by him there was inserted the following covenants, among others:

“Subject, however, to the following restrictions and covenants which are placed on said land in pursuance of a general scheme for its improvement and are hereby made a part of the consideration thereof: 1st. That no more than one building shall be erected upon a single lot as mapped nor shall any lot be created out
20 of the said tract having a width less than that as planned. 2nd. That no building shall be erected or used except for cottage resident purposes, hotels and drug stores within four hundred and twenty-four feet North of Atlantic Avenue. 3rd. That the main body of no building shall be erected nearer the front property line of any avenue than twelve feet, nor nearer than three feet from the side or rear dividing lines provided that nothing herein shall prevent the owner from building one building covering more than one contiguous lot, provided
30 the building shall be kept away a similar distance from the outside lines of said contiguous lots.”

5. Complainant is informed and believes and therefore avers that the said Lillian S. Goldsmith and Yetta K. Marcus intend to violate the foregoing

restrictive covenants by constructing a boarding house or apartment thereon; by building more than one building thereon, and by constructing the main body of the building nearer the front property line of Atlantic Avenue and Kingston Avenue than twelve feet and nearer than three feet to the rear and side lines of said lot.

6. The deed from said Wright to the predecessor in title of complainant and said Goldsmith and Marcus contained the restrictive covenants hereinabove recited. 10

7. Complainant avers that the contemplated building or buildings of said Goldsmith and Marcus will be in violation of said restrictive covenants.

Complainant is without adequate remedy in the courts of law and therefore prays: 20

1. That Lillian S. Goldsmith and Yetta K. Marcus, who are the defendants to this suit may answer this bill of complaint, without oath, and each statement herein made.

2. That said Lillian S. Goldsmith and Yetta K. Marcus may be enjoined from constructing a building on their aforesaid premises in violation of the covenants herein quoted or any contained in said deeds, and that complainant may have such other and further relief as may be agreeable to equity. 30

3. That a writ of subpoena may issue commanding said defendants to answer this bill and to abide

1. They are without knowledge sufficient to form a belief as to the allegations of paragraph one.

2. They admit that they are the owners and are in possession of a lot of land and premises situate at the southwest corner of Kingston and Atlantic Avenues, in Atlantic City, New Jersey, the said lot having a frontage on Atlantic Avenue of thirty-six and fifteen one-hundredths feet, by a depth along Kingston Avenue of one hundred nineteen feet. 10

3. They are without knowledge sufficient to form a belief as to the allegations of paragraph three.

4. The allegations in paragraph four are denied.

5. They admit that they are building an addition to their present building on said lot and that the said addition is nearer than twelve feet to the property line of Kingston Avenue, but they deny that the same is nearer than three feet to the other lines of the lot and deny that the said addition is being constructed in violation of any restrictions against their property. 20

6. They have no knowledge sufficient to form a belief as to the allegations of paragraph six.

7. The allegations in paragraph seven are denied. 30

8. These defendants further answering the bill of complaint say that the land between Kingston Avenue and Aberdeen Place, facing Atlantic Avenue, and having a depth of one hundred nineteen feet, has been divided into two lots, the easterly lot which is thirty-six and fifteen one-hundredths feet in width

by a depth of one hundred and nineteen feet, being the property of the defendants; that there has been erected upon said two lots for upwards of twenty years a large twin building, the center partition of which is co-incident with the dividing line of said lot; that said building also has an enclosed sun parlor built on the easterly side thereof within twelve feet of the property line of Kingston Avenue and
10 that the complainant has no standing to object to the same.

9. These defendants further answering said bill of complaint say that within the meaning of the alleged restrictions, and as the same have been practically interpreted and construed, the westerly line of Kingston Avenue is not a front property line of the lands abutting thereon; that all of the buildings on all of the lots, with the exception of the two Atlantic Avenue lots, have been built upon so that all
20 of the buildings face Aberdeen Place and that as far as the alleged restrictions are concerned the property line of Kingston Avenue is a rear property line.

10. These defendants further answering said bill of complaint say that there is erected in the rear of the complainant's building a structure in form of a substantial pergola which extends to, if not over the property line of Kingston Avenue; that all of the
30 land between Atlantic Avenue and Ventnor Avenue and between Aberdeen Place and Kingston Avenue is built upon, and that all of the buildings between Ventnor Avenue and the defendants' property, with the exception of the complainant's building, have garages, in many cases as a part of the main build-

ing extending out to the property line of Kingston Avenue.

11. These defendants further answering said bill of complaint say that all of the buildings between Atlantic and Ventnor Avenues are within twelve feet of the property line of Kingston Avenue.

12. These defendants further answering said bill of complaint say that the alleged restrictions have been abandoned as far as Kingston and Atlantic Avenues are concerned. 10

13. These defendants further answering said bill of complaint say that the complainant stood by and made no objection until after the defendants had entered into a binding contract for the construction of an addition to their said building and until after materials had been ordered and the work started, and that he is guilty of laches, and that the alleged restrictions have been generally violated and abandoned. 20

CHAS. C. BABCOCK,
Solicitor for Defendants.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

10

Between

JOHN R. NEISON,
Complainant,
andLILLIAN GOLDSMITH, *et al.*,
*Defendants.*Final Hearing.
On Bill, &c.

20

Atlantic City, N. J., December 26, 1922.

TESTIMONY

before HON. ROBERT H. INGERSOLL, Vice-Chancellor.

APPEARANCES:

30 For the complainant, MESSRS. COLE & COLE.
For the defendant, MESSRS. BABCOCK &
CHAMPION.

CLARK S. BARRETT, SWORN for complainant.

Direct examination.

By Mr. Cole:

Q. Mr. Barrett, what is your position with the South Jersey Title Company?

A. Assistant secretary.

Q. You possess a copy of what I will call the Bradford Wright map?

A. Yes, sir.

Q. Is this it?

A. Yes, sir.

Q. This is a copy of the map as filed at May's Landing?

A. Yes, sir.

(Map offered and admitted in evidence, marked Exhibit C1.)

Q. Have you the data here to trace the title from Bradford Wright and others into the present owners of lots 1, 2 and 3 in section 27?

A. Yes.

Q. Give us first the history of the title of the complainant, Mr. Neison?

A. The block was owned by Bradford Wright and there was a declaration of trust filed with the title to certain other parties, so that Bradford Wright, Bradford Wright, trustee, Emile J. Petroff and Rachel, his wife, Harry Wootton and Mary Down, his wife, and the Lee Land Company, conveyed to Lucy E. Gary on November 12, 1900, recorded June 18, 1901, Book 259, page 483, to Lucy E. Gary; that

conveyed lot number 4, which, as I understand, is the complainant's lot.

Q. Give us the description of that, please?

A. Beginning in the Westerly line of Milledgeville Avenue 119 feet Northwardly of the Northerly line of Atlantic Avenue, extending thence westwardly, parallel with Atlantic Avenue, seventy-two feet to the easterly line of Aberdeen Place; thence (2) Northwardly in and along the easterly line of Aberdeen Place thirty-nine feet; thence (3) Eastwardly, parallel with Atlantic Avenue, seventy-two feet to the Westerly line of Milledgeville Avenue; thence (4) Southwardly, along the Westerly line of Milledgeville Avenue thirty-nine feet to the place of beginning; being lot 4 in block 27 on plant of lots belonging to Bradford Wright.

Q. What restrictions were in that deed?

A. That is "subject to the following restrictions and covenants which are placed on said land pursuant to a general scheme for its improvement, hereby made a part of the consideration thereof; that no more than one building shall be erected upon a single lot as mapped nor shall any lot be created out of the said tract having a width less than that as planned. That no building shall be erected or used except for cottage resident purposes, hotels and drug stores within four hundred and twenty-four feet North of Atlantic Avenue. That the main body of no building shall be erected nearer the front property line of any avenue than twelve feet, nor nearer than three feet from the side or rear dividing lines provided that nothing herein shall prevent the owner from building one building covering more than one contiguous lot, provided the building shall be kept away a similar distance from the outside lines of said contiguous lots." Bay windows may be erected within said restricted space provided

they do not extend over two feet from the main body of any building. No building shall be erected having its porch floor more than nine feet over the established grade of said lot. No saloon or bar for the sale of malt or intoxicating liquors of any description shall be conducted on any part of such land except in a hotel or hotels which have at least fifty bed rooms.”

By the Court:

10

Q. Floors how high?

A. How is that?

Q. How high is the floor from the grade?

A. Nine feet.

By Mr. Cole:

Q. Did that title finally become vested in the complainant Neison?

20

A. Yes. It was conveyed by Lucy Gary to Mahlon W. Newton. Lucy E. Gary and John M., her husband, conveyed the lot to Mahlon W. Newton by deed dated April 1, 1910, recorded April 5, 1910, in Book 428, page 43. Mahlon W. Newton, and Elizabeth K., his wife, conveyed the lot to Annie Lubin by deed dated May 21, 1910, recorded June 2, 1910, in Book 435, page 43. Annie Lubin and Sigmund, her husband, conveyed the lot to Abraham Freeman, by deed dated August 11, 1919, recorded August 12, 1919, in Book 608, page 348. Abraham Freeman, and Rose, his wife, conveyed the lot to John R. Neison by deed dated September 12, 1919, and recorded September 16, 1919, in Book 613, page 55.

30

The Court: I didn't get the first deed to Gary?

A. That was by Bradford Wright individually and as trustee and by others, Petroff, Wootton and Lee Land Company, dated November 12, 1900, recorded June 18, 1901, Book 259, page 483.

Q. Can you tell us if Milledgeville Avenue is now known as Kingston Avenue?

A. It is.

Q. Now will you trace the title out of Wright and others to the defendant Goldsmith?

- 10 A. Bradford Wright, individually and as trustee, Harry Wootton and Mary Down, his wife, Emile J. Petroff, and Rachel G., his wife, and the Lee Land Company, conveyed to Rosamond A. Mulock by deed dated November twentieth, 1900, recorded November 24, 1900, in Book 251, page 400, a lot beginning at the intersection of the North line of Atlantic Avenue and the westerly line of Milledgeville Avenue, extending thence (1) Northward in the Westerly line of Milledgeville Avenue eighty feet; (2)
- 20 Westwardly, parallel with Atlantic Avenue seventy-two feet to the Easterly line of Aberdeen Place; thence (3) Southwardly along and in the Easterly line of Aberdeen Place eighty feet to the North line of Atlantic Avenue; thence (4) Eastwardly in and along the Northerly line of Atlantic Avenue seventy-two feet to the place of beginning, being lots number 1 and 2 in Section 27 as laid out on plan owned by Bradford Wright, two of the lots in the complainant's title. Rosamond A. Mulock, and Herman G.,
- 30 her husband, conveyed to Mahlon W. Newton, by deed dated March 25, 1901, in Book 258, page 102, the same two lots. In the rear of lot number 3, which is a part of the defendants' title, Bradford Wright, and Bradford Wright, trustee, Emile J. Petroff, Rachel, his wife, Harry Wootton, Mary Down, his wife, and the Lee Land Company, conveyed to Elizabeth R. Schaeffer, by deed dated November 12,

1900, recorded December 14, 1900, in Book 252, page 340, the lot which is known as lot number 3 in block 27 and is bounded as follows: Beginning at a point in the easterly line of Aberdeen Place eighty feet Northwardly from the North line of Atlantic Avenue; extending thence (1) Eastwardly, parallel with Atlantic Avenue seventy-two feet to the Westerly line of Milledgeville Avenue; thence (2) Northwardly along the said Westerly line of Milledgeville Avenue thirty-nine feet; thence (3) Westwardly, parallel with Atlantic Avenue seventy-two feet to the Easterly line of Aberdeen Place; thence (4) Southwardly along the Easterly line of Aberdeen Place thirty-nine feet to the place of beginning; being lot number three in section 27 on map or plan of lots owned by Bradford Wright, filed.

Elizabeth R. Schaeffer conveyed the same lot to Mahlon W. Newton by deed dated July 12, 1901, recorded August 2, 1901, in Book 261, page 428. From this point the title then descends another way. Mahlon W. Newton, and Elizabeth K., his wife, then conveyed to Annie Lubin by deed dated February 15, 1907, recorded February 22, 1907, in Book 352, page 422, the following described property: "Beginning at the Northwesterly corner of Milledgeville and Atlantic Avenues, extending thence Westwardly in and along the Northerly line of Atlantic Avenue 36.15 feet; thence (2) Northwardly, parallel with Milledgeville Avenue, part of the distance through a party wall, 119 feet; thence (3) Eastwardly, parallel with Atlantic Avenue 36.15 feet to the Westerly line of Milledgeville Avenue; thence (4) Southwardly in and along the Westerly line of Milledgeville Avenue 119 feet to the North line of Atlantic Avenue and place of beginning."

The Court: Is that recorded February twenty-second?

A. Record 2-22-1907.

The Court: Never knew our office was open on Washington's birthday.

10 A. That was under the fee system I think you will find. Annie Lubin, and Sigmund, her husband, conveyed the same property to Frank C. Rollmann, by deed dated November 12, 1919, recorded November 14, 1919, in Book 617, page 258. Frank C. Rollmann, and Christine M., his wife, conveyed the same property to George B. McCracken by deed dated February 21, 1920, recorded February 26, 1920, in Book 626, page 39.

The property was conveyed by George B. McCracken and wife to William H. Yorke, by deed which is recited as being dated April 12, 1920, recorded November 18, 1920. I thought I had the abstract with me, but I find I haven't.

20 William H. Yorke conveyed the property to Julia Oppenheimer by deed dated July 6, 1921, recorded July 22, 1921, in Book 657, page 348.

Julia Oppenheimer conveyed the property to Lillian S. Goldsmith and Yetta K. Marcus by deed dated June 15, 1922, recorded June 20, 1922, in Book 681, page 344.

Q. Did the original deeds out of Wright and others all contain the restrictive covenants that you read at the beginning?

A. Yes.

30 Q. Have you vested the title to lot 3 in block 27 in Goldsmith according to what you have read?

A. The rear portion.

Q. Now by the rear portion, what do you mean, which do you call the rear?

A. I mean the portion fronting Milledgeville Avenue having a depth of 36.15 feet, extending along Milledgeville Avenue thirty-nine feet.

Q. Did all the deeds out of Wright and others for the whole tract as mapped here have those restrictive covenants?

A. I have checked the block, Judge Cole; there are two lots there that I haven't proven.

Q. Ten and eleven you are not sure of?

A. Yes, I am not sure about, but 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18—I am not sure of 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 have the restriction, except in one or two cases they have used the word "erected" instead of "created." 10

Q. Of course you observe that these covenants do not apply to distance four hundred twenty some feet north of Atlantic Avenue?

A. Yes.

Q. In whom is the title vested for what we will call the front of lot 3, section 27, Mr. Rollmann?

A. I don't know; I have never proven that.

The Court: Where you have referred to a map and the numbers, is that going to be in the record? In his testimony just now he referred to numbers on a map which he was looking at.

Q. When you read were you referring to the map offered in evidence?

A. I was.

Q. Map before you?

A. I was.

Cross-examination.

By Mr. Babcock:

Q. Mr. Barrett, the Bradford Wright conveyances, the tract, as we may call it, covered from Milledgeville Avenue, now Kingston Avenue to

20

30

Tallahassee Avenue on the west and from Atlantic Avenue to Ventnor Avenue on the north?

A. Yes.

Q. In the deeds from Lubin to Freeman in 1919 and the deed Freeman to Neison in 1919 was there any mention of the restrictions?

A. No.

Q. And do both of those deeds affect the complainant's lot, number 4 on the map?

10 A. Yes.

Q. You have testified, Mr. Barrett, that the title to lots 1, 2 and 3, finally came to Mr. Newton and then he conveyed to a grantee who by other conveyances finally vested the title in the defendants to a portion of that property?

A. That is correct.

Q. Now from the time that Mr. Newton acquired the property, two properties, was there any mention made in the deeds of any restrictions?

20 A. From the time that Mr. Newton conveyed there is no mention of the restriction. Of course there is one deed that is missing; if you want me to get that, I will get that.

Q. We will omit the deed that you don't have.

A. There is no mention of restrictions from that time on.

Q. Now, Mr. Barrett, in answer to Judge Cole's question, you said the restrictions only applied to a point 524 feet north of Atlantic Avenue; what did
30 you mean by that?

A. This restriction said it should apply to a point 424 feet north of Atlantic Avenue.

Q. The restriction which you read?

A. That no building shall be erected or used except for cottage residence purposes, hotels or drug stores within 424 feet north of Atlantic Avenue.

Q. That portion of the restriction?

A. Yes.

Q. That is what you meant, I suppose.

Mr. Cole: I don't know what my question was, but I had in mind some of these covenants did not apply north of 424 feet of Atlantic Avenue.

Q. Aside from that phase of the restrictions, the restrictions applied to all of the entire tract, didn't they, Mr. Barrett?

10

A. Yes, they seem to be similar.

By Mr. Cole:

Q. When you say that no reference is made to these restrictive covenants after the deed from Newton for lots 1, 2 and 3, does that include the Newton deed also?

A. The deed by Newton, yes. That includes the deed by Newton.

20

By Mr. Babcock:

Q. And in a general way, Mr. Barrett, when were all the other conveyances made by Bradford Wright that passed title out of him for the strip of property between Atlantic and Ventnor Avenues, and Milledgeville and Aberdeen Avenues, just in a general way?

A. I have here ten deeds by him conveying the major portion of that block all dated on the twelfth day of November, 1900.

30

Q. That is the block between Aberdeen and Milledgeville?

A. Yes, between Tallahassee and Milledgeville.

JOHN R. NEISON, sworn for complainant.

Direct examination.

By Mr. Cole:

Q. You are the complainant in this suit, are you not?

10 A. Yes, sir.

Q. Do you live in the property on Aberdeen and Kingston that has been referred to?

A. Yes, sir.

Q. How long have you lived there?

A. About six years; I rented for three years and last three years I have been the owner.

Q. This property in which you live then the building was on it when you bought?

A. Yes, sir.

20 Q. What were the conditions, so far as the buildings are concerned, toward the ocean from you at the time you bought?

A. Very open and that is one of the reasons I bought the property.

Mr. Babcock: I object.

The Court: That isn't material.

30 A. All right, sir.

Q. What was the situation when you bought?

A. Open.

Q. When you say open, just what do you mean?

A. Well, that lot, additional lot that they bought to extend their property in the rear 39 by 72 was all open.

Q. You mean the entire lot from Aberdeen to Kingston was open at the time you bought?

A. Yes, sir.

Q. Were there no building on it at all?

A. No, sir.

Q. What was there on Atlantic Avenue?

A. Well, that brick building, double brick building occupied by Mr. Rollmann and this other party.

Q. How did that face?

A. On the avenue, faced Atlantic Avenue.

Q. Now when did they begin to build on the lot that is between your property and the property that faces Atlantic Avenue?

10

A. You mean this situation we are now bringing injunction?

Q. Yes.

A. Yes, sir. I left there, my family moved on about October twentieth, at that time there were no signs of building at all, and they waited, I think we left before they started.

20

Mr. Babcock: I object.

The Court: Yes.

Q. You mean October of this year?

A. Yes, sir.

Q. Was there any structure whatever on this lot which we call lot number three now owned by Mrs. Goldsmith between Kingston and Aberdeen Place?

A. Well, there is an open areaway there, you know, about thirty-nine feet, more or less, and the kitchen was there, a frame building, but it was open for about twenty or twenty-five feet, more or less, I would say.

30

Q. I don't believe you quite catch my question;

what I want to know is whether there was any structure of any kind on the ——

A. Between my line?

Q. Yes, between your line?

A. I was in town ——

Q. Just a moment. Just look at this map a moment (referring to C1) this map shows lot 1, and 2 you notice?

A. Yes, sir.

10 Q. Facing Atlantic Avenue?

A. Yes, sir.

Q. That shows lot three, which is the lot between you and lots 1 and 2?

A. Yes, my lot is four.

Q. Your lot is 4; what I want to know is this whether there was any structure of any kind on any part of lot three before October last?

A. Now I can't tell if that is thirty-nine feet, you know. Now I would say that to the best of my
20 knowledge, no.

Q. What is going on there now in the way of a building on lot number three, the one immediately adjoining yours toward Atlantic Avenue, what is the condition today?

A. Well, I haven't been down there today, but the last time I was down there there had been nothing doing at all, but I understand that now ——

The Court: No, only what you know.

30 Q. Have you seen that lot to know what is being done there since you left last October?

A. Well, I was down once on election day.

Q. That is in November; what was the situation then?

A. Situation was nil, they had done nothing except to commence to tear down the bath room and

the wooden structures and they hadn't made any excavation whatever.

Q. And you haven't seen it since?

A. Yes, I think I have been down once and they had started to build the wall toward the Longport side.

Cross-examination.

By Mr. Babcock:

10

Q. Mr. Neison, wasn't a portion of the building over on lot number three prior to October twentieth, 1922?

A. Not that I know of.

Q. Well, you lived there for six years?

A. Sir?

Q. You lived there for six years?

A. There had been no building except the one building back from, starting from Atlantic Avenue all the ways back to the kitchen. 20

Q. Didn't —

A. No separate building.

Q. I know, but didn't the rear portion of that building cover some portion of lot number three?

A. I couldn't tell you, sir; because I didn't measure it.

Q. Then you don't know whether lot number three was entirely vacant or not, do you?

A. No, I couldn't tell you that.

Q. Or, if it was covered, you don't know how much of it was covered? 30

A. That is the idea.

Q. Was the house that immediately adjoins yours on the northerly side there when you went to live there?

A. Yes, sir, that is the LaCledé Thompson house, I guess.

Q. That was there?

A. That was there, all finished.

Q. And it is there today?

A. Yes.

Q. There is a pergola in the rear of your house, isn't there?

A. Yes, sir, two or three supports that take care
10 of roses, yes, sir.

Q. From your rear entrance to Milledgeville Avenue, or Kingston Avenue now?

A. I wouldn't call it a pergola.

Q. Well, it is a structure of some kind?

A. No, I would call it two or three posts going up to take care of roses. I wouldn't call that a pergola; that is a high toned name for it, but I wouldn't call it.

Q. You can give it any name you see fit so long
20 as we know what it is; how near to the sidewalk is it?

A. Well, it is right practically within a foot, something like that.

Q. How far does it extend toward the rear of your house?

A. About two or three feet, that is three supports, that is all.

Q. Covered over, is it?

A. Covered over? No covering except two or
30 three pieces of wood on top; I wouldn't call that a structure.

Q. And in a general way the conditions which are present on that street, outside of this operation which you are complaining against, were the same when you went to live there as they are today?

A. Yes, sir.

Q. Both as to Aberdeen Avenue and as to Milledgeville Avenue?

A. Well, Aberdeen and Milledgeville, I don't know of any changes that have taken place since I have been there.

Q. Isn't it a fact when you saw the operation in November that the rear kitchen had been torn down from the Goldsmith property?

A. That had not been. Mr. Einwechter was up in what I would call the bath room, up in the second floor and he hadn't touched the kitchen up to that time. 10

Q. That was in November?

A. Yes, sir.

Q. Was the foundation dug, excavations for the foundation?

A. No, sir; they were not dug at all; hadn't started.

20

MRS. LILLIAN GOLDSMITH, sworn for complainant.

Direct examination.

By Mr. Cole:

Q. Are you the Mrs. Goldsmith who has title to the property in question here?

A. Yes.

Q. Who are your contractors for the work that is going on? 30

A. George B. Einwechter and Son.

Q. I show you a notice addressed to George P. Einwechter, builder, and Lillian S. Goldsmith, and Yetta K. Marcus, owners, and ask you to look at

that, read it and say if you had a copy of that served on you?

A. Yes.

(Notice offered and admitted in evidence dated November 7, 1922, marked Exhibit C2.)

Q. The notation on the back of this is that it was served on November eighth; is that about the time
10 it was served?

A. I expect that is about the time.

Q. I show you a copy of two letters, one dated November 13, 1922, and one November 15, 1922, from Cole and Cole, and addressed to Mrs. Lillian S. Goldsmith, and ask you if you received the original of those two letters?

A. Yes, I think I did.

(Letters offered and admitted in evidence, marked
20 Exhibits C3 and 4.)

Q. What is it that you intend to do in this property?

A. We are building an addition to the property that we already occupy.

Q. Now what property do you occupy?

A. 4501 Atlantic Avenue.

Q. That is Atlantic and which corner?

A. Atlantic and Kingston.

30 Q. That building faced Atlantic Avenue?

A. Yes, sir.

Q. And you are doing something to it?

A. Yes, sir.

Q. What are you doing?

A. A very nice addition of sixteen rooms and ten baths.

Q. To what use is it to be put?

A. A hotel.

Q. How will you enter the hotel, from what street?

A. How will I enter? I don't know. I couldn't tell you how.

Q. Is it to be one building when it is finished?

A. One building.

Q. What was the character of the building at the corner of Atlantic and Kingston before you began this addition?

A. What do you mean by that? 10

Q. Was it a home?

A. It was a boarding house before that.

Q. Do you keep a boarding house there?

A. I did not, no.

Q. Well, do you know it was a boarding house before?

A. Yes, the party I bought from kept a boarding house there.

Q. How do you know?

A. The party I bought it from did. 20

Q. Did you ever board there?

A. No, but I knew her, and when I bought why, of course, naturally going to buy a boarding house.

Q. Did you ever board there?

A. No, but I knew the lady.

Q. Pardon me, I ask you did you ever board there?

A. No, I never boarded.

Q. What was the size of that house?

A. What do you mean, how many rooms? 30

Q. Yes.

A. It had ten rooms, three baths; it had more than that, had about fifteen rooms, three baths.

Q. That is the property in which you live at the corner of Kingston and Atlantic Avenue?

A. Yes, sir.

Q. Now you say you are adding to it what?

A. I just don't know because some of the rooms were torn down.

Q. As near as you can tell?

A. I think you will have to ask the builder that.

Q. You don't know?

A. I don't know; you will have to ask the builder.

Q. Do you know whether the building is to be used as an apartment house?

A. No, no apartment house.

10 Q. As a boarding house?

A. As a boarding house or hotel, I should call it, not a boarding house.

Q. Now is it to be nearer Kingston Avenue than twelve feet?

A. Nearer Kingston Avenue than twelve feet?

Q. Is the building that you say is an addition to be built nearer to Kingston Avenue than twelve feet?

A. I don't understand what you mean.

20 Q. Do you know how near this addition that you say you are adding to your property at Kingston and Atlantic is to come to Kingston Avenue?

A. Twelve feet from Kingston Avenue?

Q. Yes.

A. I am sure not, I don't know.

Q. What?

A. I don't know. I don't understand.

Q. Who will know? Is your contractor here?

30 A. He is here. He can space that up to you; I don't know.

Q. All right, if he is here, I will find out from him. Did you have your title insured when you bought this property?

A. Yes, sir.

Q. Did you know that there were restrictive covenants against this land?

A. I know of no restrictions at all.

Q. How?

A. I knew of no restrictions at all.

Q. Have you got your policy with you?

A. Yes, sir.

Q. Let me see it, please?

A. Mr. Babcock has it.

Mr. Babcock: Deed all I have got.

Q. You say you had this property insured? 10

A. Yes, sir.

Q. What company insured it?

A. Mr. Reed whom I bought the property has it, will explain all that to you.

Q. You said you had the title policy here; have you the title policy here?

A. Have we, Mr. Babcock?

Mr. Babcock: No, I haven't.

Q. You don't know what company insured the title? 20

A. Mr. Reed is here, if you ask him he will tell you those questions.

Q. Then you discussed with your contractor and lawyer the question of whether you were violating this restriction by putting this building or the proposed addition nearer than twelve feet of Kingston Avenue?

A. No, I don't know. 30

Q. What do you understand this suit is about?

A. Really I don't know; that is what I am getting a lawyer for to tell me. I don't know. I haven't any idea.

Q. You don't know?

A. No, except I thought I was living within the law.

Q. You haven't the slightest idea?

A. Not the slightest idea, I haven't.

Cross-examination.

By Mr. Babcock:

Q. Mrs. Goldsmith, when you began this building did you have knowledge of any alleged restrictions
10 concerning Kingston Avenue?

A. No, sir.

Q. Up to the time that you had received the notice from Judge Cole did you know it was claimed that there were any restrictions against building toward or out to Kingston Avenue?

A. No, sir.

Q. At the time you received that notice from Judge Cole what had been done upon the new addition?

20 A. Why there was three rooms, a frame addition had been added to this brick addition when we bought it; that was torn down.

Q. How big an addition was that?

A. Three rooms, quite a large addition; I couldn't just tell you how many feet.

Q. How many stories?

A. Three stories and the foundation had been dug to the line, had been taken away and dug up.

Q. And this frame addition had been taken down?

30 A. All been torn down, yes, sir, that addition added there.

Q. Had you at that time entered into your contract with Mr. Einwechter for the alterations?

A. Yes.

Q. Was it he that tore down the frame addition and had the excavation done for the foundation?

A. Yes, sir.

Q. At the time you received that notice did you acquaint Mr. Einwechter with the fact that you had gotten a notice?

A. Yes.

Q. So he knows when he got it, does he?

A. Yes.

MORRELL BOWEN, sworn for complainant.

10

Direct examination.

By Mr. Cole:

Q. What is your business?

A. Contractor and builder.

Q. Do you know Mr. Neison?

A. Yes.

Q. How long have you known him?

20

A. I have known him about two years.

Q. Do you know Mr. Einwechter?

A. No, I never met him before until that day down there.

Q. You know this property at Kingston and Atlantic Avenue?

A. Do I know the property?

Q. Yes.

A. Yes.

Q. Did you notice that they were doing some work on the building at the corner of Kingston and Atlantic Avenue?

30

A. I did.

Q. When was your attention first attracted to it?

A. Why I don't know just the exact date, but the day that Mr. Neison came down there and called

me over there slightly after he went home, a few days after he went home.

Q. What month was that?

A. I should judge October.

Q. What had been done up to that time?

A. Why the day we went there they were demolishing the rear frame structure on the back of the brick building; they were demolishing that.

10 Q. Now at any time after that did you speak to anybody on the ground about these restrictions?

A. That very day we went there, Mr. Einwechter, the contractor came down and the restrictions were placed in my hands that day, on that very day.

Q. What did you say to him?

A. I told him that I, my opinion —

Mr. Babcock: I object; how can that bind the defendant what he told the contractor?

20 Mr. Cole: Contractor right on the ground.

The Court: Notice to the contractor is held to be notice to the owner. I will permit it.

Q. What did you say to Mr. Einwechter?

A. My opinion of the restrictions were that he should not go within twelve feet of that side line.

Q. Which side line are you referring to?

30 A. That is the front line Kingston Avenue front line.

Q. You said you had the restrictions; what do you mean by that?

A. I had the copy of the restrictions in my hands at the time I said it.

Q. At that time had any foundation been dug —

A. None whatever.

Q. —on Kingston Avenue side?

A. None whatever.

Q. What, if anything, did Mr. Einwechter do in reply, what did he say when you told him that?

A. He said that he thought he could go out to three feet within the side line, what he said.

Q. Calling Kingston Avenue the side line?

A. Side line.

Cross-examination.

By Mr. Babcock:

10

Q. You are a building contractor?

A. Yes, sir.

Q. On this day in question you went there with Mr. Neison, did you?

A. Went there with Mr. Neison.

Q. And it was you that did the talking to Mr. Einwechter?

A. What is that?

Q. I say it was you that did the talking with Mr. Einwechter?

20

A. Yes.

Q. And he told you he thought the restrictions did not prevent him from going out to the side line of Kingston Avenue?

A. What his opinion was, yes.

Q. That was the sum total of the conversation, was it?

A. Yes.

30

ELMER EINWECHTER, sworn for complainant.

Direct examination.

By Mr. Cole:

Q. Are you the contractor for Mrs. Goldsmith?

A. I am one of the partners.

10 Q. What is it you intend to do there?

A. Why build an addition of sixteen rooms and ten bath rooms to the present addition and carry out the same line of the property, same style of architecture.

Q. How near will the structure come to the line of Kingston Avenue?

A. Within three feet.

Q. How will the entrance be affected to this building, when completed?

20 A. The entrance will be on Atlantic Avenue.

Q. As it is now?

A. As it is now, yes.

Q. Are there plans for this work?

A. Yes.

Q. How is this work named? How is it denominated on your plans, what is it called?

A. An addition and alteration.

Q. Is that all?

A. That is all.

30 Q. Did you ever have any talk with Mrs. Goldsmith about the restrictive covenants on this land?

A. No, I went and looked them up myself.

Q. When did you look them up?

A. Two or three weeks before we started to get the plans out.

Q. Why did you look it up?

A. I always look up restrictions before I get plans out; I am the one drew the plans.

Q. And you found the restrictions there, didn't you?

A. Yes.

Q. Didn't you communicate that to Mrs. Goldsmith?

A. About the restrictions?

Q. Yes.

A. Well, I told her that I had looked the restrictions over and that I couldn't see anything that would stop us from going within three feet of the line. 10

Q. Of Kingston Avenue?

A. Of Kingston Avenue.

Q. When did you tell her that?

A. Oh, I don't just recall.

Q. Before the work was begun?

A. No; after the work was begun.

Q. How far had you progressed with it when you told her that? 20

A. We had the back addition torn down.

Q. How did you come to tell her?

A. When we received notice.

Q. From who?

A. From the lawyer.

Q. What lawyer?

A. Cole—Cole & Cole.

Q. Hadn't this gentleman spoken to you about it before that (referring to Mr. Bowen)? 30

A. Yes, he had spoken to me.

Q. Now wasn't it right after that that you went to see Mrs. Goldsmith?

A. I don't think so.

Q. At all events your contention was that you could build within three feet of Kingston Avenue?

A. That is my contention.

Q. And so told her?

A. And so told her.

Q. And she told you to go on, did she?

A. She signed the contract with me ahead of that to go on.

Q. How close to lot number four on this map will this building come?

A. Three feet.

Q. So you kept back three feet from Kingston
10 Avenue and three feet from what I suppose you would call the rear of that lot?

A. The rear.

Q. Next to Mr. Neison's property?

A. Yes. Also three feet from Mr. Rollman's property.

Cross-examination.

By Mr. Babcock:

20 Q. Mr. Einwechter, as I understand you, when the proposition of building this addition came to you, for your own information you went and ascertained if there were any restrictions affecting the building you contemplated, is that correct?

A. That is correct.

Q. And you made the investigation, did you?

A. Yes.

Q. Satisfy yourself?

A. Yes.

30 Q. And after you did that you went on and drew your plans?

A. Went on and drew the plans.

Q. According to what you believed you had a right to build?

A. Yes.

Q. Up to that time you hadn't spoken to Mrs. Goldsmith at all, had you?

A. No.

Q. Isn't it a fact that you did not mention the question of restrictions to her until after you had received a notice that, you had been made acquainted with the fact that Mrs. Goldsmith had received notice from Judge Cole?

A. Yes.

Q. Then you discussed with her for the first time the restrictions, did you? 10

A. Yes.

Q. Now at the time you received that notice what was the condition of the work?

A. The back building was tore down and we had the top soil taken off for the starting of the foundations.

Q. Were the foundations dug at that time?

A. We were just starting.

Q. When you say the rear portion of the building was torn down, in a general way what was the character of that portion of the building? 20

A. Why it was a three story frame, lath and plastered, well built addition, just the same, livable addition, and extended out on lot number two or three at least seven or eight feet.

Q. What was the front portion of the building?

A. Brick.

Q. Is the addition that you are making brick?

A. Brick, yes.

Q. So that the rear of the old building, which was frame, has been torn down? 30

A. That has been all torn down.

Q. And that was torn down when you received notice?

A. Yes.

Q. How is the front portion of the Goldsmith

building divided from the building on the lower side?

A. By a brick party wall.

Q. Does that run the entire length of the building?

A. Runs the entire length of the building.

Q. Any means of communication from one house to the other?

A. None whatsoever.

10 Q. Then the two houses, I understand, are separated by this partition wall?

A. Yes.

Q. Now with respect to this new addition, does any portion of that come within three feet of any of the lines of the lot?

A. None.

By the Court:

20 Q. Mr. Einwechter, how far is the front brick building from Kingston Avenue?

A. Well, that is sixteen feet.

Q. Sixteen feet? How wide is the porch?

A. Nine feet, enclosed porch.

Q. How was it enclosed, you say it was enclosed?

A. Glass and frame.

Q. Glass and frame; is there being made any change to it now?

A. It has been changed to brick and frame.

30 Q. To brick and frame?

A. Yes.

Q. How close now does the brick work come to Kingston Avenue?

A. Of the porch?

Q. Yes.

A. I judge about seven feet.

Q. How close does the brick work of the new part come to Kingston Avenue?

A. Three feet.

Q. How high?

A. Three stories. Same as the old building.

Q. Is there any part of the three story old building nearer than sixteen feet of Kingston Avenue?

A. No.

Q. But there is of the new part?

A. There is of the new part.

10

By Mr. Cole:

Q. In other words, you are shoving the side of the building out all the way now nearer to Kingston Avenue than before, isn't that a fact?

A. I am putting the side within three feet of the building line.

The Court: You mean that of the new building?

20

A. Of the new building.

Q. Whereas before that the old brick building was sixteen feet back?

A. Yes.

The Court: But you are now putting a brick enclosed porch, brick and frame, between your old building and Kingston Avenue?

A. Yes.

30

By Mr. Babcock:

Q. Mr. Einwechter, in a general way is there any difference between the appearance of the front portion of the building by means of this new work you are doing?

A. Yes, a decided.

Q. In what way does it change the appearance or will it change the appearance of the side of the old building towards Kingston Avenue from what it was before you began work?

A. The porch wasn't, no porch floor can go over nine feet; well, we are not over nine feet with our porch floor, but we are going up about two feet higher with the porch roof.

10 Q. Porch roof will be two feet higher?

A. Two feet higher.

Q. Instead of being all bricked in?

A. Instead of being a slanting roof it will be level.

Q. And the sides will be brick all the way up?

A. Brick to window sill height, then piers in between brick, frames, permanent frames and plate glass.

Q. How much nearer to Kingston Avenue will the side of that extension be than the old enclosure?

20 A. It will be one foot more.

Q. One foot nearer Kingston Avenue?

A. One foot nearer Kingston Avenue.

By Mr. Cole:

Q. Mr. Einwechter, did you seek any legal advice for the construction of these restrictive covenants before you reached a conclusion?

A. Legal advice on the restriction?

30 Q. See any lawyer about it?

A. No.

Q. You just construed them yourself?

A. Well, I had several friends.

Q. Who were not lawyers?

A. Who were not lawyers and we all went into it and, in fact, every man that estimated on it went into those restrictions.

Q. Everybody agreed with you?

A. Everybody agreed that that was the side or the rear of Aberdeen Place.

Q. You thought there was only one front?

A. One front.

Q. Why didn't you select Kingston Avenue for the front instead of Aberdeen?

A. Well, my idea in building line has always been the way you enter a house is your front.

10

COMPLAINANT RESTS.

DEFENDANTS' TESTIMONY.

ELMER EINWECHTER, recalled for the defendants.

Direct examination.

By Mr. Babcock:

20

Q. Mr. Einwechter, how long have you lived in Atlantic City?

A. I have lived here for two years now.

Q. Engaged in the building business?

A. Engaged in the building business.

Q. Are you acquainted with the general neighborhood of the property in question?

A. I am.

Q. Have you made a personal observation of the conditions of the buildings between Atlantic and Ventnor Avenues and between Kingston and Milledgeville Avenues?

30

A. I have.

Q. With the exception of the Atlantic Avenue building which you have already described, how do

the buildings on the upper side of Aberdeen Place face?

A. Face towards Aberdeen.

Q. Are there any of them that face toward Kingston Avenue?

A. None whatsoever.

Q. What is the character of the building along Kingston Avenue?

A. Brick and frame.

10 Q. You know Mr. Neison's property?

A. Yes.

Q. Is there anything in the rear of that property?

A. A pergola.

Mr. Babcock: I want to offer in evidence a number of photographs which were taken November twenty-third, 1922; the first photograph shows two buildings joined together facing Atlantic Avenue on lots 1 and 2.

20 (Photograph admitted in evidence and marked D1.)

Number two is a picture taken from Atlantic and Kingston Avenue with the camera looking toward Ventnor Avenue and showing the westerly side of Kingston Avenue, the property first appearing in the picture being the rear of Mr. Neison's property.

30 (Photograph admitted in evidence and marked D2.)

Number three is a picture with the camera looking in the same direction but at a different angle and showing buildings on the west side of Kingston Avenue.

(Photograph admitted in evidence and marked D3.)

Number four is another view of the westerly side of Kingston Avenue with the camera looking toward Ventnor Avenue.

(Photograph offered and admitted in evidence and marked Exhibit D4.)

10

Number five shows the westerly side of Kingston Avenue with the camera pointed toward the ocean looking down Kingston Avenue, the building in the foreground being the building at the southwest corner of Ventnor and Kingston Avenues.

(Photograph admitted in evidence and marked D5.)

Number six is a view of the easterly side of Aberdeen Place with the camera near Atlantic Avenue and pointed toward Ventnor Avenue. 20

(Photograph admitted in evidence and marked D6.)

Q. Referring to picture number two, I ask you whose building this is that shows in the foreground, in the rear of the building?

A. Mr. Neison's.

Q. In the rear of Mr. Neison's property is there constructed anything? 30

A. A pergola consisting of four posts and a number of two by one inch, one by two slats, a very substantial character completed in, imbedded in concrete.

Q. Does it show on this picture?

A. It shows on this picture, yes.

Q. Is this lattice work you see, is that the pergola to which you refer?

A. That is the one I refer to.

Q. How far does that come out as compared to the property or the sidewalk line?

A. Well, he extends over his property line at least a foot on to the sidewalk.

Q. The house adjoining that property toward
10 Ventnor Avenue?

A. That is within eight feet of the building line, the main body of the property.

Q. All the way up to the roof?

A. All the way to the roof.

Q. Mr. Einwechter, are there buildings, any buildings northward of Mr. Neison's property that are out to Kingston Avenue?

A. With the exception of one or two there are on every property.

20 Q. What?

A. A two car garage built.

Q. How are those buildings constructed? Are they a part of the house in general or are they constructed separately?

A. They are a part of the house in general and built of brick and frame.

Q. Are some of them separate buildings?

A. None; they are all part of the main buildings.

30 Q. Now with respect to other properties in block 27 shown on the map, do you know whether there are separate buildings built in the rear of those properties?

A. This is block twenty-seven?

Q. From Tallahassee Avenue to Milledgeville Avenue, anywhere in block 27, are there more than one building on a lot?

A. I don't think so.

Q. Any garages?

A. There are garages, yes.

Q. How were they built?

A. Brick and frame.

Q. Approximately how many?

A. I judge very near every house down there has a garage.

Cross-examination.

10

By Mr. Cole:

Q. In giving figures did you make measurements?

A. Yes, sir.

Q. Have any assistance?

A. Yes, sir.

Q. Who assisted you?

A. One of my men.

Q. Now you speak of the building being within eight feet of some avenue from the ground to the 20 roof?

A. Yes.

Q. Whose building is that?

A. That is the building adjoining Mr. Neison's.

Q. That is toward Ventnor Avenue?

A. That is toward Ventnor Avenue.

The Court: I think it has been called the Thompson property once, McLeod Thompson property.

30

Q. Is that toward Kingston or toward Aberdeen Place?

A. Within eight feet of Kingston Avenue.

Q. You say that is solid from the ground up?

A. Yes, sir.

Q. Part of the main structure?

A. Yes.

Q. These other buildings you speak of, you say they are garages?

A. They are.

Q. In how many instances are they a part of the main building?

A. All.

Q. Every one of them?

A. Yes.

10

ESTEL D. RIGHTMIRE, sworn for defendants.

Direct examination.

By Mr. Babcock:

Q. You are a civil engineer practicing your profession in Atlantic City?

20 A. Yes, sir.

Q. At my request did you make an examination of the properties shown in block 27 on this map?

A. Yes, sir.

Q. Particularly did you make measurements of the properties between Aberdeen and Milledgeville Avenues in that block?

A. Yes, sir.

Q. Do you know the property of Mr. Neison?

A. Yes, sir.

30 Q. Is there anything constructed in the rear of his property?

A. Whereabouts in the rear?

Q. On Kingston Avenue?

A. Well, the only thing is a pergola or lattice frame work.

Q. Of what is that constructed, Mr. Rightmire?

A. Of frame.

Q. Of what size and character of frame?

A. I didn't measure that.

Q. Approximately?

A. I should judge it was about four by six or eight feet; I am not sure about that.

Q. You mean that is the dimensions of it?

A. Yes.

Q. But the dimensions of the timbers are what?

A. I should judge they are four by four posts and lattice work.

10

Q. Did you make a measurement of the house that adjoins Mr. Neison's toward Ventnor Avenue?

A. Yes, sir.

Q. With what result?

A. I found the rear of the building 8.85 feet west of the west property line of Milledgeville Avenue.

By the Court:

Q. Was the garage in the rear of that house?

20

A. That is on the side in the same line, on the rear of the building.

Q. On the same line?

A. On the same line of the rear of the building.

By Mr. Babcock:

Q. Is that house the one that is shown on Exhibit D2 adjoining the, what we have called the Neison property?

30

A. I think that is the one, yes.

Q. Well, is there any doubt about it adjoining the Neison property, I mean the property that you measured?

A. The property I measured adjoining the Neison property is 8.85 from the curb line and I should judge that was the house.

Q. Did you make your measurements with respect to the map of the property?

A. Yes, sir.

Q. On what lot would that be, Mr. Rightmire?

A. That would be lot number five.

Q. Going on up toward Ventnor Avenue on the westerly side of Kingston Avenue what did you find?

A. I found two buildings or a dwelling and a garage on practically each lot, practically all of
10 them.

Q. All of them did you say, Mr. Rightmire?

A. Excepting the Neison property.

Q. Will you just describe them, please and how they were built with respect to Kingston Avenue?

A. Lot number six, of course, that is vacant, but lot number seven has a dwelling and a garage which is on the street line, westerly street line of Milledgeville Avenue.

Q. Is that garage attached to the building?

20 A. It is with an entrance built from the rear of the building to the garage.

Q. What?

A. It has just an entrance, the garage is detached, but it has an entrance built from the rear.

Q. A building in itself?

A. Well, it is, I don't know just what we would call that, it is an areaway or something.

Q. I say the garage is a building in itself, is it?

A. Oh, yes; that is my idea.

30 Q. And the only way that is attached is by this entrance you speak of?

A. Built out from the rear of the house.

Q. What about number eight?

A. Number eight has a garage attached to the house and is 3.15 feet west of the west property line of Milledgeville Avenue.

Q. Number nine?

A. Lot number nine has a garage attached to the house and that is within four-tenths feet of the west property line of Milledgeville Avenue.

Q. Four-tenths feet?

A. Four-tenths of a foot.

Q. Number ten?

A. Lot number ten has a garage detached from the house and is on the westerly street line of Milledgeville Avenue.

Q. Number eleven?

10

A. Number eleven has a garage attached to the house and is one and one-half feet west of the west property line of Milledgeville Avenue.

Q. Number twelve?

A. Number twelve has a garage attached to a brick building and is .25 feet west of the west property line and the rear of the building is 10.1 feet west of the property line, the brick building.

Q. But the garage —

A. On number twelve.

20

Q. How near is the garage to Kingston Avenue?

A. .25 of a foot from the west property line.

By the Court:

Q. Does that garage go under a part of the house?

A. No, it is attached in the rear.

Q. And is only ten feet in depth?

A. That is what my notes show, and I thought it was rather strange.

Q. Could it be a garage ten feet?

30

A. I am not sure but it is a building anyway; it is a brick building attached to the rear of this building that is two or three stories high.

By Mr. Babcock:

Q. Number thirteen?

A. Number thirteen is on the corner of Aberdeen and Winchester Avenue and on the westerly street line.

By the Court:

Q. You don't mean that, do you, Mr. Rightmire?

A. Well, it is on the corner of Aberdeen or Milledgeville.

10 Q. And what?

A. And Ventnor Avenue.

Q. You said Winchester.

A. I meant Ventnor Avenue, and it has a garage or brick building attached to the dwelling and is on the westerly line of Milledgeville Avenue.

By Mr. Babcock:

20 Q. Now, Mr. Rightmire, with respect to these garages, or whatever they may be, that extend out, some of them to Milledgeville Avenue and some practically out to there, how are they constructed? I mean by that, what, are they not buildings apparently of a permanent character or only frail, insubstantial, that is?

A. Well, I should say they were permanent character.

Q. Have you been familiar with that neighborhood for any length of time?

30 A. I have, yes, sir.

Q. About how long?

A. At least twenty years.

Q. Do you know about how long the two buildings joined together on Atlantic Avenue have been constructed?

A. I should say more than twenty years.

Q. Do you know, as a matter of fact, how the

dividing line as shown on this map between lots one and two corresponds with the partition wall between the two buildings on the front?

A. Why I am not sure. I think it is on the dividing line. I made a survey of that in October locating the main building, which I haven't the notes with me; I could tell exactly if I had those.

Q. I don't mean whether it is just the center, but does the dividing line pass through the party wall?

A. I think it does from my survey. 10

Q. Do any of the houses erected between Ventnor and Atlantic Avenues face Kingston Avenue?

A. I don't know of any.

Q. Well, you have just been there and looked?

A. They all face Aberdeen Place.

Q. Now, Mr. Rightmire, about how long has the Neison property been built?

A. I should judge over twenty years.

Q. It has an appearance of newness now; has anything been done to it? 20

A. Well, originally it was, when Currie built the building it was brick, now I think it is stucco.

Q. With respect to the other buildings northward toward Ventnor Avenue, in a general way, how long have they been built?

A. Most of them for a number of years but just how long I am not able to state.

Q. The building at Ventnor Avenue corner is recently constructed?

A. Well, that is so, during the past year, and the one adjoining about within the past two years I should judge. 30

Q. Outside of those two are they all old buildings?

A. Comparatively so.

Q. Does that apply also as to the garages or buildings in the rear?

A. I am not sure about the garages; I think some of those have been more recently constructed.

Q. But in a general way how long have they been there?

A. That I wouldn't like to say, but I should think for some time.

Q. You mean by that what?

A. Been there two or three years anyway.

10 Q. Did you make an inspection of the other properties in block 27 to determine whether there was more than one building on the property?

A. Yes, sir.

Q. Are there instances of where there is more than one building on a property?

A. I found that there were six detached garages in that block between Aberdeen, Tallahassee, Atlantic and Ventnor, that is at a point 424 feet north of Atlantic Avenue.

20 Q. How many feet in the block or were in the block when this was mapped?

A. Originally five hundred.

Q. That has been reduced ten feet now, hasn't it, by reason of widening Ventnor Avenue?

A. Yes, sir.

Q. Were there other cases where garages were attached to buildings?

A. I think it is one other instance, yes.

Q. The other lots you found seven garages?

A. Six.

30 Q. Six detached buildings for garages?

A. Yes, sir.

Q. And one garage that was attached to a building?

A. Yes, sir.

Q. Do you happen to know on what lots they were?

A. No, I don't on account of the lots being changed in size.

Q. In a general way where would those six be distributed?

A. On Aberdeen Place it would be, I should judge, it would be lots 25 and 26 and lot 24, part of 23—I am not certain of these on account of the change in the size of the lots.

Q. But they would affect to some degree these lots which you are giving now, which correspond with this map? 10

A. Yes. And lot 19, and lot 18 on Tallahassee Avenue, lots 16 and 29, in fact lot 16 faced Atlantic Avenue originally, I am not sure, but I think lot 35 Tallahassee.

Q. Now, Mr. Rightmire, so we may get the record clear, you have given, you have stated several numbers of lots in block 27?

A. They are only approximate because I had no way of determining.

Q. Sixteen lots approximately located, property where there has been garages erected as you have indicated? 20

A. Yes, sir.

By Mr. Cole:

Q. Your testimony covered between Kingston and Aberdeen and also Aberdeen and Tallahassee, as I understand?

A. Yes, sir. 30

Q. With respect to garages?

A. Yes, sir.

Q. You are testifying from measurements actually made, Mr. Rightmire?

A. Yes, sir.

JOSEPH W. SALUS, sworn for defendants.

Direct examination.

By Mr. Babcock:

Q. To show you are not biased at all, I will ask you, are you a brother to Mrs. Goldsmith, the defendant?
10

A. I am.

Q. Are you acquainted with the two buildings joined together that face Atlantic Avenue between Kingston and Aberdeen Place?

A. Yes, sir.

Q. How long have you known that property?

A. Oh, I should say twenty to twenty-five years.

Q. Are you familiar with the properties between Atlantic Avenue and Ventnor Avenue and between
20 Kingston and Aberdeen Place?

A. Yes, sir.

Q. How do all of the properties, buildings face?

A. On Aberdeen Avenue.

Q. What is the character of the building that looks toward Kingston Avenue or buildings that look toward Kingston Avenue?

A. They all appear to be, the rear of the buildings facing Aberdeen Place.

Q. That is the rear of the buildings, you say the rear of the buildings toward what?
30

A. The Kingston Avenue side appear to be the rear of the properties on Aberdeen Place.

Q. Is that the appearance of the street?

A. That is the general appearance of the street.

Q. Do you know any, either garages or buildings which are attached or detached from the other build-

ings that are near the property line of Kingston Avenue?

A. Nearly all of them.

Q. Do you know what they are used principally for?

A. Garages.

Q. What is the general appearance of them?

A. Well, they are constructed of brick and frame and they appear to be the same kind of properties all garages are.

Q. About how long, if you know, has that condition obtained? 10

A. For many years.

Q. Of course you know the property which your sister and Mrs. Marcus now own?

A. Yes.

Q. Do you know what that building was used for prior to the time when they purchased it?

A. As a hotel.

Cross-examination.

20

By Mr. Cole:

Q. What was the name of the hotel?

A. It had no particular name.

Q. Particular name? Did it have any name?

A. I would say no, that it was named by the parties who ran it.

Q. You said it was a hotel; I want to know if you know what name it had? 30

A. No name, as a hotel, it was known as.

Q. Did you ever board there?

A. I did not.

Q. How do you know it was a hotel?

A. I have sold goods there.

Q. Well, you sell goods at private homes too, don't you, or did?

A. Yes.

Q. How were they charged the goods that you sold there?

A. To the parties who operated the place.

Q. Charge it to any hotel by name?

A. No.

10

WALTER T. REED, SWORN for defendants.

Direct examination.

By Mr. Babcock:

Q. Mr. Reed, you are engaged in the real estate business?

20 A. Yes, sir.

Q. Are you acquainted with the property in question and neighboring properties? A. Yes, sir.

Q. How long have you known the property of the defendant, Mrs. Goldsmith?

A. Fifteen or twenty years.

Q. Has there been any change in the location of that building during that time?

A. Only recently a change.

Q. I mean this present operation?

30 A. Yes.

Q. Aside from that has the building been located the same during all those years?

A. Yes, sir.

Q. You know the properties on the upper side of Aberdeen Place toward Ventnor Avenue?

A. Yes.

Q. How do all those properties face?

A. They face on Aberdeen every one of them.

Q. In a general way what is the appearance of the other end of the building toward Kingston Avenue?

A. I would call that the rear, back entrance, garages, &c., on that side.

Q. Do you know what the Goldsmith building was used for before they purchased it or at the time when they purchased it?

A. I think it was a boarding house; I am not sure, 10
boarding house or hotel, small.

Cross-examination.

By Mr. Cole:

Q. Mr. Reed, why do you think it was a boarding house or hotel?

A. Well, they accommodated guests there that I knew.

Q. How did you know? 20

A. The present owners and the previous owners told me.

Q. Is that the only way you know?

A. Well, I have no reason —

Q. Is that the only way you know, what they told you?

A. Yes.

Mr. Cole: I ask that his opinion about that be stricken. 30

The Court: Yes, entitled to that.

Mr. Cole: Can't cross-examine people who are not here.

LILLIAN GOLDSMITH, recalled.

Direct examination.

By Mr. Babcock:

Q. Mrs. Goldsmith, you have already testified that
10 this addition which is being made to the building
is for the purpose of a hotel?

A. Yes, sir.

Q. What is your intention with respect to the
use of the entire property?

A. To have one of the finest high-class hotels that
size in Chelsea.

Q. Your intention to use it as a hotel?

A. Yes, sir.

Cross-examination.

20

By Mr. Cole:

Q. You are going to run it, are you?

A. Yes, sir. Judge, may I say something?

Q. No, that is all. Have you selected a name for
the hotel yet?

A. No. Places of our kind, we never need a
name; my name is sufficient.

30

DEFENDANT RESTS.

(Recess taken to 1.30 o'clock P. M.)

AFTERNOON SESSION.

(Trial of the cause resumed at 1.30 P. M.)

MRS. YETTA MARCUS, sworn for defendants.

Direct examination. 10

By Mr. Babcock:

Q. Mrs. Marcus, are you one of the defendants in this suit?

A. Yes, sir.

Q. Did you have any connection with the property in question before the purchase of it by you?

A. No.

Q. Since the purchase of it by you have you done anything with it? 20

A. I had a small hotel there last summer.

Q. Did you conduct it yourself?

A. Yes.

Q. Do you know what it was conducted as before you bought?

A. Same thing.

Q. What are your intentions with respect to the use of the building after it is enlarged and completed?

A. To run a hotel there. 30

Q. With whom?

A. With Mrs. Goldsmith.

Q. Is it your intention for you two to operate it?

A. Yes.

Cross-examination.

By Mr. Cole:

Q. You have no sign out?

A. No, sir.

Q. Have any name to it?

A. No, sir.

Q. In what way would a person on the outside
10 know that you run it as a hotel?

A. I advertise it.

Q. What?

A. I advertise it under my own name.

Q. Where did you advertise?

A. Last summer.

Q. I say in what paper?

A. Different papers, different cities.

Q. Give us the name of one paper you advertised
in?

20 A. The Jewish Exponent.

Q. Have you a copy of the advertisement here?

A. No, sir.

Q. What did it say?

A. Why, I don't know; I just can't recall exactly.

Q. Where does the paper circulate?

A. All through Philadelphia.

Q. Does it circulate here in Atlantic City?

A. Yes.

Q. Is it printed in Jewish?

30 A. No.

Q. In English?

A. In English.

Q. Can't you recall what the advertisement said?

A. Why I think I just advertised that I was opening up a refined hotel or something of that sort.

Q. Did you have a register?

A. No, sir; it was a small place; ten bed rooms.

Q. You didn't have a register is what I want to know?

A. No.

Q. Keep books?

A. I didn't have big enough business for books.

Q. You kept no books?

A. No.

Q. Did you make any return to the Government under the income tax laws that you were running the hotel? 10

A. Wasn't sufficient to make any.

Q. I am asking you whether you did?

A. No, I did not.

By Mr. Babcock:

Q. Have you had any applications for accommodations for the ensuing year?

A. Plenty. That came this morning.

Q. You have had applications? 20

A. Yes.

Mr. Babcock: The building proper of the complainant is about sixteen feet from the property line of Kingston Avenue.

DEFENDANTS REST.

TESTIMONY CLOSED.

CONCLUSIONS.

(Filed Feb. 6, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between

JOHN R. NEISON,

Complainant,

and

LILLIAN S. GOLDSMITH,

*et als.,**Defendants.*On Bill for Injunction.
Conclusions.

20

For the complainant: COLE & COLE.

For the defendants: CHARLES BABCOCK.

INGERSOLL, V. C.:

I am satisfied that the right of complainant to relief in this case has not been sustained by the proof submitted.

30

The bill must be dismissed.

Submitted: January 25th, 1923.

Determined: February 6th, 1923.

DECREE.

(Filed Feb. 19, 1923.)

IN CHANCERY OF NEW JERSEY.

Between

JOHN R. NELSON,
Complainant,
 and
 LILLIAN S. GOLDSMITH,
et als.,
Defendants.

On Bill for Injunction.

10

This cause coming on to be heard in the presence of Cole & Cole, solicitors for the complainant and Charles C. Babcock, solicitor for the defendant and the proofs having been taken and considered with the argument of the respective counsel and it appearing that the complainant is not entitled to the relief for which prayer is made in the bill of complaint.

20

It is one this 19th day of February, 1923, ordered, adjudged and decreed that the bill of complaint be and the same is hereby dismissed with the costs.

30

E. R. WALKER,
 C.

Respectfully advised,
 R. H. INGERSOLL,
 V. C.

Approved as to form.

COLE & COLE,
Solicitors for Complainant.

A true copy.

CLIFTON E. SHINN,
Serg't-at-Arms.

10

NOTICE OF APPEAL.

(Filed Aug. 27, 1923.)

IN CHANCERY OF NEW JERSEY.

20

Between

JOHN R. NEISON,
Complainant,

and

LILLIAN S. GOLDSMITH,
et als.,

Defendants.

On Bill for Injunction.
Notice of Appeal.

30

The complainant hereby appeals from the final decree made in this court in the above stated cause made on the nineteenth day of February, 1923, which decrees that complainant is not entitled to the relief prayed for in his bill and dismisses his bill, on the ground that the whole and every part thereof is

erroneous, to the Court of Errors and Appeals in the last resort in all causes.

Dated August 24, 1923.

COLE & COLE,
Solicitors for and
C. L. COLE,
Of Counsel with Compl't.

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

C. L. COLE, 10
Of Counsel with Complainant.

PETITION OF APPEAL.

(Filed Aug. 27, 1923.)

NEW JERSEY COURT OF ERRORS AND APPEALS. 20

Between
JOHN R. NEISON,
Complainant-Appellant,
and
LILLIAN S. GOLDSMITH,
et als.,
Defendants-Respondents. }
On Bill for Injunction.
Petition of Appeal. 30

The petition of John R. Neison, the appellant in the above stated cause, respectfully shows that your

petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the nineteenth day of February, 1923, wherein your petitioner was complainant and the said Lillian S. Goldsmith and Yetta K. Marcus were defendants, in this respect, to wit: that the said decree adjudges that complainant is not entitled to the relief prayed for in his bill and dismisses his bill. And your petitioner humbly appeals from the whole and every part of said decree on the ground that the same is erroneous in that it was error to dismiss the bill and it should have been decreed that complainant was entitled to an injunction as prayed for. Your petitioner therefore prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

20

COLE & COLE,
Solicitors for and
C. L. COLE,
Of Counsel with Appellant.

30

equity and they pray that the same may be affirmed with costs to be adjudged to these respondents.

BABCOCK & CHAMPION,
*Solicitors for and of Counsel
with Respondents.*

10

EXHIBIT C2.

12-26-22L.

NOTICE.

TO George P. Einwechter & Son
Builders,

20 Lillian S. Goldsmith & Yetta K. Marcus
Owners.

We represent John R. Neison, owner of property at Kingston Avenue and Aberdeen Place, adjoining the property at the corner of Atlantic Avenue, Aberdeen Place and Kingston Avenue, in Ventnor, All the property within the area of the named avenues is subject to certain restrictions. We are advised that you intend to build on the property at Atlantic Avenue, Kingston Avenue and Aberdeen Place in violation of such restrictions by building nearer than 30 twelve feet to the front property line and three feet of the rear and side lines, and that said building is to be erected and used as a boarding house.

This is to notify you that unless you refrain at once from further prosecution of the work that we shall file a bill in the Court of Chancery for an in-

junction to restrain further construction.
November 7, 1922.

Cole & Cole,
Attorneys for John R. Neison.
(On Back)

Served personally & Einwechter &
Son and Mrs. Lillian Goldsmith at 4501
Atlantic Ave. on Nov. 8, 1922 at 12:35
P. M.

10

EXHIBIT C3.

12-26-22L.

Nov. 13, 1922.

Mrs. Lillian S. Goldsmith,
Mrs. Yetta K. Marcus,
4501 Atlantic Avenue,
Atlantic City, N. J.

20

Dear Mesdames:

On behalf of John R. Neison we are today filing
a bill in the Court of Chancery to enjoin you from
building on Atlantic Avenue, Kingston Avenue and
Aberdeen Place in violation of restrictions, about
which we notified you on the 7th inst.

In view of the reluctance of the Vice Chancellor
to grant a preliminary injunction, it is not our in-
tention to apply for the same, but this is notice that
you will proceed with the building at your peril.

30

Very truly yours,
Cole & Cole

EXHIBIT C4.

12-26-22L.

Nov. 15, 1922.

Lillian Goldsmith,
Yetta K. Marcus and
Frederick C. Rollman.

10 Dear Mesdames and Sir:

We have filed a bill on behalf of John R. Neison seeking an injunction against the construction of a building by Goldsmith and Marcus on lot on Kingston Avenue 80 feet from Atlantic Avenue, in Atlantic City. We are advised that the original lot was 39 feet in width and ran from Kingston Avenue to Aberdeen Place and that said lot has recently been divided so that Goldsmith and Marcus own 39 x 36 feet and Rollman owns a lot 39 x 36 on Aberdeen
20 Place. The restrictions imposed by Bradford Wright, the owner of the original tract forbid the construction of more than one building on a lot. If Goldsmith and Marcus build on the lot now owned by them it would seem to follow that there would be no right to construct a building on the lot now owned by Rollman. Our client, Mr. Neison, will insist upon strict obedience to the restrictions and we are advising you that in order that you may understand that If Goldsmith and Marcus are permitted
30 to construct building on the half of the lot now owned by them, that Rollman will not be permitted to build any structure on the half owned by him.

Very truly yours,

Cole & Cole

New Jersey Court of Errors and Appeals

Between

JOHN R. NEISON,
*Complainant-
Appellant,*

and

LILLIAN S. GOLDSMITH,
et al.,

*Defendants-
Respondents.*

} On Appeal from
Chancery.

BRIEF FOR APPELLANT.

STATEMENT.

Bradford Wright and others owned a tract of land in Atlantic City bounded by the Ocean, Ventnor Avenue, Aberdeen Place and Millidgeville Avenue. They filed a map showing the area and the lots plated, and in each deed delivered by them they inserted restrictive covenants, among others:

“That the main body of no building shall be erected nearer the front property line of any avenue than twelve feet nor nearer than three feet from the side or rear dividing lines,” &c.

Complainant owns the lot which is numbered 4 on the map and is described as beginning in the west-

erly line of Millidgeville (now Kingston) Avenue 119 feet northwardly of the northerly line of Atlantic Avenue and extends westwardly 72 feet to Aberdeen Place and along Aberdeen Place 39 feet, &c.

Defendant owns a lot at the northwest corner of Atlantic and Kingston Avenues (being lot No. 1 on map), on which at the time she purchased was standing a brick dwelling.

Upon her threat to enlarge by adding not only to the rear but the side of the building, complainant served notice that what she intended to do would be a violation of the restrictive covenants. She persisted and complainant filed his bill for an injunction.

After final hearing the learned Vice-Chancellor filed his conclusions as follows:

“I am satisfied that the right of complainant to relief in this cause has not been sustained by the proof submitted.”

From the decree entered on his conclusions, this appeal is taken.

ARGUMENT.

It is not denied that Bradford Wright and others did not own the tract of land referred to in the bill, that they did not map it as is claimed, or that all conveyances by them did not contain the restrictive covenants set up in the bill; nor is it denied that defendant's building as added to is nearer than twelve feet to the property line of Kingston Avenue. But if denied, it is sufficient to say that they are fully established by the proof.

The answer sets up that because the lots run from Kingston Avenue to Aberdeen Place that there can be only one front property line, and that by common consent the front property line is Aberdeen Place and not Kingston Avenue.

The answer also sets up an alleged violation of the covenant by the complainant, and numerous violations which it is claimed amount to an abandonment.

Taking these matters in their order —

The language of the covenant involved is that the main body of no building shall be erected nearer the front property line of any avenue than twelve feet, &c. To say that this language refers to only one of the two avenues is untenable. Kingston Avenue is as much an avenue as Aberdeen Place, and the same as to the reverse. If the respective grantees are permitted to determine which of the two avenues is referred to, then confusion at once follows. Nor is complainant bound by any action on the part of other grantees which attempted to construe the covenants as referring to only one of the two avenues. The language, "the front property line of any avenue" is clear and does not call for interpretation.

The claimed violation by complainant is the presence of a pergola on complainant's lot on the Kingston Avenue side. This is not a building within the meaning of the covenant. It is no more a building than would be a fence. It is used to train roses. See Neison's testimony, page 22.

The testimony of Mr. Rightmire, engineer, sworn for defendants, demonstrates that the thing by whatever name it may be called, is not a building. He says it is a pergola or lattice framework (p. 44) and at page 45 he gives its dimensions. In all

80 E 83: 185
Mass 223

other respects complainant's property is built in strict conformity with the restrictive covenants.

See *Kirkpatrick v. Peshine*, 24 Equity, p. 206.

As to the alleged abandonment:

It must be conceded that there are violations on the Kingston Avenue front, but these are to the north of complainant's property and in the opposite direction of that of defendant's property. The chief ground of complaint is that the addition to defendant's property cuts off the Ocean view of the complainant, which is the valuable thing to his property.

The case is free of any evidence to show how it came about that the buildings to the north of him violated the covenant in question. There is not a line to show that either he or his predecessors in title are chargeable with notice of the violations, or that they in any way assented thereto. Even if it had been shown that complainant or his predecessors had knowledge of the threatened violations to the north, equity did not require him or them to proceed for an injunction under penalty of being charged with an abandonment of the scheme. As far as complainant is concerned, his real damage flowed when defendant threatened a violation of his ocean view. When this was done, he moved promptly, as is indicated in exhibits, pages 66, 67 and 68 and by the examination of the defendant, pages 23-28. In *Morrow v. Hasselman*, 69 Equity, p. 616, it is said:

“Where the restriction relates to the character or location of the building itself, the passive acquiescence of a purchaser in breaches of the covenant, by which he sustains no particular injury, has been held not to deprive him of his equity to protection, where the breach im-

mediately affects his enjoyment of his own house." Citing cases.

The opinion then proceeds:

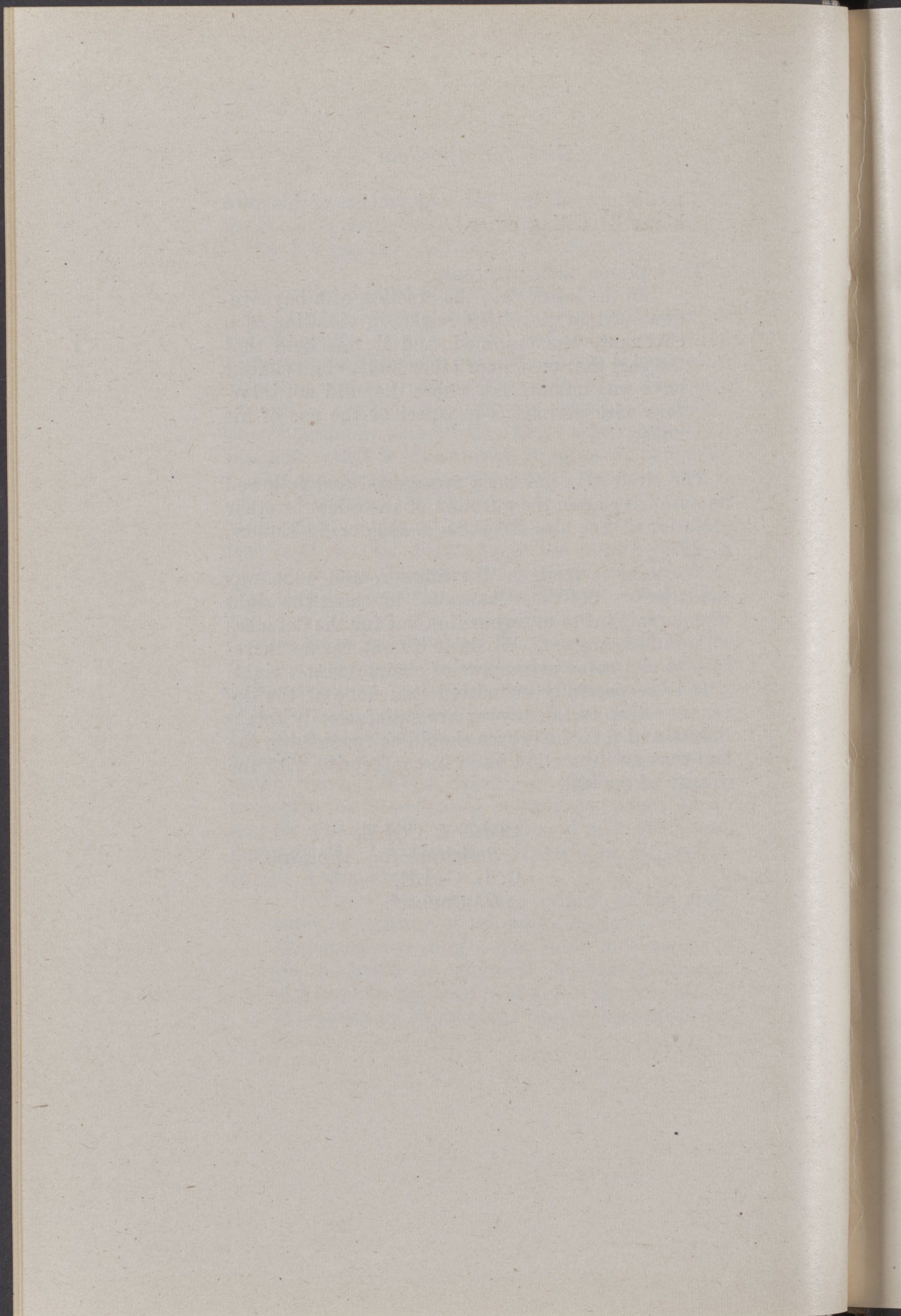
"In the latter case the erection of a bay window next to plaintiff's house, in violation of a covenant, was enjoined, and it was held that the fact that owners of other houses had similar bays was immaterial, where they did not interfere with plaintiff's prospect or the use of his house."

The cited case has been recognized and followed as authority upon the question of the effect of other violations. See also *Brigham v. Mulock*, 74 Equity, p. 287.

No point is made in the answer, and none was made before the Vice-Chancellor touching the right of complainant to an injunction but for the defenses set up in the answer. We deem it unnecessary therefore to cite cases in support of complainant's right.

It is respectfully submitted that none of the defenses set up in the answer are satisfactorily established, and that the decree should be reversed to the end that an injunction issue in conformity with the prayer of the bill.

COLE & COLE,
Solicitors for Appellant.
C. L. COLE,
Of Counsel.



NEW JERSEY COURT OF ERRORS AND APPEALS

BETWEEN

JOHN R. NEISON,
Complainant-Appellant,

and

LILLIAN S. GOLDSMITH, ET AL.
Defendants-Respondents.

}
Appeal from
Chancery

DEFENDANTS' BRIEF

FACTS.

This suit challenges the right of the defendants to build within twelve feet of the property line of Kingston Avenue.

Bradford Wright owned a tract of land bounded by Millidgeville (now Kingston) Avenue, on the East, Tallahassee Avenue on the West, Ventnor Avenue on the North and Atlantic Avenue on the South, and plotted the same into sections and lots as delineated on map offered in evidence and marked exhibit P 1.

The complainant is the owner of lot number 4 on the map, which faces Aberdeen Place. The lot has a width of thirty-eight feet by a depth of seventy-two feet to Millidgeville (now Kingston) Avenue.

The defendants own the lot at the corner of Atlantic and Millidgeville (now Kingston) Avenue, the lot having a width of thirty-six and fifteen-hundredths feet on Atlantic Avenue by a depth of one hundred nineteen feet, being lot number one, the rear of lot number three

and fifteen hundredths of a foot of lot number two, and have built a three story brick addition in the rear three feet from the side line of Kingston Avenue.

The title to all of the lots passed out of Bradford Wright about 1900 (P. 17). Bradford Wright and others conveyed lot number one to Rosamund A. Mulock by deed dated November 20, 1900; conveyed lot number three to Elizabeth R. Schaeffer by deed dated November 12, 1900 (P. 12-13) and conveyed lot number four to Lucy E. Gary on November 12, 1900, (P. 9).

Deeds for all three conveyances contained restrictive covenants as follows:

“Subject to the following restrictions and covenants which are placed on said land pursuant to a general scheme for its improvement hereby made a part of the consideration thereof; that no more than one dwelling shall be erected upon a single lot as mapped nor shall any lot be created out of the said tract having a width less than that as planned. That no building shall be erected or used except for cottage resident purposes, hotels and drug stores within four hundred and twenty-four feet North of Atlantic Avenue. That the main body of no building shall be erected nearer the front property line of any avenue than twelve feet, nor nearer than three feet from the side or rear dividing lines provided that nothing herein shall prevent the owner from building one building covering more than one contiguous lot, provided the building shall be kept away a similar distance from the outside lines of said contiguous lots. Bay windows may be erected within said restricted space provided they do not extend over two feet from the main body of any building. No building shall be erected having its porch more than nine feet over the established grade of said lot. No saloon or bar for the sale of malt or intoxicating liquors of any description shall be conducted on any part of such land except in a hotel or hotels which have at least fifty bed rooms.”

After several intervening conveyances lot number four, being the complainant's property, was acquired by Maylon W. Newton in 1910 (P. 11) and the premises of the defendants were acquired by Mr. Newton in 1901 (P. 12).

After several intervening conveyances lot number four was conveyed to complainant in 1919 and the premises of the defendants were conveyed to them in 1922 (P. 14). Newton conveyed lot number four in 1910 (P. 11) and conveyed the premises now owned by the defendants in 1907. The deeds made by Mr. Newton and by the several subsequent grantors made no mention whatever of any restriction (P. 16).

Effort was made by the complainant to prove that the same restrictions were imposed by all the deeds made by Bradford Wright but was able to show that only about half of the lots were sold subject to the neighborhood restriction. There were thirty-nine lots and the witness was only sure as to lots one to nine, inclusive, and twelve to eighteen, inclusive (P. 15).

The photographs are very important exhibits (P. 40-41).

No. 1 shows two buildings joined together facing Atlantic Avenue on lots one and two.

No. 2 is taken from Atlantic and Kingston Avenues with the camera looking toward Ventnor Avenue and showing the Westerly side of Kingston Avenue, the property first appearing in the picture being in the rear of Mr. Neison's property.

No. 3 is taken with the camera looking at a little different angle but in the same general direction and showing other buildings on the Westerly side of Kingston Avenue.

No. 4 is another view of the Westerly side of Kingston Avenue with the camera looking toward Ventnor Avenue.

No. 5 shows the Westerly side of Kingston Avenue with the camera at Ventnor Avenue looking toward Atlantic Avenue, the building in the foreground being the building at the Southwest corner of Ventnor and Kingston Avenues.

No. 6 shows the Easterly side of Aberdeen Place with the camera near Atlantic Avenue and pointed toward Ventnor Avenue, and shows Mr. Neison's property in the foreground.

The map, the manner of building, and the whole scheme clearly shows that the lots on Atlantic Avenue were intended to front on that street and that the lots extending from Millidgeville (now Kingston) Avenue to Aberdeen Place, were intended to face on Aberdeen Place, in which street are shown flower beds, and that Kingston Avenue was intended to be a rear line.

The questions presented are, first, is Kingston Avenue a front property line within the meaning of the restrictions, and, secondly, if so, has the practice of building out to the building line in some cases, and within the twelve feet in other cases, and the general practice of facing all buildings on Aberdeen Place, amounted to an abandonment or to a contemporary construction that the restriction does not apply to Kingston Avenue.

IS KINGSTON AVENUE A FRONT PROPERTY LINE WITHIN THE MEANING OF THE RESTRICTION:

All of the buildings between the defendants' property and Ventnor Avenue front Aberdeen Place. The map, with reference to which the conveyances were

made, shows the lots on Atlantic Avenue as fronting on that street.

Bradford Wright, who originated the restrictions, owned Westward from Kingston Avenue. The map shows flower beds in Aberdeen Place, and having in mind that the Westerly line of Kingston Avenue was his extreme boundary and that all of his interest lay Westward of that point, and having regard for the general layout of the property, it is unreasonable, and certainly doubtful, that he ever intended that the lots running from Aberdeen Place to Millidgeville (now Kingston) Avenue, should face Kingston Avenue instead of Aberdeen Place, and that he ever intended that Kingston Avenue should be a front property line within the meaning of the restrictions. The lots on the Westerly side of Aberdeen Place face that street and it is reasonable to suppose that he intended that the lots on the Easterly side should also face that same street. The language of the restriction is not the "property line" but the "front property line" clearly indicating that the "property line" of the street intended was the street on which the lot was intended to front.

The fact that all of the buildings, except on Atlantic Avenue, actually front on Aberdeen Place and are built on a uniform line, is a clear indication that the owners of the various properties understood that Aberdeen Place was a street on which their buildings should face, and shows there has been a general and practical interpretation that Aberdeen Place is a front property line and that Kingston Avenue is a rear property line, with the exception of the lot on the corner of Kingston and Atlantic Avenues and as to that lot, Kingston Avenue is a side line.

There has been no attempt to observe a uniform line on Kingston Avenue. The building just Northward of the defendant's property is about eight feet

from the property line, the complainant's enclosed sun parlor was for many years maintained within twelve feet of that line, and many of the other buildings are less than twelve feet inside of the property line, and there has been no attempt whatever to have the rear of the buildings on a uniform line.

Scull v. Eilenberg, decided by this Court (121 A. 788-792) reversing *Waters v. Collins*, dealt with restriction much stronger and more complete which were imposed by the Chelsea Beach Company. Judge White, in his concurring opinion held:

“Personally, I have no doubt that this 20 feet restriction was never intended to apply to the so-called side avenue fronts of the lots shown by the filed plan as fronting on Atlantic Avenue. Where Atlantic Avenue lots were corner lots, I think it was intended that the 5-feet-from-side-lines restriction would make them set back that distance from the side street, and that to the extent of this 5-foot recession only, the neighborhood scheme to set buildings back from the street line embraced in its territorial scope the lots fronting on Atlantic Avenue.”

In *Meaney v. Stork*, 80 Eq., page 60, 83 Atl., 492, Vice Chancellor Garrison held:

“I take it as firmly settled that a restrictive covenant, to be enforceable in equity, must be reasonable, and that the meaning to be attributed to it must be ascertained not only by a consideration of its language, but also by a consideration of the circumstances existing at the time of the creation of the covenant and its obvious purpose.”

and advised the dismissal of the bill.

This case was affirmed by this Court. 81 Eq., page 21, 86 Atl., 398. The opinion of the Court being as follows:

"We agree with the Vice Chancellor, except as to the views expressed by him with reference to the porch as a violation of the restrictions. We think it unnecessary to express an opinion upon his reasoning in that regard, since the other buildings on the tract have porches as wide or wider than the defendant's and no objection is shown to have been made thereto. This fact establishes either a contemporary construction by the parties concerned, adverse to the complainant's contention, or an abandonment of the restriction in that respect. Upon either view, the complainants are not entitled to an injunction."

In *Union v. Fiske*, 107 Atl., page 65, the restrictions were as follows:

"That said party of the second part, her heirs and assigns shall not at any time hereafter erect * * * any building other than a dwelling house * * * and which shall not have the exterior line or lines of the porches thereof nearer to the street line than 30 feet, such restriction, however not to apply to the erection of any barn, stable, or other outhouse necessary and appropriate to the use of such dwelling house, which it is agreed may be erected on said lands, but not nearer to the street line than 70 feet."

The Court held:

"The most that can be said in favor of the complainant's contention is that the restriction is vague, indefinite and uncertain and complainant's right to have it enforced is at least doubtful. Without attempting to determine whether the repeated violations of the restrictions are to be regarded as an abandonment of it, as defendants claim, I find that this restriction does not prevent the erection of a garage within 70 feet of the line of both streets; that the restriction was intended to apply only to the street on which the corner lot fronts and not to the line of the side street. This conclusion is in accord with both the letter and spirit of the covenant; to hold otherwise would be

to unreasonably and unwarrantably deprive defendant of the full and complete enjoyment of his property.

Restrictions of this kind are strictly construed (Walker v. Renner, 60 N. J. Eq., 495, 46 Atl., 626) and all doubts are resolved against the party seeking to enforce them (Fortescue v. Carroll, 76 N. J. Eq. 583, 75 Atl. 923; Meaney v. Stork, 80 N. J. Eq. 83 Atl. 492, affirmed 81 N. J. Eq., 210, 86 Atl. 398).

When the right to relief is doubtful, or when the meaning of the restriction is vague or uncertain, as in the present case, an injunction will not issue to enforce it. Meaney v. Stork, *supra*; Howland v. Andrus, 81 N. J. Eq., 175, 86 Atl., 391."

In Howland v. Andrus, 80 Eq., 276, 83 Atl., 982, Vice Chancellor Emery dealt with restrictions, one of which was as follows:

"That the dwelling should be so located that the front line thereof shall not be nearer than 60 feet to the street measured at right angles thereto."

The lot of land in question was situate in Montclair at the corner of Park Street and Wildwood Avenue. The map of the lots showed the corner lots both at the Northwest and Southwest corner of Park Street and Wildwood Avenue as fronting on Park Street and abutting on the adjoining Wildwood Avenue lots. (It will be noted that the Bradford Wright maps show the Atlantic Avenue lots as fronting on Atlantic Avenue). The complainant sought to have the restrictions held to apply to both streets and the Vice Chancellor took the view that the defendant might front his house as desired but that the side lines of the house must be kept back from the street.

"Complainant's deed would not, as I take it, prevent his building a house on his lot which fronted toward Park Street, but no part of the line of his dwelling which 'fronts' to Wildwood Avenue can be nearer than 60 feet.

For the purpose of the covenant, the line of the dwelling 'fronting' toward the street from which the measurements are to be taken is to be considered as the 'front line' intended by the covenant, although this line might be in fact the side line of the dwelling."

The *Howland v. Andrus* case was reviewed by this Court and was reversed. 81 Eq. 175 (86 Atl. 391). Justice Trenchard speaking for the Court held:

"A reference to the description of the property and the map seems to plainly show that the street line referred to was that upon which the property fronted. The map, which was a part of the public records affecting the property, showed that these lots which the defendant purchased fronted on Park Street. Moreover, the complainant knew that they fronted on Park Street."

He also in a most illuminating way, points out why the restriction should not be applied to both street fronts, and concludes his opinion thus:

"Courts of Equity do not aid one man to restrict another in the uses to which he may lawfully put his property unless the right to such aid is clear. *Fortescue v. Carroll*, 76 N. J. Eq., 583, 75 Atl. 923, Ann. Cas., 1912 A, 79. In that case Mr. Justice Garrison, speaking for this Court, said that 'it is well settled that, in cases where the right of a complainant to relief by the enforcement of a restrictive is doubtful, 'to doubt is to deny.' The reasons for the rule, as pointed out in the opinion are (1) because restrictions of the lawful uses of property are against common right; and (2) because restrictions in the framing of which a subsequent purchaser has had no voice, ought to be so clear that by the acceptance of the deed that declares them he may reasonably be deemed to have understood and acceded to them."

Since the complainant's right to relief is at most doubtful, the decree below will be reversed."

From the cases it is perfectly clear that all of the facts and surrounding circumstances may be taken into consideration in ascertaining the meaning of restrictions and that the manner of building may be considered as evidence of a practical or contemporaneous construction as well as of abandonment.

Kingston (formerly Millidgeville) Avenue was the extreme Easterly boundary of the Wright tract and he was not interested in having the buildings face Kingston Avenue but as he owned property on both sides of Aberdeen Place, it was most important that the buildings front the latter street. With some of the houses actually fronting Kingston Avenue, and some of them actually fronting Aberdeen Place, it is easy to picture what the appearance of the street would be like. The owners of the various lots had no difficulty in understanding the situation and construed Aberdeen Place as being the front property line and built their houses accordingly.

The restrictions show a feeble attempt to create a neighborhood scheme and the most reasonable construction which can be given to them is that it was intended that there should be no restriction whatever affecting the line of Millidgeville (now Kingston) Avenue. The requirement of the restriction is three feet "from the side or rear dividing lines." The "rear dividing lines" are between the lots facing Tallahassee Avenue and Aberdeen Place respectively. By every indication and by practical interpretation the lines of Aberdeen Place are regarded as being the front property lines of the lots on both sides of that street, with a result that there is no restriction whatever as to Kingston Avenue, and with a very few exceptions, buildings have been built out to the line thereof. The inside lots are 38 feet in width and deducting the side line restriction leaves the owner 32 feet on which to build. The cor-

ner lot in question is 36 feet in width and if deduction is made of the dividing side line restriction of 3 feet and 12 feet for the Kingston Avenue side line, there is left but 21 feet for building, yet, the restriction contemplates that the property may be used for a hotel and for business purposes, and the lot is located on a business street.

We are not concerned as to how the restriction should be applied as to the corner lots at Aberdeen Place and Atlantic Avenue and further Westward. As to the corner lot in question every fact and circumstance indicates that Kingston Avenue is not a "front" property line, and is not within the restriction.

TO DOUBT IS TO DENY.

The principle of law that an injunction will be denied unless the complainant's right is clear is too well settled and known to require citation of authorities. There are a great number of cases on this point. In *Newbery v. Barkalow*, 71 Atl. 752, the Court said it must be conceded that restrictive covenants must not be vague or uncertain, that the complainant's right to insist upon the covenant and to invoke the injunctive powers of the Court must be clear and satisfactory.

In *Fortescue v. Carroll*, 75 Atl. 923, Justice Garrison held:

"A more practical statement would be that Courts of Equity do not aid one man to restrict another in the use to which he may put his land, unless the right to such aid is clear."

See also *Ocean City Land Co. v. Weber*, 83 Eq., page 496 (91 Atl. page 600) affirmed 94 Atl. page 1102.

The property in the *Weber* case was situate at the Northwest corner of Fourth Street and Corinthian

Avenue and was composed of two lots, and were shown by the map of the Ocean City Land Company to front on Fourth Street. The two lots were referred to in the deed by lot and block number. According to the map only one of the lots was at the corner and the other was necessarily an interior lot having no other frontage than Fourth Street. The restriction employed the word "Avenue" instead of using the word "Street" and the Court held, in effect, that it was not clear in case of corner lots that the restriction applied to a highway called "street" as well as to a thoroughfare designated "Avenue."

The plan shows that two-thirds of the lots in the Wright tract fronted Aberdeen *Place*. The language of the restriction is "the front property line of any *Avenue*." If, within the meaning of the Weber case, there is fatal doubt of a restriction applying to an "Avenue" being applied to a highway designated a "Place" then the situation is presented of a large number of lots without restriction although similarly located to other lots attempted to be covered by the neighborhood scheme.

THERE HAS BEEN AN ABANDONMENT.

The building shown in photograph D 1 is divided by a party wall which practically coincides with the dividing line of the two Atlantic Avenue lots and is, in fact, the same as two separate houses. The Easterly one-half of that building is the property of the defendants now in question. The building has been erected for more than twenty years and the enclosed sun parlor which extends within twelve feet of Kingston Avenue has been in existence for many years. The frame portion of the building which extended over the rear of lot number three has been torn down and a three-story rear brick addition to the building has been constructed

and completed which is three feet from Kingston Avenue and three feet from the line of complainant's lot.

The deed to the defendants made no mention of restrictions and they never heard of them until this suit was started.

Assuming the restriction ever applied to Kingston Avenue it has been so generally violated as to amount to an abandonment.

The two Atlantic Avenue lots are numbers 1 and 2 and the side lots are numbers 3 to 13 both inclusive. The complainant's property is lot number 4. He has constructed in the rear of his house and out to Kingston Avenue a pergola of a substantial character (P. 45) see photograph D 2.

The building adjoining complainant's property and situate on lot number 5 and shown in photograph D 2 is built to within 8.35 feet of Kingston Avenue (P. 45). All of these measurements are by Mr. Rightmire, Civil Engineer.

Lot number 6 is vacant.

Lot number 7 has erected upon it a dwelling and a garage which is on the street line of Millidgeville or Kingston Avenue (P. 46).

Lot number 8 has a garage attached to the house and is 3 feet West of Kingston Avenue (P. 46).

Lot number 9 has a garage attached to the house and is within four-tenths feet of the line of Kingston Avenue (P. 46-47).

Lot number 10 has a garage detached from the house and is on the Westerly line of Kingston Avenue (P. 47).

Lot number 11 has a garage attached to the house and is 11½ feet West of Kingston Avenue (P. 47).

Lot number 12 has a garage attached to a brick building and is 3 inches West of Kingston Avenue and a portion of the building above the garage is 10.1 feet West of Kingston Avenue (P. 47).

Lot number 13 is at the corner of Ventnor and Kingston Avenues and it has a garage or a brick building attached to the dwelling and is built to the line of Millidgeville or Kingston Avenue (P. 47-48).

These brick buildings and the buildings toward Atlantic Avenue are shown in Photograph D 5. The rear of the other properties are shown in photographs D 3 and 4.

All of the buildings on Kingston Avenue with the exception of the two brick buildings, have been in existence for many years and the complainant's property was erected about twenty years ago. The extensions or additional buildings out to Kingston Avenue have also been, with very few exceptions, in existence for several years.

The two buildings facing Atlantic Avenue with the party wall on the dividing line, a frame extension in the rear of the defendants' property, which has been replaced by the brick addition, and the enclosed sun parlor on Kingston Avenue, were all permitted to be built and continued for many years without the slightest objection.

The words "main body" of the building are used in the restriction for the purpose of distinguishing one portion of the building from other portions used as bay windows, and possibly porches, although there is no express provision that porches may extend over the restricted line.

Under *Supplee v. Cohen*, 83 Atl., 372, and which was affirmed by this Court, the Marlborough case, and other cases, eaves, porches, bay windows and projections are a part of the building within the meaning of restrictive covenants unless there is something to indicate to the contrary.

In the present case the only exceptions are bay windows which may project to a certain extent.

Some of the garage buildings are attached to the dwellings and some are not. By any fair construction the garages are either part of main buildings or they are separate and distinct buildings in themselves. If they are part of the dwellings they violate the restriction and if they are separate buildings, then they are "main" buildings in themselves and result in two violations, one, in that they are built in the restricted area, and the other, that two buildings are erected on one lot. Either construction is fatal to the complainant.

In *Fortescue v. Carroll*, *Supra*, Justice Garrison, held that a building, although adaptable for two residences, was, nevertheless, one building; that the fact of its susceptibility of change in the adaptation for one or for two families would not constitute it in one situation one building and in another situation two buildings. As already noted the garage buildings are either a part of the dwelling or are separate buildings. If the latter construction is given all of the garages are separate buildings, and if the former is accepted as a proper construction, then several of the dwellings, portions of which are adaptable for garages, are built out to the street line and there are several independent buildings also built to the same line.

It would do violence to the fair intent and meaning of the restriction to hold that extensions might be built from what may be denominated in a most restricted

sense the main body of the building. Such construction would permit lateral extensions of any height and in any direction. For example, a one story extension might be made at street level, another owner might desire to have an overhanging extension one story high and one story above the ground, and still others might desire extensions and projections of any height, and either on or above ground level.

The restriction against building is not limited to a building for dwelling purposes. Any structure is a building within the meaning of the restriction under consideration. Unquestionably the substantial structures used as garages are buildings within the legal sense and meaning of the word.

Corpus Juris, Vol. 9, page 684, defines a building to be:

“A fabric or edifice constructed for use or conveniences, as a house, a church, a shop, etc., a fabric or edifice, such as a house, church, or the like, and designed for the habitation of men or animals, or for the shelter of property, a structure; any structure with walls and a roof; in the nature of a house built where it is to stand, which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property.”

See also page 685.

This Court, in *State v. Atlantic City*, 53 Atl., page 399, held that a frame tenement used as a kitchen, was not a building within the meaning of the tax exemption statute which refers to certain kinds of buildings, but observed that it was a building in the ordinary definition of “building” in its broadest sense. The use to which the buildings may be put does not change their character as buildings. What is today used as a garage may tomorrow be used as a dwelling or part of a dwelling and if such buildings are not covered by the restric-

tion, then, they can be built to any height and used for any purpose except as to the restriction which limits the use of buildings which are built within 424 feet Northward of Atlantic Avenue to certain purposes. All of the garages within that distance are also in direct violation of that restriction.

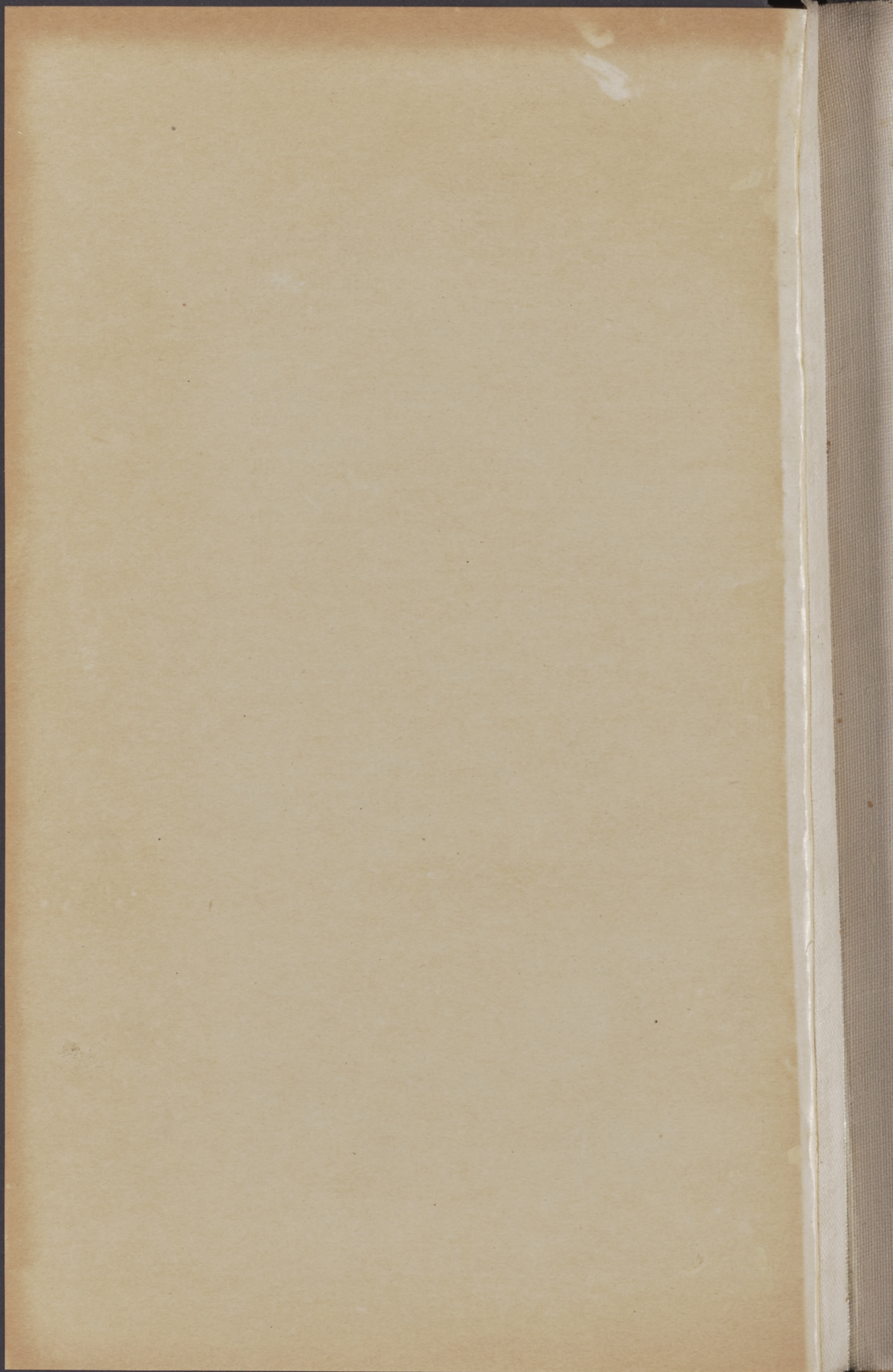
If it should be held that these extensions used for garages and other purposes are not either separate buildings or are not a part of the main building, then, on the same theory, the addition which has been built by the defendant should not be regarded as a part of the main building. The photographs and other evidence clearly indicate that there has either been a contemporaneous construction of the restriction that it does not apply to Kingston Avenue or there has been such violations and abandonment as to prevent its enforcement.

It is respectfully submitted that the decree of the Court of Chancery dismissing the bill of complaint should be affirmed.

BABCOCK & CHAMPION,

Solicitors of Respondents.

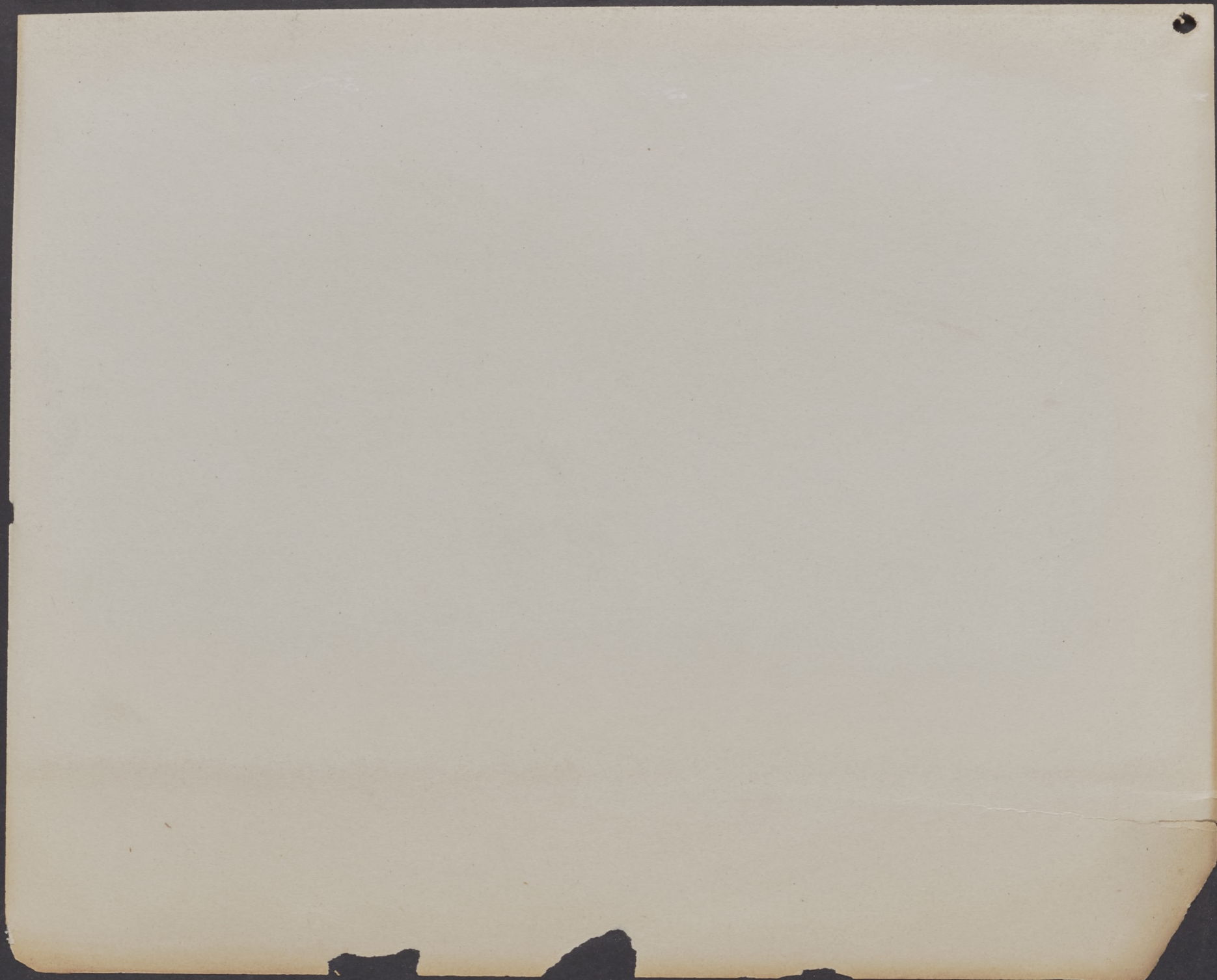
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N. W. COR. KINGSTON & ATL.
Nov. 23, 1922.
No. 1

Photo. by
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atl. City



KINGSTON AVE. LOOKING NORTH
NOV. 23, 1922
No. 2.

Photo. by
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KINGSTON AVE. LOOKING NORTH
Nov. 23, 1922.
No. 3

Photo. by
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alt. City
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Kingston Ave. Looking North
Nov. 23, 1922
No. 4

Photo. by
Fred Hess & Son
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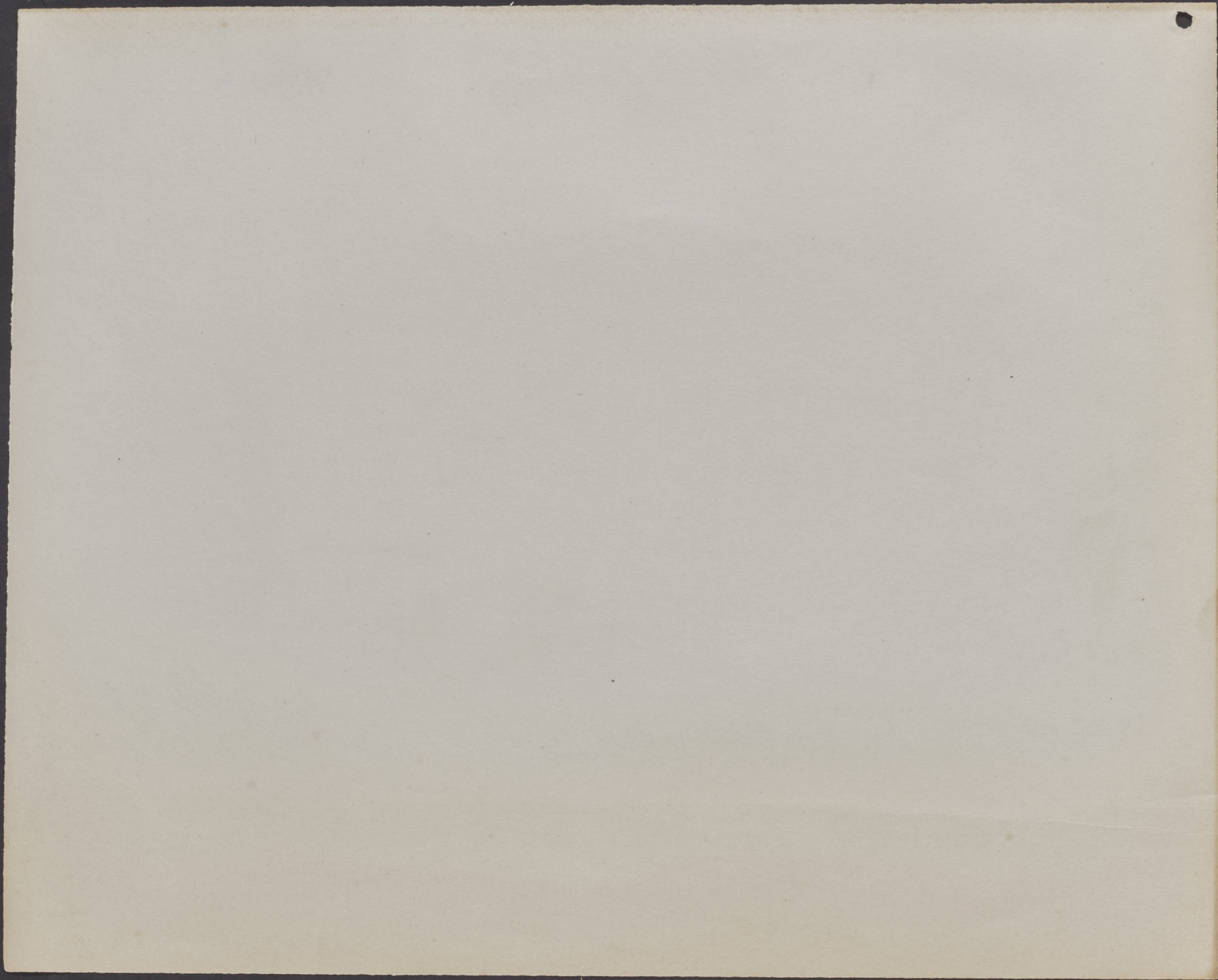
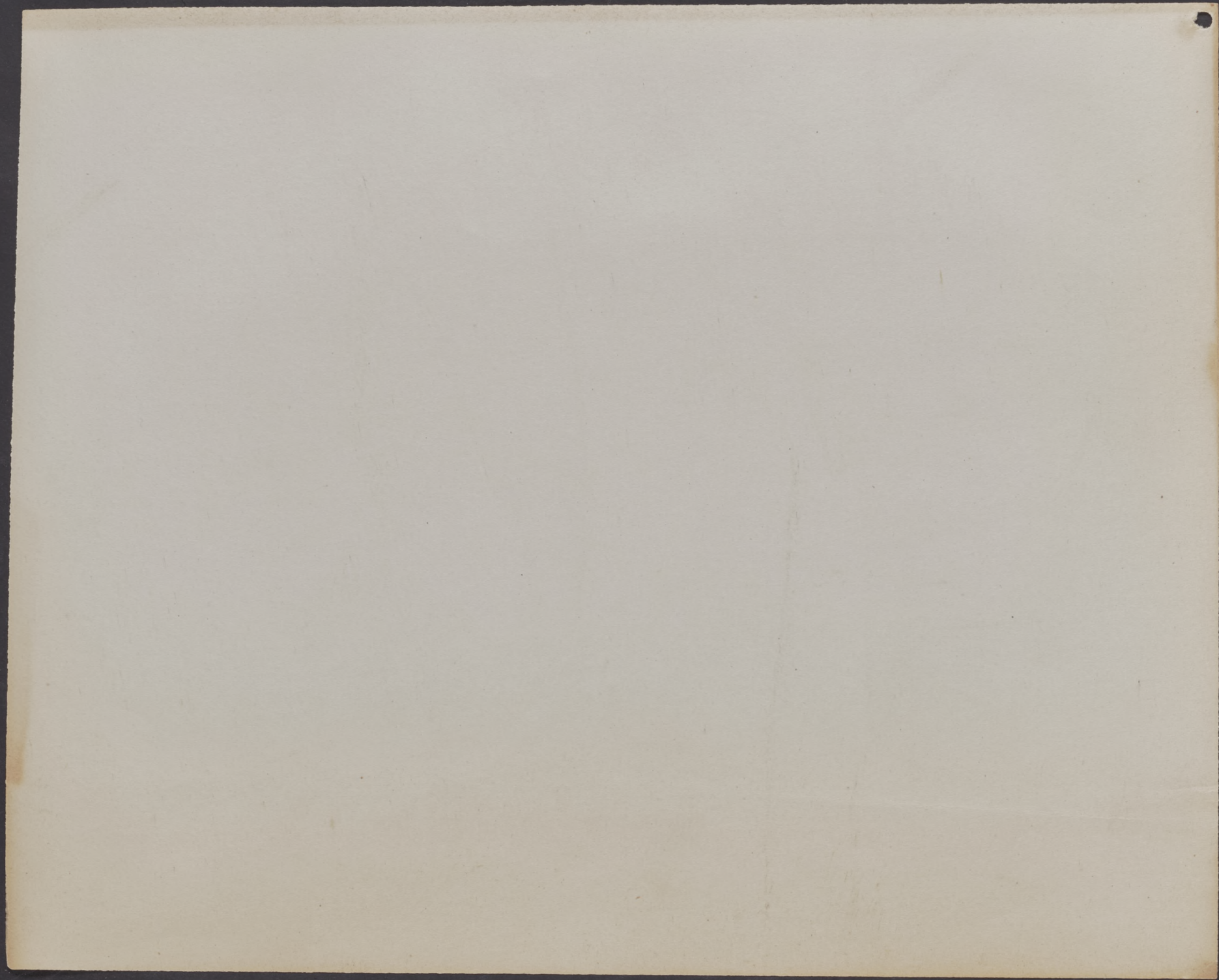




Photo. by
FRED HESSON
at. City

KINGSTON AVE. LOOKING
SOUTH FROM VENTURA AVE
Nov. 23, 1922
No. 5





ABERDEEN PL. LOOKING NORTH
NOV. 23, 1922
No. 6

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Goldsmith

