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New Jersey State Library

Bill of Complaint.

In Chancery of New Jersey.

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

The complainants, William N. Bennett and Anna D. Bennett, his wife, of the City of East Orange, County of Essex and State of New Jersey, respectfully show:

1. That on or about the 1st day of February, 1917 they purchased from the Philip J. Bowers & Co., a corporation of New Jersey, a certain plot of ground, described as follows:

All that tract or parcel of land and premises, hereinafter particularly described, situated, lying and being in the City of East Orange, in the County of Essex and State of New Jersey. BEGINNING in the Westerly side of Netherwood Terrace, at a point therein distant Northerly, one hundred feet from the Northerly line of Cleveland Terrace; thence south, Thirty-nine degrees, seventeen minutes West, one hundred feet; thence North, fifty degrees, forty-three minutes West, fifty feet; thence North, thirty-nine degrees, seventeen minutes East one hundred feet to Netherwood Terrace; thence along Netherwood Terrace South, fifty degrees, forty-three minutes East, fifty feet to the place of

BEGINNING.

Being known and designated as lots Nos. 216 and 217 on Map of East Orange Park, property of Philip J. Bowers & Co., situated in the City of East Orange and Town of Bloomfield, Essex County, New Jersey, February 1909, Ernest Baechlin, C. E.

2. That the deed from said Philip J. Bowers & Co. to these complainants bears date the 1st day of February, 1917 and was recorded in the Essex County Register's Office on February 2nd, 1917, in Book G-58 of Deeds on pages 541-543, as by reference thereto will more fully appear.

3. That the said deed to these complaints contained the following restrictive covenants: "The above described premises being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot line, and shall be erected on not less than fifty feet front, and shall cost at least Four Thousand Dollars, and shall be a one-family house only; that no stable or any out-building of any kind shall be erected on said lots, excepting a garage, and that only on the rear end of the above described lots, and which shall not be used for any purpose than for private use; and that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line."

4. That Katherine C. Haerlin, by deed dated February 19, 1925 and recorded in the Register's Office in the Essex County on March 25, 1925, in Book G-71 of Deeds on pages 253 &c., purchased from Grace M. Holmes and Robert D. Holmes, her husband the premises adjoining those of complainants on the east and forming the plot of 50 feet by 100 feet on the southwest corner of Netherwood Terrace and Cleveland Terrace, in said City of

East Orange, aforesaid and said lots are known as numbers 212 and 213 on the Map of East Orange Park tract property of Philip J. Bowers & Co. aforesaid.

5. That the said Grace M. Holmes purchased said lands and premises known as lots 212 and 213 on map mentioned in the preceding paragraph from Philip J. Bowers & Co. and were conveyed to her by deed bearing date the 16th day of April, 1917 and was recorded in the Register's Office of Essex County on the 21st day of May, 1917 in Book Z-58 of Deeds for said County on pages 191-193, as by reference to said record will more fully appear.

6. That said deed from Philip J. Bowers & Co. to Grace M. Holmes, contains the following restrictive covenants and conditions: "The last above described premises being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot line, and shall be erected on not less than fifty feet front, and shall cost at least Four Thousand Dollars, and shall be a one-family house only; that no stable or any out-buildings of any kind shall be erected on said lots; that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line."

7. That these complainants purchased said premises now owned by them and invested their money in the same because of the restrictive character of the neighborhood in which the same are located and relied upon the restrictions covering

the adjacent lands and premises contained in the deeds made, executed and delivered by the said Philip J. Bowers & Co. especially those affecting the premises immediately adjoining the lands of complainants.

8. Complainants further show that the premises of these complainants and those of said Katherine C. Haerlin are part and parcel of the same tract as laid out by the said Philip J. Bowers & Co.

9. Complainants further show that the said Katherine C. Haerlin purchased said premises immediately adjoining those of complainant's with full knowledge and notice of the restrictions covering the same and also with notice and knowledge that a decree pro confesso was filed in the Court of Chancery of the State of New Jersey against the said Grace M. Holmes, the former owner of the said premises, on the 19th day of July, 1922, in an action restraining said Grace M. Holmes from erecting a garage upon said premises, but that, nevertheless, the said Katherine C. Haerlin, the defendant herein, has begun the erection and construction of a one-story stucco garage or out-building upon the rear end of the plot owned by her.

10. Complainants further show that they have requested said Katherine C. Haerlin to refrain from the erection and construction of said garage or out-building, as the erection of the same would materially and irreparably affect the value of the premises owned by complainants.

11. Complainants further show that the said Katherine C. Haerlin, notwithstanding the requests of these complainants, is proceeding with the erec-

tion and construction of said garage or out-building in violation of the covenants and conditions contained in her deed and the deed of her grantors, and to the irreparable damage and injury of these complainants.

Complainants are without adequate relief in the courts of law and therefore pray:

1. That Katherine C. Haerlin, the defendant to this suit may answer this bill of complaint without oath and any statement therein made.

2. That the said defendant may be decreed to comply with the restrictive covenants contained in her deed.

3. That a writ of injunction be issued restraining the defendant, Katherine C. Haerlin, from proceeding with the erection and construction of any garage or out-building upon the premises described in the bill of complaint and that she be compelled to remove such part of said building that may have been constructed and erected up to the present time.

4. That the complainants may have such further or other relief as the nature of the case may require.

5. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

MAX A. STURM,
Solicitor for and of Counsel
with Complainants.

Affidavit of William N. Bennett.

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

William N. Bennett, of full age, being duly sworn upon his oath, doth depose and say: That he is one of the complainants named in the foregoing complaint. That he has read the same and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

Deponent further says that he and his wife, Anna D. Bennett, are the owners of premises known as lots numbered 216 and 217 on Map of East Orange Park property of Philip J. Bowers & Co. situated in the City of East Orange and Town of Bloomfield, Essex County, New Jersey, February, 1909, Ernest Baechlin, C. E.

Deponent further says that there is erected on said plot a one-family house occupied by this deponent and his wife, and that he estimates the value thereof at $13,000.

Deponent further says that defendant, Katherine C. Haerlin, is the owner of premises adjoining those of complainants on the east and forming the plot on the southwest corner of Netherwood Terrace and Cleveland Terrace, in the City of East Orange, County of Essex and State of New Jersey.

Deponent further says that the said defendant, Katherine C. Haerlin, purchased said premises from Grace M. Holmes, who purchased the same from the same grantor as these complainants purchased their premises, to wit: Philip J. Bowers & Co., a corporation of the State of New Jersey, and formed part of the same tract of land from which the premises of the complainants were taken. That in a deed by the said Philip J. Bowers & Co. to Grace M. Holmes, bearing date April 16, 1917 and

recorded on May 21, 1917 in the Essex County Register's Office in book Z-58 of deeds on Page 191, there is contained the following language: "The last above described premises (the premises now owned by defendant) being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot line, and shall be erected on not less than fifty feet front, and shall cost at least Four Thousand Dollars, and shall be a one-family house only; that no stable or any out-buildings of any kind shall be erected on said lots; that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within Twenty-five feet of the lot line."

Deponent further says that the said Katherine C. Haerlin purchased the premises formerly owned by Grace M. Holmes, subject to the same restrictions as contained in the deed from Philip J. Bowers & Co. to the said Grace M. Holmes and that the deed from Grace M. Holmes to the defendant is dated February 19, 1925 and recorded in the Office of the Register of Essex County in Book G-71, page 253, and that she had full knowledge and notice of these restrictive covenants and conditions.

Deponent further says that he purchased premises now owned by him and invested his money in said premises, because of the restrictive neighborhood in which the same are located, and that this deponent relied upon the restrictions covering the adjacent lands and premises contained in the deeds made by the said Philip J. Bowers & Co.

Deponent further shows that the said defendant,

Katherine C. Haerlin, in violation of said restrictive covenants and conditions contained in the deed by said Philip J. Bowers & Co. to Grace M. Holmes and from Grace M. Holmes to the defendant and subject to which the said premises were conveyed, and with full knowledge of the same and contrary to the protests and objections of the complainants herein, is erecting upon said premises known as lots 212 and 213 on said map of East Orange Park, property of Philip J. Bowers & Co. aforesaid, a one-story stucco garage or out-building. That the same is being erected at the end of said lots and near the home of this deponent and that if the said garage would be permitted to remain, the same would materially and irreparably damage and depreciate the value of the premises of complainants.

Deponent further says that the said defendant has commenced to erect and construct the said garage and has begun the excavation for the foundation thereof and partly constructed said garage, and deponent further says that he verily believes that the said defendant, Katherine C. Haerlin, intends to proceed with the erection and construction of the said garage or out-building contrary and in violation of the covenants in said deed aforesaid, and that if permitted so to complete the erection and construction of said garage building, the same will be a detriment to the neighborhood and will seriously affect the selling value of the premises of these complainants.

WILLIAM N. BENNETT.

Sworn and subscribed to before me
this 18th day of March, 1929.

ALFRED A. FRANCK,
Master in Chancery
of New Jersey.

Order and Rule to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	On Bill, &c. Rule to Show Cause.

On reading and filing the bill of complaint in this cause and the affidavit thereto annexed and on motion of Max A. Sturm, of counsel with complainants, it is on this 19th day of March 1929, ORDERED that the defendant Katherine C. Haerlin, show cause before the Chancellor at the Chancery Chambers, at 1060 Broad Street, in the City of Newark, County of Essex and State of New Jersey, on the 26th day of March next, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why an injunction should not be issued according to the prayer of the said bill, and for such further relief as may be just.

And it is further ORDERED that a copy of said bill and affidavit and of this Order, certified to as a true copy, by the solicitor for the complainants, be served on the defendant Katherine C. Haerlin, within three days from the date of this order.

Respectfully advised,

ALONZO S. CHURCH,
V.C.

Notice.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	On Bill, etc. Notice.

To WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, or MAX M. STURM, Solicitor of Complainants.

PLEASE TAKE NOTICE: That on Tuesday, April 2, 1929, at 10 o'clock in the forenoon, or as soon thereafter as Counsel can be heard, I shall move to dismiss the Bill of Complaint filed herein, on the grounds:

1. That the same does not set forth a cause of action such as to entitle Complainants to equitable relief,

2. That the court is without jurisdiction to try said alleged cause of action.

Respectfully,
JOSEPH A. FUERSTMAN,
Solicitor of Defendant.

Service of a copy of within Notice acknowledged this 28th day of March, 1929.

MAX A. STURM,
Solicitor of Defendant.

Order Amending Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	On Bill, etc. Order Amending Bill of Complaint.

A motion having been made by the defendant, Katherine C. Haerlin, to dismiss the complainants' bill of complaint on the ground that same does not set forth a cause of action, and on the further ground that the court is without jurisdiction to try the alleged cause of action contained in the complaint, and it appearing that due notice of this motion has been given to the said complainants; and the court having heard the arguments of Joseph A. Fuerstman, Solicitor of said defendant, and of Max A. Sturm, Solicitor of complainants, and being of the opinion that the said bill is defective in that it neither sets forth a community scheme, nor a special restrictive covenant in favor of the complainants, so as to entitle complainants to the relief prayed for, and the court being also of the opinion that the complainants herein should be permitted to amend their bill of complaint,

It is thereupon on this 3rd day of April 1929 Ordered, that complainants have leave to amend said bill of complaint within five days after the

date of this Order, upon payment to the defendant of the costs of this motion to be taxed, and a counsel fee of $50.00, and also upon service upon the defendant, within the said days of their bill of complaint as amended.

And it is further Ordered, that the said defendant have twenty days from the service upon her of said copy of said amended bill of complaint, within which to file her answer or other pleading thereto.

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

Order Discharging Rule.

Filed April 3rd, 1929.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	On Bill, etc. Order Discharging Rule.

This matter coming on to be heard for a Rule to Show Cause why the defendant should not be restrained from erecting a garage on her premises in alleged violation of a restrictive covenant in favor of the defendant, and the Court having heard arguments of Max A. Sturm, Solicitor of complainants, and Joseph A. Fuerstman, Solicitor of defendant, and the Court being of the opinion that the bill of complaint filed herein is defective.

It is therefore, on this 3rd day of April 1929, Ordered, that the rule to show cause issued herein be discharged with costs.

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

Amended Bill of Complaint.

Filed April 3rd, 1929.

IN CHANCERY OF NEW JERSEY.

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

The complainants, William N. Bennett and Anna D. Bennett, his wife, of the City of East Orange, County of Essex and State of New Jersey, for their amended bill of complaint, respectfully show:

1. That on or about the 1st day of February, 1917, they purchased from the Philip J. Bowers & Co., a corporation of New Jersey, a certain plot of ground, described as follows:

All that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey. BEGINNING in the Westerly side of Netherwood Terrace, at a point therein distant Northerly, one hundred feet from the Northerly line of Cleveland Terrace; thence south, Thirty-nine degrees, seventeen minutes West, one hundred feet; thence North, fifty degrees, forty-three minutes West, fifty feet; thence North, thirty-nine degrees, seventeen minutes East, one hundred feet to Netherwood Terrace; thence along Netherwood Terrace South, fifty degrees, forty-three minutes East, fifty feet to the place of BEGINNING.

Being known and designated as lots Nos. 216 and 217 on Map of East Orange Park, property of Philip J. Bowers & Co., situated in the City of East Orange and Town of Bloomfield, Essex Coun-

ty, New Jersey, February 1909, Ernest Baechlin, C. E.

2. That the deed from said Philip J. Bowers & Co. to these complainants bears date the 1st day of February, 1917 and was recorded in the Essex County Register's Office on February 2nd, 1917, in Book G-58 of Deeds on pages 541-543, as by reference thereto will more fully appear.

3. That the deed to these complainants contained the following restrictive covenants: "The above described premises being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot line, and shall be erected on not less than fifty feet front, and shall cost at least Four thousand Dollars, and shall be a one-family house only; that no stable or any out-buildings of any kind shall be erected on said lots, excepting a garage, and that only on the rear end of the above described lots, and which shall not be used for any purpose than for private use; and that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line."

4. That Katherine C. Haerlin, by deed dated February 19, 1925 and recorded in the Register's Office in the County of Essex on March 25, 1925, in Book G-71 of Deeds on pages 253, &c., purchased from Grace M. Holmes and Robert D. Holmes, her husband, the premises adjoining those of complainants on the east and forming the plot of 50 feet by

100 feet on the southwest corner of Netherwood Terrace and Cleveland Terrace, in said City of East Orange, aforesaid and said lots are known as numbers 212 and 213 on the Map of East Orange Park tract property of Philip J. Bowers & Co. aforesaid.

5. That the said Grace M. Holmes purchased said lands and premises known as lots 212 and 213 on map mentioned in the preceding paragraph from Philip J. Bowers & Co. and were conveyed to her by deed bearing date the 16th day of April, 1917 and was recorded in the Register's Office of Essex County on the 21st day of May, 1917, in Book Z-58 of Deeds for said County on pages 191-193, as by reference to said record will more fully appear.

6. That said deed from Philip J. Bowers & Co. to Grace M. Holmes, contains the following restrictive covenants and conditions: "The last above described premises (being the premises now owned by defendant) being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot line, and shall be erected on not less than fifty feet front, and shall cost at least Four Thousand Dollars, and shall be a one-family house only; that no stable or any out-buildings of any kind shall be erected on said lots; that no building shall be used for any business purposes whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line."

7. That the lands and premises of the complainants, as well as those of the defendant, formed

part and parcel of a large tract of land owned by said Philip J. Bowers & Co., who laid out said tract into lots or plots, and opened up streets and of which tract they prepared a plan or map showing the streets and building lots thereon. That said plan or map was filed in the Office of the Register of Essex County and entitled "Map of East Orange Park Tract Property of Philip J. Bowers & Co., situated in the City of East Orange and Town of Bloomfield and Borough of Glen Ridge, Essex County, New Jersey, February 1909, Ernest Baechlin, C. E."

8. That said tract as laid out by said Philip J. Bowers & Co. consisted of approximately four hundred and twenty (420) lots and that all deeds made by said company conveying the lots comprising said tract, contained restrictive covenants similar to those contained in the deeds of complainants and of said Grace M. Holmes, who conveyed to the defendant herein, and were embodied as a part of the conditions under which they were sold and that it was the intention of the said Philip J. Bowers & Co. and understood by the buyers of the various lots or plots, to be for the common advantage of the several purchasers.

9. That these complainants purchased said premises now owned by them and invested their money in the same because of the restrictive character of the neighborhood in which the same are located and relied upon the restrictions covering the adjacent lands and premises contained in the deeds made, executed and delivered, and also upon similar restrictions to be inserted in subsequent deeds by the said Philip J. Bowers & Co., especially

those affecting the premises immediately adjoining the lands of complainants.

10. Complainants further show that the said Katherine C. Haerlin purchased said premises immediately adjoining those of complainants' with full knowledge and notice of the restrictions covering the same prohibiting the erection of any out-buildings of any kind, and also with notice and knowledge that a decree pro confesso was filed in the Court of Chancery of the State of New Jersey against the said Grace M. Holmes, the former owner of the said premises, on the 19th day of July, 1922, in an action restraining said Grace M. Holmes from erecting a garage upon said premises, but that, nevertheless, the said Katherine C. Haerlin, the defendant herein, has begun the erection and construction of a one-story stucco garage or out-building upon the rear end of the plot owned by her.

11. Complainants further show that they have requested said Katherine C. Haerlin to refrain from the erection and construction of said garage or out-building, as the erection of the same would materially and irreparably affect the value of the premises owned by complainants and that the erection thereof is contrary to the restrictions contained in her deed.

12. Complainants further show that the said Katherine C. Haerlin, notwithstanding the requests of these complainants, is proceeding with the erection and construction of said garage or out-building in violation of the covenants and conditions contained in her deed and the deed of her grantors,

and to the irreparable damage and injury of these complainants.

Complainants are without adequate relief in the courts of law and therefore pray:

1. That Katherine C. Haerlin, the defendant to this suit, may answer this bill of complaint without oath and every statement therein made.

2. That the said defendant may be decreed to comply with the restrictive covenants contained in her deed.

3. That a writ of injunction be issued restraining the defendant, Katherine C. Haerlin, from proceeding with the erection and construction of any garage or out-building upon the premises described in the bill of complaint and/or that she be compelled to remove such part of said building that may have been constructed and erected up to the present time.

4. That the complainants may have such further or other relief as the nature of the case may require.

5. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

MAX A. STURM,
Solicitor for and of Counsel
with Complainants.

Affidavit of William N. Bennett.

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

William N. Bennett, of full age, being duly sworn upon his oath, doth depose and say: That he is one of the complainants named in the foregoing complaint. That he has read the same and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

Deponent further says that he and his wife, Anna D. Bennett, are the owners of premises known as lots numbered 216 and 217 on Map of East Orange Park Property of Philip J. Bowers & Co. situated in the City of East Orange, and Town of Bloomfield, Essex County, New Jersey, February, 1909, Ernest Baechlin, C. E.

Deponent further says that there is erected on said plot a one-family house occupied by this deponent and his wife, and that he estimates the value thereof at $13,000.

Deponent further says that defendant, Katherine C. Haerlin, is the owner of premises adjoining those of complainants in the east and forming the plot on the southwest corner of Netherwood Terrace and Cleveland Terrace, in the City of East Orange, County of Essex and State of New Jersey.

Deponent further says that the said defendant, Katherine C. Haerlin, purchased said premises from Grace M. Holmes, who purchased the same from the same grantor as these complainants purchased their premises, to wit: Philip J. Bowers & Co., a corporation of the State of New Jersey, and formed part of the same tract of land from which the premises of the complainants were taken. That in a deed by the said Philip J. Bowers & Co. to Grace M. Holmes, bearing date April 16,

1917 and recorded on May 21, 1917 in the Essex County Register's Office in book Z-58 of deeds on Page 191, there is contained the following language "The last above described premises (the premises now owned by defendant) being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot line, and shall be erected on not less than fifty feet front, and shall cost at least Four Thousand Dollars, and shall be a one-family house only; that no stable or any out-buildings of any kind shall be erected on said lots; that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within Twenty-five feet of the lot line."

Deponent further says that the said Katherine C. Haerlin purchased the premises formerly owned by Grace M. Holmes, subject to the same restrictions as contained in the deed from Philip J. Bowers & Co. to the said Grace M. Holmes and that the deed from Grace M. Holmes to the defendant is dated February 19, 1925 and recorded in the Office of the Register of Essex County in Book G-71, page 253, and that she had full knowledge and notice of these restrictive covenants and conditions.

Deponent further says that he purchased premises now owned by him and invested his money in said premises, because of the restrictive neighborhood in which the same are located, and that this deponent relied upon the restrictions covering the adjacent lands and premises contained in the deeds made by the said Philip J. Bowers & Co.

Deponent further shows that the said defendant,

Affidavit of William N. Bennett.

Katherine C. Haerlin, in violation of said restrictive covenants and conditions contained in the deed by said Philip J. Bowers & Co. to Grace M. Holmes and from Grace M. Holmes to the defendant and subject to which the said premises were conveyed, and with full knowledge of the same and contrary to the protests and objections of the complainants herein, is erecting upon said premises known as lots 212 and 213 on said map of East Orange Park Property of Philip J. Bowers & Co. aforesaid, a one-story stucco garage or out-building. That the same is being erected at the end of said lots and near the home of this deponent and that if said garage would be permitted to remain, the same would materially and irreparably damage and depreciate the value of the premises of complainants.

Deponent further says that the said defendant has commenced to erect and construct the said garage and has begun the excavation for the foundation thereof, and partly constructed said garage, and deponent further says that he verily believes that the said defendant, Katherine C. Haerlin, intends to proceed wtih the erection and construction of the said garage or out-building contrary and in violation of the covenants in said deed aforesaid, and that if permitted so to complete the erection and construction of said garage building, the same will be a detriment to the neighborhood and will seriously affect the selling value of the premises of these complainants.

WILLIAM N. BENNETT.

Sworn and subscribed to before me
this 11th day of April, 1929.

ALFRED A. FRANCK,
Master in Chancery
of New Jersey.

Affidavit of R. Thomas Bowers.

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM N. BENNETT and ANNA D. BENNETT,
Complainants,

and

KATHERINE C. HAERLIN,
Defendant.

R. Thomas Bowers, of full age being duly sworn upon his oath doth depose and say:

1. That he is the Assistant-Secretary of Philip J. Bowers & Co., a corporation of the State of New Jersey, which corporation was the owner of a large tract of land situated in the City of East Orange, Town of Bloomfield and Borough of Glen Ridge, in the County of Essex and State of New Jersey; and which was laid out by said company into lots and a map thereof filed entitled "Map of East Orange Park, property of Philip J. Bowers & Co., situate in the City of East Orange and Town of Bloomfield, Essex County, New Jersey, February 1909, Ernest Baechlin, C. E."

2. That Philip J. Bowers & Co. above named is the grantor in a deed to William N. Bennett and Anna D. Bennett, his wife, bearing date February 1, 1917 in the Register's Office of the County of Essex in Book G-58 of Deeds for said County, pages 541-543, conveying lots 216 and 217 on aforesaid map.

3. Deponent further says that the said Philip

J. Bowers & Co. was also the grantor in a deed to Grace M. Holmes bearing date the 16th day of April, 1917 and recorded in the Register's Office of the County of Essex on the 21st day of May, 1917 in Book Z-58 of Deeds for said County, pages 191-193, conveying lots 212, 213, 214 and 215 on said map aforesaid. That both conveyances by Philip J. Bowers & Co. contained certain restrictive conditions as to the use of said land; among them being that no stable or any outbuildings of any kind could be erected upon said lands and premises, except a garage, and that only on the rear end of the described lots, with the exception, however, that no outbuilding or garage could be erected upon lots 212, 213 and 214 being a part of the premises conveyed by the said Philip J. Bowers & Co. to the said Grace M. Holmes.

4. That the said tract as laid out by said Philip J. Bowers & Co. consisted of approximately four hundred and twenty lots and that all deeds made by said company conveying the lots comprising said tract contained restrictive covenants and which were embodied as a part of the conditions under which they were sold and that it was the intention of the said Philip J. Bowers & Co. that all the purchasers from this company should have the benefit of the restrictions contained not only in their own deed but also in the deeds of the other lot owners.

5. Deponent further says that the said company expressly prohibited the erection of a garage upon lots 212, 213, and 214 because said lots form a corner plot and the rear of said lots abut the side

line of the lots of the complainants herein, which face on Netherwood Terrace.

6. Deponent further says that the restrictive covenants were one of the selling arguments and conditions under which the various lots comprising this entire tract were sold.

(Signed) R. THOMAS BOWERS.

Sworn and subscribed to before me
this 2nd day of April, 1929.

MAY F. BOWERS,
Notary Public
of N. J.
My commission expires
Nov. 8, 1932.

Answer.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	On Bill, etc. Answer.

The answer of the defendant, Katherine C. Haerlin.

This defendant, Katherine C. Haerlin, answering the amended bill of complaint says that:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 1, 2 and 3 of the complainants' complaint.

2. Defendant admits paragraph 4, except that the defendant does not know whether the defendant's premises adjoin the complainants' premises on the east.

3. Defendant admits paragraphs 5 and 6.

4. Defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 7 of the complainants' complaint.

5. Defendant denies paragraph 8

6. Defendant denies paragraphs 9, 10 and 11.

7. Defendant admits that she has erected a gar-

age on her premises, but denies that such erection was in violation of any lawful and binding covenants and conditions contained in her deed, nor that such erection resulted in any irreparable damage or injury to the complainants.

Defendant further answering the Amended Bill of Complaint for her First Separate Defense says:

The common grantor of the complainants and defendant did not similarly restrict the use to be made by complainants and defendant of their respective lands and premises, and there exists no reciprocal right in the defendant to restrict the complainants in the manner and form as the complainants claim against the defendant, and therefore the complainants are without right to so restrict the defendant's lands.

Defendant further answering the Amended Bill of Complaint for her Second Separate Defense says:

There exists no separate special covenant on the part of the defendant running in favor of complainants, wherein and whereby the defendant agreed to restrict her lands in the manner as claimed by the complainants.

Defendant further answering the Amended Bill of Complaint for her Third Separate Defense says:

The common grantor did not covenant to restrict all lands in the tract mentioned in the complainants' amended bill of complaint in the same man-

ner and form as the defendant's lands are alleged to be restricted.

Defendant further answering the Amended Bill of Complaint for her Fourth Separate Defense says:

The complainants have waived and forfeited any right they might have had to restrict the defendant's use of her land for the building of a garage, by failing to object to the erection of garages by other owners in said tract similarly situated as is the defendant's.

Defendant further answering the Amended Bill of Complaint for her Fifth Separate Defense says:

The complainants are in gross laches in that they permitted the defendant to proceed with the erection of her garage although they had notice of her intention to erect a garage, and they did not file their bill of complaint until the garage was substantially completed, and they are therefore without right to equitable relief at this time.

Defendant further answering the Bill of Complaint for Her Sixth Separate Defense says:

The erection of a private garage such as was erected by the defendant is not in violation of any covenant contained in defendant's deed.

Defendant Further answering the Bill of Complaint for her Seventh Separate Defense says:

The erection of a private garage such as was erected by the defendant is not in violation of any

community scheme of which the defendant had any notice whatever.

Defendant further answering the Bill of Complaint for her Eighth Separate Defense says:

Even if the covenants were originally enforceable, the original restriction has been abandoned and relinquished by repeated and continuous violation thereof by others in the same tract, without objection from the complainants, both before and after complainants obtained title; owners of lands similarly situated as is the defendant's in the same tract having erected garages on their premises with the knowledge and acquiescence of the complainants.

Defendant further answering the Bill of Complaint for her Ninth Separate Defense says:

No binding universal and reciprocal covenant against the erection of a private garage exists in the tract mentioned, in that some owners are expressly permitted to erect garages on their lands while others in the same tract are neither expressly permitted to erect, nor expressly restricted against erecting garages, and in the absence of a universal or reciprocal restriction, no general plan or community scheme of restrictions exists, and there is no mutual obligation nor common benefit among all the owners of lands in said tract.

JOSEPH A. FUERSTMAN,
Solicitor of Defendant.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	73 - 31 On Bill, etc. Minutes of Hearing.

Final Hearing before HON. JOHN J. FALLON, Vice Chancellor, Chancery Chambers, Jersey City, May 8, 1930.

APPEARANCES:

MR. MAX A. STURM, for Complainants.

MR. JOSEPH A. FUERSTMAN, for Defendant.

Mr. Sturm: Your Honor, we can shorten this case to some extent by agreeing on the record as to the character of the lay out of the plot which was formerly owned by Philip J. Bowers & Company, and called the East Orange tract, of which I think the property owned by the complainants and defendant are a part, and that in practically all the deeds there are contained restrictions. Some are similar to those contained in the deeds of the complainants as well as of the defendant.

Mr. Fuerstman: Some similar to those in the complainants deed and some similar to those as contained in the defendant's deed, there being a dif-

ference between the restrictions in the complainants and the defendant's deed, both being grantees out of the tract derived from the common grantor originally.

Mr. Sturm: The only difference appearing as of record between the restrictions contained in the complainants deed is that the complainants are permitted to erect a garage on their lots. The two lots owned by the defendant contain a restriction similar to those of complainants except that it prohibits—

Mr. Fuerstman: Does not provide expressly for the building of a garage.

Mr. Sturm: I want to read the exact language.

Mr. Fuerstman: The defendant's deed does not contain the express provision—

The Court: First read the clause in the complainants deed.

Mr. Sturm: This is the restriction contained in the complainants deed—"The above described premises being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall is put twenty-five feet back from the front lot lines and shall be erected on not less than fifty feet fronts and shall cost at least four thousand dollars and shall be a one family house only; that no stable or any outbuildings of any kind shall be erected on said lots, excepting a garage, and that only on the rear end of the above described lots, and shall not be used for any purpose than for private use; and that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erect-

ed other than a metal fence, and that not within twenty-five feet of the lot line."

The Court: Read the restriction contained in the defendant's deed.

Mr. Sturm: "The last above described premises

The Court: Are you referring to the defendant's deed or the complainants deed?

Mr. Sturm: I am referring to a deed from Philip J. Bowers & Company to Grace M. Holmes who is the grantor of the defendant.

The Court: Is the covenant expressly contained in the defendant's deed?

Mr. Sturm: I think so.

The Court: Why not give me the restriction in that deed?

Mr. Fuerstman: I have not the deed here and will consent to that going in.

Mr. Sturm: "The last above described premises (being the premises now owned by the defendant) being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty five feet back from the front lot lines and shall be erected on not less than fifty feet fronts and shall cost at least four thousand dollars, and shall be a one family house only; that no stable or any out-buildings of any kind shall be erected on said lots; that no building shall be used for any business purposes whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty five feet of the lot line." Thats the end of the restriction.

Mr. Fuerstman: Some of the deeds out of that

tract taken at random by the searcher are contained in an affidavit made by the searcher and will show the lack of uniformity—will show a difference, a variance between the restrictions contained in these deeds included in this affidavit.

The Court: It is not a general building scheme restriction in that there are variances?

Mr. Fuerstman: And the variances consists in this. One deed contains no recitals as to outbuildings. Another contains a restriction among other things against out-buildings but does not except the garage. Another says no out-building excepting garage for private use. Another says no outbuilding excepting a garage for private use. I am taking the deeds as they run. Another says no outbuilding excepting a garage. Another says no outbuilding except a garage. Another says no outbuilding excepting a suitable garage. Another says no out-building excepting a suitable garage. Another says no stable or any out-building of any kind excepting a garage. Another says no stable or out-building of any kind. Another says no stable or out-building of any kind excepting a garage. Another excepts a garage. Another excepts a garage. Five others in this affidavit in succession except garages. The next to the last one in the affidavit says no stable or out-building of any kind, and then the last one says except a garage for private use. These restrictions as I say are contained in deeds taken at random out of a very large tract and indicate the general run of the restrictions in that tract. The affiant is in court and can be examined. Now in fact I think the entire case can go in on affidavits.

The Court: It cannot go in on affidavits.

Mr. Fuerstman: I make a stipulation as to the facts. Among other things it is stipulated—

Mr. Sturm: We had better set forth that "no stable or out-building of any kind" generally refers to corner plots.

The Court: You mean the restrictions?

Mr. Sturm: Yes.

Mr. Fuerstman: That is not universally so.

The Court: You say that restriction which you mentioned applies only to corner plots?

Mr. Furstman: Not universally. He says it was inserted more frequently in corner plots out of that tract but not universally. Some of the corner plots have permits to erect garages the same as the inside plots. It can be stipulated that the property of the defendant is a corner plot; that the property of the defendant adjoins the property of the complainants on the east.

The Court: And the property of complainants is not a corner lot?

Mr. Fuerstman: No, it is not a corner lot. It is also stipulated that a large number of the corner plots in that track actually have garages erected on them since the insertion of the restriction. We will also stipulate that the photographs taken by a man who is in court now of garages on corner lots out of that tract—

The Court: What is the significance of the photographs?

Mr. Fuerstman: That is a matter of proof. We don't need the photographs. The proof will be there are at least twelve corner lots within a short radius of defendant's garage upon which there are garages.

Mr. Sturm: We won't consent to that.

Mr. Fuerstman: Then we will prove it. Aside from the inside lots, of course. We will prove that since the filing of the bill garages have been erected on corner lots in that tract without objection by any one in the tract.

The Court: There are cases that hold they don't have to object. The mere fact they don't object— The mere fact rather they permit a violation in one case does not estop them from seeking to prevent a violation in another case.

Mr. Fuerstman: There are cases which hold that where the party who claims to be injured by the particular garage to which he objects is injured by another similar violation he cannot permit that violation and object to the other.

The Court: All right.

Mr. Fuerstman: Now it will be stipulated that the grantor's deed, the original grantor's deed, does not contain any covenant by him as to the manner in which he will restrict other conveyances out of the tract.

The Court: Is that the Bowers deed?

Mr. Fuerstman: Yes. It will also be conceded that no deed in the tract which has been examined describes any covenant running in favor of any grantee as against any other grantee except as such grantees may derive their rights through a general scheme.

The Court: Indicated by the original grant.

Mr. Fuerstman: Indicated by the original grant through the various deeds.

The Court: Do you mean that there is no general building scheme restriction which is uniform and intended to be for the benefit of all parties in interest?

Mr. Fuerstman: Not only that, but there is no personal right given to any grantee to object to the nature of the construction of any other party's property. There is no express right given to him.

Mr. Sturm: All the deeds contain this restriction, the only difference is about a garage.

The Court: Do the restrictions relate only to garage buildings?

Mr. Sturm: Some say "no buildings of any kind whatsoever" and some except a garage.

The Court: Now in reading the papers over it seems that the doctrine of estoppel may perhaps be significant in this case. I gather that the one who is now complaining stood by for a period of time and allowed the other to go on with the building scheme of this garage without applying to this court for relief. Of course I suppose they will say they applied within a reasonable time, but I surmise the question of estoppel is going to be an important one.

Mr. Fuerstman: In fact the application was made so much time after the work was begun. The work was begun and a bill was filed and a preliminary injunction prayed for and denied. Vice Chancellor Church, I believe, on the hearing of the application for a preliminary injunction denied it. Do you rest on that stipulation, Mr. Sturm?

Mr. Sturm: I rest my case on the stipulation as to what the record will disclose as to the restrictions and as to the restrictions contained in the complainants deed and the defendant's deed, and as it affects the other property in the same tract.

The Court: You represent the complainants here?

Mr. Sturm: Yes, the complainants.

The Court: I think I gather somewhat from these papers before me your client, Mr. Fuerstman, asserted the right to build the garage first, undertaking thereafter to negotiate with the other party, the complainants, to obtain their consent. After some little negotiation consent was not given and then your client feeling certain she had a right to building a garage went ahead and built it, and when she asserted that right the complainants said something to your client which indicated that if she did so she would do so at her peril because they would object to it and take a court action. Is that so? You had better bring out the proofs. If that is so then the proposition of estoppel may not apply.

Mr. Fuerstman: After we started the work the first thing we knew about any objection, any concrete objection as distinguished from possibility the responsibility of getting express consent, was the service upon us of an order to show cause without a restraint, at which time we had already practically completed the garage.

The Court: What I have in mind is that if you started to erect that building upon the assumption that you had a right to erect it and the other party knew you were erecting it under such assumption and made no objection, but stood by and allowed you to do what you thought you had a right to do, would be a different thing from your putting up that building after the other side had made known to you their objection.

Mr. Fuerstman: Your Honor is right.

The Court: All right, you can go ahead.

DEFENDANT'S CASE

KATHERINE C. HAERLIN, a witness being sworn in behalf of defendant.

Direct-examination by Mr. Fuerstman:

Q. Miss Haerlin, where do you reside? A. 53 Cleveland Terrace, East Orange.

Q. And by occupation? A. A teacher.

Q. Where did the complainants reside up until two weeks ago? A. The house in back of us facing on Netherwood Terrace.

Q. You have a garage now on your property? A. Yes, we have, and have been using it for more than a year.

Q. Now before you erected the garage were you in communication with the complainants, or either of them? A. You mean before I intended to build?

Q. Yes. A. No, not at all. We had nothing to say to each other. We bid each other the time, and that's all.

Q. When you made plans or decided you were going to, or were about to erect the garage, did you communicate with the complainants? A. I did then at the suggestion of Mr. Wood.

Q. Can you fix the time when you first communicated with the complainants or either of them with reference to your intention to building a garage on your property? A. I think, but I am not sure, it was some time in February when I first communicated with them. I think the 26th.

By the Court:

Q. What year? A. 192—

Q. Last year? A. Yes, last year. A year ago this February.

Katherine C. Haerlin—Direct.

By Mr. Fuerstman:

Q. I show you a letter which has been produced by the complainants, and ask you if you wrote that letter to the complainants? A. I wrote this letter.

Mr. Fuerstman: I offer it.

(Letter marked Exhibit D-1 and envelope marked Exhibit D 1-A in evidence).

Mr. Fuerstman: The envelope Exhibit D 1-A is post marked February 27, 1929. The letter reads—"February 26, 1929. Mr. and Mrs. W. Bennett, 11 Netherwood Terrace, East Orange, New Jersey. Dear Mr. and Mrs. Bennett: I wish to notify you that I shall build a garage on my property. Work will begin within a few days. Very truly yours—Katherine C. Haerlin."

Q. Did you receive a reply? A. Not to that.

Q. What did you do then? A. I think I waited for about two weeks and then I called Mr. Wood and told him to begin work, and began to show I was going to build a garage very openly in order to give them time.

By the Court:

Q. For what? A. If they wanted to make a complaint.

Q. You knew they were making a complaint? A. No, they weren't making a complaint.

Q. Apparently from the course of action you took you must have considered they had some rights in the matter? A. They wanted me to build a garage as an addition up against the house.

Q. How do you know that? A. Well, they told me they would rather not have the garage there.

By Mr. Fuerstman:

Q. Now tell us when those conversations with reference to whether you should or should not have a garage took place, and what the conversations were. A. That was some time in February. The first time Mr. Wood and I together went over.

By the Court:

Q. Who did you see and what did you say? A. We said it was our intention—

Q. Who did you see and what did you say? A. Mr. Bennett and Mrs. Bennett were there, and I think some other person—I am not sure, and Mr. Wood and I.

Q. Who is Mr. Wood? A. He built the garage.

Q. Why did he go with you?

Mr. Furstman: He was the contractor.

By the Court:

Q. Is he a builder? A. Yes.

Q. Tell us what was said. A. We told them we intended to build a garage.

Q. Who did the talking, you or Mr. Wood? A. I.

Q. All right, tell us what you said. A. I just said I was going to build a garage, and Mr. Wood suggested that I go over there and see what they said because he didn't know what that clause meant. I understood it to mean an out-building, and an out-building as I understood it was a stable in connection with that phrase in the clause.

Q. What are you talking about? A. A clause in the deed that restricts no out-building shall be built on the property in designating a stable in its category.

Q. As a result of you or Mr. Wood reading that

clause you went to see those parties? A. Yes, to be sure.

Q. Tell us everything that was said there. A. That night they did not commit themselves.

Q. Just tell us what the conversation was. A. Well, at that time, why, they said nothing. They wanted a few days to think it over.

Q. Who said that? A. I think Mr. Bennett said that.

Q. They wanted a few days to think it over? A. Yes.

Q. Is that what they said? Didn't they discuss the matter with you at all? A. No—very terse.

Q. Was it before that they told you they didn't want a garage there? A. No, it was after that.

Q. Did you then hear from them after that about it?

Mr. Fuerstman: There was some more.

By Mr. Fuerstman:

Q. When was the next time you saw them as a result of what they said? What did you do? A. I said I could build as an addition because several people near them had since built as an addition.

By the Court:

Q. You told them that? A. I told them I could do that within the restriction. So they asked me to submit a plan drawn to scale. There were two trees in the back of our house, one about six foot from the house and the other eight foot. In order to build up to the rear I would have to destroy those trees. I suggested building an arch leading from the house to the garage and I handed the drawing to them, and the answer I got—Mrs. Ben-

net was only home, that their lawyer said that I could not build that way, and I sent that letter.

By Mr. Fuerstman:

Q. Did you say after sending this letter you heard nothing further from them? A. No until the builder began to work.

Q. Then what happened? A. The morning he began work Mr. Bennett telephoned to me and told me he was going to put the matter in the hands of his attorney and I said "All right."

Q. Then did you hear anything further from them until you were served with papers in the case? A. I am not sure whether Mrs. Bennett telephoned. I have a faint recollection she did, but I am not sure.

Q. Now then, at the time that you were served with papers, how much of the garage had been completed? A. Why, it was almost entirely completed with the exception of the ornamental work on a part of the roof—just a few places.

By the Court:

Q. Before that they told you they didn't want the garage there? A. Not definitely.

Q. Tell us what they said. A. They said they wanted me to stop building the garage.

By Mr. Fuerstman:

Q. Before you started to build the garage I understood you to say they told you they were not anxious to have a garage there. A. They didn't like it there.

Q. Now, Miss Haerlin, you have been in the use of that garage since it was completed? A. Yes.

Q. And that's over a year?

The Court: The bill was filed over a year ago.

By Mr. Fuerstman:

Q. It was before you had notice of the proceedings? A. It was completed by the time the case came up.

Q. Before you commenced negotiations with the complainants had you observed whether other garages were located in that particular neighborhood?

Mr. Sturm: I object to it.

The Court: I wouldn't care how many garages were there. The question is whether this is a community scheme by which this property was laid out. If so, it wouldn't make any diffeernce how many garages were there.

Mr. Fuerstman: It would come up on another question.

The Court: I think I will receive it subject to your objection, Mr. Sturm. You see if the original grantor made certain restrictions for his property he would have a right to make a particular restriction for one portion of it as divided upon into areas, and another restriction for another portion and still another separate restriction for a third, and likewise other numerous portions of his property, but if he makes a restriction it would have to be uniform and adhered to uniformly within that area.

By Mr. Fuerstman:

Q. Before you proceeded with your negotiations with the Bennetts, did you observe whether there

were any garages? A. There was a garage built alongside from us. There was another one built alongside of the Bennetts, and I thought I would like to have one, which I certainly do.

Q. Within three blocks of your property in that same plot how many corner garages are there? A. I don't know, but there are very many. I think about fourteen, roughly speaking.

Q. You are referring to corner garages? A. Yes.

Q. Are there also inside garages? A. Yes, inside garages.

Q. Where is your place of employment? A. In the School for the Deaf, in Newark.

Q. And how far are you from school? A. About five miles.

Q. What is your means for getting to that school? A. By auto.

The Court: How is that significant?

Mr. Fuerstman: I think the general trend is in regards to a garage and an automobile as a necessity of life. It is a question of public policy today that if a person under the present condition of affairs of employment may be employed a great distance from his home, that it would be a great injury to the individual not to be permitted to use the means of conveyance that civilization makes possible for him.

The Court: I don't agree with you but I will receive it.

By Mr. Fuerstman:

Q. If you were unable to use an automobile to get to the school, what means would you have to go through? A. I have two means. One of walk-

ing about eight blocks to a jitney and then boarding a bus and getting off and taking a trolley car and then walk over two blocks to the school.

By the Court:

Q. And another is to hire a taxi? A. For about two dollars.

Q. I don't care about the price. That was the other means? A. Yes.

By Mr. Fuerstman:

Q. If you did not go by machine what would be the difference in time gained or lost? A. I gain about forty-five minutes by using my own car.

Q. Now the complainants have moved from the property, have they not? A. They have.

Q. Two weeks ago, or recently? A. I think about two weeks ago?

The Court: Do they still own the property?

Mr. Sturm: Yes.

By Mr. Fuerstman:

Q. How long was the house vacant after they moved out? A. It wasn't vacant at all.

Q. Somebody moved right into the house? A. Yes, right into the house.

Q. Have you had any objection from the complainants or any other person since the garage was erected as to the use of it—as to any noises or odors, or any other cause? A. No.

The Court: They are not charging nuisances. They are relying upon a violation of a restriction.

Mr. Fuerstman: I wanted to show there

was no real harm done to the complainants. If there is nothing in that there is nothing in the other one. That's all.

Cross-examination by Mr. Sturm:

Q. Miss Haerlin, at the time you bought this property you knew about these restrictions? A. I knew about them, but not as I thought. My lawyer told me that out-building meant some building like a stable, and he said "That will not cause you any trouble anytime you want to build a garage."

Q. When did you buy the property? A. I think in December, 1925.

Q. In 1929 you decided to build a garage. Four years later, is that right? A. Yes.

Q. Prior to that time you had a car? A. Yes, I had a car for a number of years.

Q. Where did you keep your car? A. In the house next door. In the garage building of the people next door.

Q. You were not given any notice to vacate that garage? A. No, we were not, but we knew the young boy bought a car and we knew the notification would come very soon.

Q. Did you ever get the notification? A. No.

Q. And the garage is still vacant? A. No, it is rented.

Q. How long ago? A. I don't know.

Q. Very recently? A. I don't know; but it is rented.

Q. To some other family? A. Yes.

Q. How long was it vacant after you had left the garage? A. I suppose a couple of months.

Katherine C. Haerlin—Cross.

By the Court:

Q. It has been occupied by some one else? A. The man who had this garage suddenly gave out and had it towed away. The car the boy had bought gave out.

Q. The garage was not used next door by any member of his family, or was it? A. No.

By Mr. Sturm:

Q. When you started to build you spoke to Mr. Wood and he asked you for a deed, didn't he? A. I don't remember that.

Q. In your affidavit in paragraph 4 you say—

Mr. Fuerstman: That is not evidence and was not used.

The Court: He can use it. Is that an affidavit filed in the cause?

Mr. Fuerstman: No, it was not filed.

The Court: There doesn't appear to be any affidavits filed.

Mr. Fuerstman: I am prepared to file it.

The Court: You have a right to call her attention to it and offer it in evidence if you wish to contradict her, Mr. Sturm.

By Mr. Sturm:

Q. Before you started to build you took the matter up with Mr. Wood, is that right? A. Yes.

Q. And he asked for the deed? A. Mr. Wood asked for the deed.

Q. And you gave him the deed? A. Yes.

Q. And what happened then? A. He looked at that and said "Now, I will say that means a stable, but to be sure let us go and ask the other people".

Q. Ask them what? A. "We will tell them we are just going to build a garage."

Q. What were you going to ask them? A. That's what I want to know. I did it on his suggestion.

By the Court:

Q. When you went there what did you say? A. We told them we were going to build a garage.

Q. Don't say we. A. I was going to build a garage.

By Mr. Sturm:

Q. What else did you tell them? A. I told them if I didn't build as an out-house I could build it as an addition.

Q. And you did build a garage irrespective of whether it would be an out-building or an addition to the house? A. I wouldn't say irrespective, but I said I noticed that I could build as an addition. I said I would build as a garage, thats all.

The Court: What he is trying to get you to say is that you personally told these people you were going to build a garage and it was a question of whether you would build it as an addition or an out-building.

By Mr. Sturm:

Q. Is that right? A. Yes.

Q. You didn't care whether Bennett objected to it or not, you were going ahead and build your garage? A. Yes, certainly I wanted a garage.

By the Court:

Q. Is that your answer? A. I told them I was going to build a garage.

Katherine C. Haerlin—Cross.

By Mr. Sturm:

Q. And they objected to it at that time? A. They didn't say no.

Q. Did they say yes? A. They said "Give us time." They wanted to think about it.

Q. And didn't they say you should submit a sketch? A. I did.

Q. And that sketch was not satisfactory? A. Well, to them.

Q. It wasn't satisfactory and they objected to your going ahead and building the garage? A. With that sketch.

Q. And you proceeded against their objection and built? A. It was my property. Why should they object? They told me how to lay out this thing.

Q. After you started to build on the fourth of March, as you claim in your affidavit, you were notified by Mrs. Bennett they objected to your building the garage? A. But it was my property.

Q. They objected though, didn't they?

The Court: Read the question.

(Last question read by stenographer.)

A. They said they were going to consult their attorney. I suppose there was an objection.

By Mr. Sturm:

Q. And the same evening Mr. Bennett called you up on the 'phone and objected to it? A. He said "I will put the matter in the hands of my attorney," and I said "All right."

Q. Did he say anything else? A. That's all.

By the Court:

Q. When he called you up didn't he say some-

thing? Didn't he say "How do you do, Miss Haerlin"? A. He said "Miss Haerlin, I see you are going to build a garage," and I said "Yes," and he said "I will put it in the hands of my attorney."

Q. And you said "Go ahead"? A. Yes.

By Mr. Sturm:

Q. And you started work? A. Yes.

Q. For about seven or eight days nothing done, is that right? A. No.

Q. When did you start work again? A. I should think it must have been fully two weeks after that.

Q. You didn't do any more work after you got the telephone call from Mr. Bennett? A. Some of the bricks were delivered and part of the lumber.

By the Court:

Q. Nothing done about construction? A. Yes, the stones were laid in the ditch for the foundation.

Q. Then notwithstanding what he told you over the 'phone you proceeded with the work? A. I thought I was in my right.

Q. I thought you said you waited seven or eight days? A. It is so long ago.

By Mr. Sturm:

Q. Isn't it the fact in your affidavit you say you stopped work until the 11th of March?

The Court: Does that refresh your recollection?

A. Yes.

Katherine C. Haerlin—Cross.

By Mr. Sturm:

Q. So you did stop work. There was nothing done for over a week? A. Yes.

Q. In fact you didn't go ahead until about the 14th or 15th? A. Yes.

Q. And four or five days after you began to work again you got the notice from the court? A. After the work was almost completed.

By the Court:

Q. Now you couldn't complete the work in four days, could you? He is calling your attention to what is said to be the fact up to the 11th of March you did nothing. After the 11th of March you started to do something and four or five days after you got a paper from the court? A. Yes.

Mr. Fuerstman: That is not so. The builder is here. He has a better idea of it.

Mr. Sturm: That's all.

JAMES WOOD, a witness being sworn in behalf of Defendant.

Direct-examination by Mr. Fuerstman:

Q. Mr. Wood, do you recall when you first became interested in building a garage on Miss Haerlin's property? A. Yes.

Q. Tell us whether or not you went with her to the Bennetts. A. Yes, I went one evening in February.

Q. Tell us what occurred at the house of the Bennetts when you went there. A. We entered and met Mr. and Mrs. Bennett, and Miss Haerlin

engaged in conversation with Mrs. Bennett and Mr. Bennett regarding going to build a garage, and I told them I was there as an interested party wanting to get an order to build a garage. Miss Haerlin did most of the talking.

By the Court:

Q. What did she say? A. She said she intended to building a two car garage on the premises.

Q. What did the Bennetts say? A. The Bennetts were not—

Q. Just tell us what they said? A. I couldn't tell you exactly.

Q. Don't give us conclusions. Don't you remember what they said? A. They said they weren't in favor of it but wanted Miss Haerlin to give them more detail information as to what she intended to do. Miss Haerlin told them she could build it as an addition, but she wanted to build it as a separate garage.

Q. And did you prepare a sketch? A. Yes, a rough sketch.

Q. Did you give it to Miss Haerlin? A. I think I gave it to her and I think she used the sketch I gave her.

By Mr. Fuerstman:

Q. Did you ever talk to the Bennetts again after that? A. No.

Q. When did you start work if you recall? Just tell how much work you did when you started and when you completed it? A. I proceeded to do a little preliminary work such as removing all brush and getting started on the trench work.

By the Court:

Q. How soon after your visit to the Bennett home did you do that? A. About five weeks.

Q. Then you undertook to get rid of the brush? A. Yes.

Q. Then what did you do? A. I waited one week and did some more work.

Q. Of the same kind? A. No, the trench work —to put the foundation there.

Q. Then what? A. Then I kept right on if I remember and completed the garage.

Q. Miss Haerlin says she asked you to stop for a while? A. That is covered in my affidavit. I can't remember dates.

By Mr. Fuerstman:

Q. You have to remember it yourself. Now between the beginning of your work, that is, the preliminary work, and your setting the work in order to complete it, was there a period of time when you did nothing? A. Yes, there was.

Q. Well, how long was that period? A. I think the first period from the time I started was about ten days.

By the Court:

Q. Why was that? A. Because Miss Haerlin said it would be best to wait and see if they heard from the people next door.

By Mr. Fuerstman:

Q. And then was there another period of delay? A. There was a shorter period.

Q. When you first stopped how much work had you completed? A. I had dug some of the trench and removed the brush.

Q. From what you did would indicate to any one approaching there as to the kind of work done there and the size of the garage? A. Yes.

Q. And then afterwards when you started again just what did you do before you stopped again? A. I did a little more of the foundation work.

Q. And how long did you stop then? A. I think a couple of days.

Q. Until after you stopped the second time had you heard any objection from any one? A. No.

Q. And you started to finish up your work? A. Yes.

Q. How long did it take you up to the time you were informed that papers had been served on Miss Haerlin? A. Just about close to twelve or fourteen days.

Q. I am not referring to the very beginning, but from the time you started to finish up? A. About twelve days, I think. You mean from the time I started to really build?

Q. Yes. A. It took me about twelve days or two weeks to get through.

Q. From the beginning to the end? A. No, from the time I started in earnest to go ahead with the work. It must have been close to a month from the time I first started.

Q. Is your memory clear on that Mr. Wood? A. No, after a year's time.

Q. Now if you are not sure there is no use of making any statement. You are under oath, you know. A. Yes.

Q. Is there any way of refreshing your recollection? A. I made an affidavit a year ago to you.

Q. Outside of that? A. No.

Q. Now then, Mr. Wood, what is the condition of that neighborhood there with reference to gar-

ages on corners at or near the house of Miss Haerlin? A. There is a cut-a-way on corners in the subdivision for garages on the corner properties—detached garages.

Q. Did you personally make an inspection of those garages? A. Yes.

Q. I show you various photographs and ask you who took them? A. I took them.

Q. And what are these photographs? A. Photographs of garages on corner properties.

Q. And how near? A. All within two blocks of the property.

Cross-examination by Mr. Sturm:

Q. Some of the corner garages are extra plots are they not, Mr. Wood? A. I don't think so.

Q. You say you made an examination of these corners? A. Yes, I did.

Q. How about the southwest corner of Lenox Terrace and Fulton Street?

Mr. Fuerstman: Let him see the picture. Point it out to him.

By Mr. Sturm:

Q. You have no picture of that? A. No.

Q. That has an extra lot? A. That has nothing to do with my affidavit.

Q. You are only testifying about what was in your previous affidavit? A. Yes.

Q. The only corners you have reference to? A. The only corners I recall.

Q. Did you look at the entire tract say within four or five blocks of the immediate vicinity? A. Not closely, no.

Q. You merely looked within one or two blocks of the house? A. Yes.

Q. You don't know anything about the restrictions in the restrictive deeds? A. No, I don't.

By the Court:

Q. But you did know about the restriction in the deed of Miss Haerlin because she said you called her attention to it? A. Yes. I also built for other owners that had the same restrictions.

The Court: I will have to strike that out unless we see the restriction.

By Mr. Sturm:

Q. You started to build on the fourth of March? A. Yes.

Q. You say you merely removed some shrubbery? A. Yes.

Q. And then you quit? A. Yes.

Q. Why did you stop? A. Miss Haerlin wanted me to stop to see if there would be a legal objection from her neighbor.

By the Court:

Q. Court action you mean? A. Yes.

Q. Did she say anything about court action? A. No. She said she wanted to see how the people next door would react.

Q. You already knew that from the talk you had with the people next door? A. Yes.

By Mr. Sturm:

Q. Did Miss Haerlin at that time inform you that the Bennetts objected to your building the garage? A. They objected as a separate building.

Q. They objected to your building the garage as you were attempting to put it up, is that right? A. Yes.

Q. And Miss Haerlin told you on the fourth of March that the Bennetts had called her up and notified her to that effect, is that right? A. Yes.

Q. And by reason of their objection you stopped work at the suggestion of Miss Haerlin? A. No.

By the Court:

Q. Why did you stop work if not for that? A. To see if anything developed. I worked a week and I don't think I had a message from the Bennetts at all.

By Mr. Sturm:

Q. You stopped on the fourth of March. You said that you stopped your work because Miss Haerlin told you to stop? A. Yes.
or fourteen days? A. Yes.

Q. And then you went ahead? A. Yes.

By the Court:

Q. How did you come to go ahead after twelve or fourteen days? A. Miss Haerlin figured there would be no objection.

Q. What did she say? A. She said "Go ahead and proceed to build."

By Mr. Sturm:

Q. Then in four or five days you got notice to stop again the second time? A. I got notice to proceed slowly.

Q. Didn't you stop for a couple of days around the 18th or 19th? A. Yes.

By the Court:

Q. Why did you stop then? A. At Miss Haerlin's suggestion to proceed slowly.

Q. Didn't Miss Haerlin say she received an order to show cause? A. The garage was practically completed.

Q. What do you mean? A. The walls were up and the roof was practically on.

Q. You said you started on the fourth of March and you stopped on that day and didn't do anything more until the 11th, and then you started in to remove brush. A. I am getting confused on the dates.

By Mr. Sturm:

Q. You said when you stopped it took you twelve to fourteen days to complete it? A. It took me twelve to fourteen days to complete the actual structure.

By the Court:

Q. How long did it take you to dig the trench? A. One whole day.

Q. You couldn't dig it in one whole day? A. I removed some of the brush.

By Mr. Sturm:

Q. How long did it take you to dig the trench for the garage? A. The first time I started I can't remember the exact dates, but the first time I worked one whole day.

By the Court:

Q. How many men did you have? A. We had some men there and removed some of the shrubbery.

Q. First you removed the shrubbery, didn't you? A. Yes.

Q. How long did it take you to do that? A. About two or three hours.

Q. And then the same day you started in to do the trench work? A. Yes.

Q. How much of the trench work did you do that day? How many yards? A. About half of the twelve inch foundation wall.

Q. What were the dimensions of the trench? A. A twelve inch wall.

Q. No, the trench. Never mind the wall. A. Twenty by twenty some feet.

Q. How big was the trench? I want the dimensions of the trench. A. Twelve inches wide and three feet six inches deep.

Q. How much of that did you do that day? A. About half of it.

Q. Then you didn't do anything more for eleven days after, did you? A. It might have been eleven —a few days.

Q. March 11th I think the date is. What did you do on March 11th? A. Did some more work.

Q. Some more work on what, the trench? A. On the trench.

Q. Did you complete the trench that day? A. Yes.

Q. Did you do any more than to complete the trench? A. No.

Q. You keep a time book. You can tell us definitely if you bring the time book here? A. I wish I had.

Q. Could you tell us if you had your time book? A. I could give you more definite information.

Q. You have a time book, haven't you? A. Yes, sure; I have records.

Q. You have to keep a record to show how much money you pay to the laborers, don't you? A. Yes.

By Mr. Sturm:

Q. Did you keep a record on this job? A. No, not an exact record.

By the Court:

Q. But you did keep a record to know whether you made or lost money? A. The mason work was sublet.

Q. Even though, you would keep a record? A. Surely.

By Mr. Sturm:

Q. To whom did you sublet it? A. A man named Harrison.

Q. When did he start work? A. The dates I told him to.

By the Court:

Q. How long after the talk in the Bennett home was it that this mason started to work? A. It must have been about three weeks after we first called.

Q. What did the mason do at that time? A. He started the preliminary work.

Q. Putting in a foundation? A. Yes.

Q. How long after he started that was it you received word from Miss Haerlin she had received a telephone message from the Bennetts? A. It was within a few days.

Q. And when you received that word from Miss Haerlin you then stopped again for a few days? A. Yes.

Q. Did you tell the mason to stop? A. Yes.

Q. Why did you start off again? A. Why, Miss Haerlin told me we had better proceed to erect it.

Q. Then you proceeded right along and erected the garage? A. Yes.

By Mr. Sturm:

Q. Didn't you stop for several days after Miss Haerlin received the rule to show cause from the Court of Chancery? A. No.

Q. You kept right on? A. Yes.

The Court: There was no restraint, was there?

Mr. Fuerstman: No, it was crossed out.

Redirect-examination by Mr. Fuerstman:

Q. Mr. Wood, the testimony which you just gave, is that your positive recollection as to when the mason stopped? A. No, the dates are confusing. I can't remember exactly.

Q. If you don't know say so. Do you know how many days it took you from the day you started to complete the work up to the time you finished? A. From the time we started until we finished was approximately with the delays and all—

The Court: He wants the actual number of days employed.

The Witness: I would rather not answer that.

Mr. Fuerstman: That's all.

The Court: Is that your case?

Mr. Fuerstman: Yes, sir.

COMPLAINANTS REBUTTAL CASE

WILLIAM N. BENNETT, a witness being sworn on behalf of Complainant.

Direct-examination by Mr. Sturm:

Q. Mr. Bennett, you are one of the complainants in this case? A. Yes.

Q. Did you have a talk with Miss Haerlin about the erection of a garage on the property adjoining your house? A. I did.

Q. When was the first time Miss Haerlin spoke to you about it, if you remember? A. About the fourth of February.

Q. And do you recall what was said at that time by Miss Haerlin? A. I do.

Q. Will you give us the conversation? A. Miss Haerlin came in and said she wanted to build a garage and asked me if we had any objection. My reply was that we did object to the building of a garage and suggested to her that she might build her garage as an addition to her house to which we couldn't object the same as our neighbors on the west had done, and she indicated she did not want to do that.

The Court: Don't say that.

(Witness continuing). She said she did not want to do that on account of the expense. I then as her to submit a sketch made to scale as to how she intended to lay the garage out in the yard and I would take it up with my attorneys and see wh they thought about it, but I made it distinctly plain we objected to the building of a garage on that plot.

William N. Bennett—Direct.

By Mr. Sturm:

Q. What happened after that? A. A few days later a sketch was submitted.

Mr. Fuerstman: Now just a minute. The part that he made it distinctly plain I would like to have struck out.

The Court: You are too late now. Lawyers must be alert.

(Witness continuing). A few days later we received the sketch and I took it over to our attorney and he told me—

Mr. Fuerstman: I object to that.

The Court: I will sustain the objection as to what the attorney said.

By Mr. Sturm:

Q. After you received the sketch did you have a talk with Miss Haerlin? A. Not on that particular subject. Not in connection with the sketch.

By the Court:

Q. Did you talk to her about the proposed erection of the garage? A. I talked to her when she first started to dig the foundation wall.

By Mr. Sturm:

Q. When was the next time you spoke to her? A. When they started to dig the foundation wall.

Q. When was that? A. About March 4th or 5th.

Q. Did you talk to her about it? A. I called her up on the telephone and I said "I see you have started to build a garage," and I told her I had taken it up with our attorneys as we intended to object to any garage, and she says "Does that

mean you are going to sue," and I said "Yes," and she replied "That is just what I want."

Q. Did she go ahead with the building? A. She did.

Q. I mean that same time, or did she stop? A. I can't answer that personally because I am away during the week.

Q. How long were you away Mr. Bennett? A. At that time I was coming home week ends and was away during the week.

Q. Had they done any work from the time you spoke to her on the 4th or 5th of March until the next time you came home? A. Not very much.

By the Court:

Q. How much? A. My recollection is they had begun to dig the trenches and when I came home again the trench had been finished and they started on the footings. Whether I was away six or seven days I don't recall.

By Mr. Sturm:

Q. Did you have a talk with her after that time? A. No.

Q. Why did you object to the erection of a garage?

Mr. Fuerstman: That is immaterial.

The Court: As long as he wants to bring it out.

A. It is a violation of the restrictions.

Mr. Fuerstman: I object to that.

The Court: I will strike that out as a conclusion.

William N. Bennett—Direct.

By Mr. Sturm:

Q. Where is the garage now erected in relation to your house? A. It is erected as I understand it right as close to our building line as it can be put.

The Court: I will strike that out.

By the Court:

Q. Where is it erected? On what part of the Haerlin lot? A. On the rear end of the lot.

Q. Does it cover the whole rear yard or is it over towards your house? A. It is put as far back on the rear end of their lot—

Q. I can't let you say that. A. It is within two feet of the building line—of the lot line.

By Mr. Sturm:

Q. That is the dividing line between her property and your property? A. Yes.

Q. And what part of your house is it located near? A. Right next to our dining room window.

Q. Does it have any affect upon your light, or anything? A. It has. It has made the dining room darker, and the view from the dining room table is the wall of the garage.

Q. Miss Haerlin testified your house was not vacant for any length of time after you moved away, Mr. Bennett? A. That is correct.

Q. Why did you move away? A. The answer is I am working—

Mr. Fuerstman: I think that is immaterial.

The Court: So do I. He still owns the property.

Mr. Sturm: That's all.

William N. Bennett—Cross.

Cross-examination by Mr. Fuertsman:

Q. I show you a photograph, and ask you whether that does not show the garage and also your house? A. It does.

Q. Will you show us how the wall of the garage shuts off the light or view from your dining room? A. You can't demonstrate that from the photograph.

By the Court:

Q. But you see the fact is it doesn't? A. Yes.

By Mr. Fuerstman:

Q. Does the photograph show that it does? A. Apparently not.

Mr. Fuerstman: I offer the photograph in evidence.

Q. That is a correct demonstration? A. From that point.

The Court: Let it be marked.

(Photograph marked Exhibit D-2 in evidence).

Mr. Fuerstman: That's all.

ANNA D. BENNETT, a witness being sworn on behalf of Complainant.

Direct-examination by Mr. Sturm:

Q. Do you recall Miss Haerlin calling on you in the beginning of February? A. In February.

Q. What was said to you by Miss Haerlin and

what did you tell her? A. She said she was going to building a garage and we objected.

Mr. Fuerstman: I object. What did she say?

By the Court:

Q. Tell us the conversation. A. She said she intended to build a garage and I said we wouldn't stand for no garage.

Q. Who said that? A. I said it. Of course my husband was there. She said she intended to build it. My husband said to make a drawing and let us see what kind of a garage she intended to build, and she brought the drawing in—I couldn't tell you when, but a few days later, and I spoke to her then and said we would not agree for her to build any garage unless she build it up against her home just as our neighbor on the left, and she said she intended to go ahead and build the garage, and she said also—I spoke to her first and said we would bring a court action to stop her from building. She said "That is perfectly all right; that is what she wanted." She said she would bring it to the Supreme Court if necessary. I said "All right; I guess that's all that is necessary."

By Mr. Sturm:

Q. When did you have the next talk with her? A. It was over the 'phone.

Q. When was that? A. Now I can't remember just the time that was in between.

By the Court:

Q. Who was present? A. In the morning. My daughter I guess was present. My husband wasn't

there. I said "The builder started to build." I thought before she started to go to any expense to ask whether she decided to bring any court action.

The Court: I will strike that out. We are not concerned with your thoughts.

By Mr. Sturm:

Q. As a result of your seeing them start to dig what did you do? A. I called her up on the 'phone.

Q. What did you say? A. I said we intended to start court action to keep them from building the garage.

Q. What did she say? A. She said she intended to keep on.

Q. What happened then? Did the work stop? A. Yes, for a while.

Q. For how long? A. I didn't keep a record.

By the Court:

Q. For a day or two or two weeks, or what? A. It must have been a week or two. I can't recall that.

Q. But it stopped for a time, did it? A. Yes.

By Mr. Sturm:

Q. And then they proceeded again? A. Yes.

By the Court:

Q. How far had they proceeded at that time? A. The first time?

Q. The time when you had the telephone conversation. A. They first started with the trench. When did they start? I don't know whether they were building up against her home or not. That was perfectly all right.

Q. You mean you could not tell from the way the trench was being built? A. After the trench was dug and I saw it was going to be at the end of their lot nearest our home.

By Mr. Sturm:

Q. Then you applied to the court? A. Yes.

Q. You instructed your attorney to go ahead? A. Yes.

Q. And was the work stopped after they received the notice of the rule to show cause?

The Court: She don't know anything about rules to show cause.

A. I couldn't say truthfully. They stopped for a while.

By Mr. Sturm:

Q. They stopped the second time? A. Just a few days one time. It was a long stretch the other time. I think after they dug the trench was a few days and after that was the longest stretch.

Cross-examination by Mr. Fuerstman:

Q. You are not positive about whether you called up when you saw the trench being built, or when you called up the second time? A. Yes, as soon as I saw the trench.

Q. Then you called them up? A. Yes, right then.

Q. If you didn't know whether the garage was going to be erected near her house, or near yours, why did you call them up? You said you couldn't tell. A. Until the trench was completed.

Q. When you saw the trench there you knew it

was near your house? The digging was right near your lot? A. She started on her own place first.

The Court: I understood her to say when they started she couldn't tell, but when they completed the trench she saw it was at the end of the lot.

By Mr. Fuerstman:

Q. When you called her up the trench was dug? A. Yes.

Q. Then you saw the work as it was in progress by the digging of the excavation? A. I wasn't home all the time.

Q. It only took a day or two to do it? A. A couple of days.

Q. When you did call them up there was a delay of about a week? A. I couldn't say positively.

Q. You wouldn't say it wasn't, would you? A. It is confusing in my mind, the two times they stopped.

Q. During that period of time you did nothing? A. We gave it into the hands of our attorney right away.

Q. So far as you know there was no loss of time? A. Of course we left it to him.

Q. Then they started to work again sometime afterwards? A. Yes.

Q. Do you know when the papers were served upon them? Did you serve them? A. No, I didn't serve them.

Q. Do you know when they were served as to dates? Can you fix any date? A. No.

Mr. Fuerstman: That's all.

Mr. Sturm: I want to offer in evidence

that the service was made on the 19th of March. It is probably on file in this court.

The Court: The file shows that the bill of complaint was filed March 22, 1929. The order to show cause appears to be dated March 19, 1929.

Mr. Fuerstman: They were served after that any way.

The Court: The bill of complaint apparently was not marked filed by the Vice Chancellor when he signed the order to show cause because the bill of complaint bears the clerk's stamp as being received in the office of the clerk March 22, 1929.

Mr. Fuerstman: The notice was served on the defendant either on the 19th or later. There is no question as to that, but the only proof is that most of the work was completed by that time.

The Court: The subpoena was tested March 25th, 1929 and served March 30th, 1929. There is no definite proof here as to when it was completed if it is material. I don't think it is material. You can argue it if you like but I don't think it will be material. Anything else? Is that the case now?

Mr. Fuerstman: Yes.

The Court: All right, I will hear you.

(After argument of counsel it was agreed that briefs be submitted.)

Exhibit D-1.

55 Cleveland Terrace
East Orange, New Jersey

Feb. 26, 1929.

Mr. and Mrs. W. Bennett,
11 Netherwood Terr.,
East Orange, N. J.

Dear Mr. and Mrs. Bennett:

I wish to notify you that I shall build a garage on my property. Work will begin within a few days.

Very truly yours,

KATHERINE C. HAERLIN.

Conclusions.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	73/31 On Bill, &c. On Final Hearing. Conclusions.

1. The restrictive covenant *sub judice* provides *inter alia* "that no stable or any out-buildings of any kind shall be erected on said lots." Defendant, against the protest of complainants, erected a garage upon the rear of the lots. A dwelling house was previously erected upon the property. The garage is separate and distinct from the dwelling house. *Held,* the prohibition contained in said covenant against the erection of a stable will not effect a prohibition of the erection of a garage, but the language of the covenant following the word *stable*—"or any out-buildings of any kind" is broad enough to comprehend the erection of any building whatever additional or appurtenant to the dwelling house.

2. An *out-building*, within the meaning of the covenant *sub judice*, comprehends a building adjoining or belonging to the dwelling house, something used or intended for use in connection therewith. *Held,* a garage constructed apart from the dwelling house is an *out-building* within the restrictive covenant forbidding the erection of *any out-buildings of any kind.*

Conclusions.

3. The maxim *Ejusdem Generis* and the maxim *Noscitur A Sociis* are inapplicable to the covenant *sub judice.*

Mr. Max A. Sturm, for Complainants.

Mr. Joseph A. Fuerstman, for Defendant.

Fallon, *V. C.*

The bill prays an injunction against the defendant for an alleged violation of a covenant contained in her deed, which *inter alia provides*—"that no stable or any out-buildings of any kind shall be erected on said lots." Complainants and defendant are adjoining property owners. Their respective lands are part of a tract comprising 420 lots known as "East Orange Park" owned and developed by Philip J. Bowers & Co. Deeds to various grantees of the common grantor contain restrictions pursuant to a general plan adopted for the development and improvement of the tract. All lots similarly located were treated alike. The erection of garages on inside lots was permitted. No provision was made for the erection of garages on corner lots. Deeds for corner lots contained the restriction *sub judice.* A neighborhood or community scheme was ostensibly contemplated. The erection of a dwelling house only on corner lots was planned. Where, as in the case *sub judice,* the restrictions are based upon a uniform scheme they will be enforced in equity. In *Dettsloff* v. *Hockstetter,* 96 N. J. Eq. 391 (at p. 393) the Court says—"The theory upon which those community agreements are enforced is that there has accrued to everybody the rights as are defined in these uni-

form restrictive covenants, and that it is inequitable upon the part of any person after entering into a general scheme of that kind to repudiate their agreement and violate the covenants in a manner that they had agreed not to do. A suit of this nature is not a suit for the enforcement of a covenant, strictly speaking. The written covenants are all made with the vendor who sold these properties; they do not run in terms to grantees of the vendor, they are in form personal to the vendor, and this is not a suit by the vendor for the enforcement of these covenants as such, it is a suit by one of the purchasers against other purchasers to compel them to observe good faith in this general scheme, and it is the uniform covenants to which all have agreed, which we turn to to ascertain the scope and tenor and character of that general scheme, and it is from the general scheme defined by these covenants that the equity arises as distinguished from a suit to enforce specifically a covenant by a person to whom the covenant has been made." The complainants, not being a party to the defendant's deed, and having therefore no privity, either of legal estate or contract, with the defendant, have only an equitable right to enforce the covenant in question, and such right depends upon the existence of the general plan for the development and improvement of the entire "East Orange Park" tract by a uniform scheme, which is manifest herein, and the insertion of covenants in the deeds of purchasers, intended for the benefit of each purchaser, and to which each purchaser with notice was subject. *Morrow* v. *Hasselman,* 69 N. J. Eq. 612, at p. 614. The fact that restrictions contained in deeds of various

grantees varied in different sections of the tract in accordance with the designs of the promoters for the character of such sections respectively, does not affect the integrity of the planned neighborhood or community scheme. *Sanford* v. *Keer,* 80 N. J. Eq. 240, 245. A small number of violations of restrictive covenants which in no substantial way affect the property of the complainants will not constitute a bar to complainants' relief by way of enforcement of the restrictive covenant in question. *Polhemus* v. *DeLisle,* 98 N. J. Eq. 256. As stated in the above cited case: "The small number of such violations on a large tract is really an indication of the general adherence to the general plan of the whole tract." The defendant claims that several garages were built in violation of covenants prohibiting same, that complainants did not object thereto and therefore they are estopped from enforcing the covenant against the defendant. It has not been satisfactorily established herein that the complainants had knowledge of any such violation of restrictive covenants. Even if they had knowledge thereof it was not incumbent upon them to seek the enforcement of the covenant throughout the entire tract. There is no proof herein of any such violations in close proximity to or materially affecting complainants' property. The complainants promptly protested to defendant against infringement by her of the restrictive covenant in question by the erection of a garage upon her property upon their being apprized of her intention to erect such garage, and they also made known to the defendant their intention to compel her observance of such covenant by suit, if necessary. Notwithstanding such protest and notice the de-

fendant proceeded with the erection of the garage upon her property, and it has been completed and is now in use by the defendant The completion of the garage under such circumstances must be considered to have been at the defendant's risk of being obliged to remove same upon the court determining that the erection thereof was violative of the restrictive covenant in question. *Morrow* v. *Hasselman,* 69 N. J. Eq. 612, at p. 619. In *Laverack* v. *Allen,* 2 N. J. Misc. Rep. 637, 130 Atl. 615, it was held—"Defendant grantee, erecting building on lot with knowledge of complainants' right under restriction in her deed, proceeded at her peril, and was precluded from complaining that complainants did not object to the erection of such building." The covenant in question, insofar as it prohibits the erection of a stable, will not prohibit the erection of a garage. *Bourgeois* v. *Miller,* 89 N. J. Eq. 285; *Hilsinger* v. *Schwartz,* 99 N. J. Eq. 288. The language of covenant following the word stable "or any out-building of any kind" is broad enough to comprehend the erection of any building whatever additional or appurtenant to the dwelling house. An *out-building* within the meaning of the covenant *sub judice* comprehends a building adjoining or belonging to the dwelling house, something used or intended for use in connection therewith. *Words & Phrases* (2nd Series) p. 838. The terms *out-building* and *out-house* are frequently used interchangeably. 46 C. J. 1156. The Supreme Court of Connecticut held a garage on a residence lot, constructed apart from the dwelling house, to be an "out-house," within a restrictive covenant forbidding the erection or maintenance of any "out-house" on land conveyed. *Bassett* v. *Pepe,* 110 Atl.

Conclusions.

56. It is urged in behalf of the defendant that under the familiar maxim of *Ejusdem Generis* the *out-buildings* prohibited by the covenant in question must be those similar to a stable. Defendant concedes that if the words "any kind *whatsoever*" had been used in the covenant, it would include buildings other than and dissimilar to a stable, (*Buchanan* v. *Smock Lumber Co.* v. *East Jersey Water Co.,* 71 N. J. L. 350) but urges in the absence of the word *whatsoever* the rule of *Ejusdem Generis* should control. In my judgment neither the maxim *Ejusdem Generis,* nor the much broader maxim *Noscitur A Sociis* are inapplicable to the covenant *sub judice.*

I will advise a decree for the complainants.

Dated: November 11, 1930.
Hoboken, N. J.

Final Decree.

73/31

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	On Bill, &c. Final Decree.

This cause coming on to be heard in the presence of Max A. Sturm, Solicitor of the Complainants and Joseph A. Fuerstman, Solicitor of the Defendant and the Court having examined the pleadings and heard and considered the arguments of counsel thereon;

And it appearing to the satisfaction of the Court that the defendant, Katherine C. Haerlin, her agents and servants, have erected a garage or outbuilding upon the rear of premises described in the bill of complaint herein contrary to the restrictive covenants contained in the deeds of the complainants and the defendant herein, which erection and construction of said garage or outbuilding is in violation of such restrictive covenants and is detrimental to complainants' use of their lands and premises and it further appearing that said Katherine C. Haerlin proceeded with the erection and construction of said garage or outbuilding with knowledge and notice of the rights of complainants and despite the protests on the part of the com-

plainants herein and that the complainants are entitled to the relief prayed for by them in their bill of complaint filed herein;

It is, on this 4th day of January 1932, ORDERED, ADJUDGED and DECREED that the said defendant be and she is hereby enjoined and commanded henceforth and forever to desist and refrain from erecting and constructing a garage or outbuilding upon the rear of the lands and premises owned by the defendant, as described in the bill of complaint herein.

And it is further ORDERED that said defendant, Katherine C. Haerlin, within 60 days from the service of a certified copy of this decree, remove the outbuilding or garage erected by her upon said lands and premises described in the bill of complaint herein.

It is further ORDERED that the said defendant, Katherine C. Haerlin, pay to the complainants the costs of this suit to be taxed, together with a counsel fee of Two Hundred and Fifty Dollars, which is hereby allowed to said complainants.

E. R. WALKER,
C.

Respectfully advised,
JOHN J. FALLON,
V. C.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants, and KATHERINE C. HAERLIN, Defendant.	On Bill, etc. Notice of Appeal.

To MAX STURM, ESQ.,
Solicitor of Complainants.

The defendant, Katherine Haerlin, hereby appeals from the decree made herein by the Chancellor, on the advice of Vice Chancellor John Fallon, on the fifth day of January, 1932, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated: Jan. 12, 1932.

JOSEPH A. FUERSTMAN,
Solicitor of Defendant.

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

CHAS. KANTEN,
Of Counsel with Defendant.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants-Appellees, vs. KATHERINE C. HAERLIN, Defendant-Appellant.	On Appeal from the Court of Chancery. Petition of Appeal.

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

The petition of Katherine C. Haerlin, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of his Honor, Vice Chancellor John J. Fallon, bearing date January 4, 1932, in a certain cause in said Court of Chancery wherein the said William N. Bennett and Anna D. Bennett were complainants, and the said Katherine C. Haerlin was defendant, in this respect, to wit, that the said decree adjudges that the said "Katherine C. Haerlin, her agents and servants, have erected a garage or outbuilding upon the rear of premises described in the bill of complaint herein contrary to the restrictive covenants contained in the deeds of the complainants and the defendants herein, which erection and construc-

tion of said garage or outbuilding is in violation of such restrictive covenants and is detrimental to complainants' use of their lands and premises and it further appearing that said Katherine C. Haerlin proceeded with the erection and construction of said garage or outbuilding with knowledge and notice of the rights of complainants and despite the protests on the part of the complainants herein and that the complainants are entitled to the relief prayed for by them in their bill of complaint filed herein;

"It is, on this 4th day of January, 1932, ORDERED, ADJUDGED and DECREED that the said defendant be and she is hereby enjoined and commanded henceforth and forever to desist and refrain from erecting and constructing a garage or outbuilding upon the rear of the lands and premises owned by the defendant, as described in the bill of complaint herein.

"And it is further ORDERED that said defendant, Katherine C. Haerlin, within 60 days from the service of a certified copy of this decree, remove the outbuilding or garage erected by her upon said lands and premises described in the bill of complaint herein.

It is further ORDERED that the said defendant, Katherine C. Haerlin, pay to the complainants the costs of this suit to be taxed, together with a counsel fee of Two hundred and fifty dollars, which is hereby allowed to said complainants."

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that

Petition of Appeal.

1. The Amended Bill of Complaint filed herein upon which this suit is based, is defective in that it neither sets forth the existence of a neighborhood or community scheme entered into by the grantees of the owner of the "East Orange Park" tract, in pursuance of a general plan for the restriction of a private garage in any part of said tract, nor an express covenant against the erection of a garage entered into by the defendant or her predecessors in title, for the benefit of the complainants, nor does it set forth or allege that the owners of the "East Orange Park" tract who imposed the "no stable or outbuildings of any kind" restriction, expressly intended same for the benefit of all other grantees; nor does the Bill of Complaint set forth any other equitable ground upon which equitable intervention can be based.

2. The evidence is that defendant erected on her land a garage for private use, and there is no evidence that there exists any covenant whatever restricting the defendant against the erection of such a garage building, the restriction, if any, being against a "stable or outbuildings of any kind," and by the rule of *"ejusdam generis"* such restriction cannot be construed as applicable to a "private garage."

3. The evidence shows that the lands of the complainants and defendant are adjacent to each other, and their titles are derived from a common grantor and were made subject to the same covenant, with one exception, namely, the complainants' deed excepts a garage in connection with their covenant against the erection of a "stable or outbuildings of any kind," while the deed of the defendant contains the same restriction as is contained in the

complainants' deed, but without the exception as to a "garage;" and there being no reciprocal benefit and no reciprocal burden as between the parties hereto in the matter of the observance of the same or similar restrictions as regards a "garage" structure, complainants are without right to enforce as against the defendant the alleged "garage" restriction.

4. Assuming, but not admitting, that the covenant in defendant's deed against erecting a "stable or outbuilding of any kind" without expressly excepting a garage, can be construed as a restriction against the erection of a garage, such restriction fails as part of a community or neighborhood scheme, because there is no evidence that the grantor imposed a similar restriction upon all other lots in the neighborhood of the lands of complainants and defendant or elsewhere, in the tract; but the proof on the other hand shows that the grantor expressly excepted a "garage" from the aforesaid "stable and outhouse" restriction in the great majority of the deeds in said tract.

5. Assuming, but not admitting that the restriction against a "stable or outbuildings of any kind" without excepting a "garage" can be construed as intending to prohibit the erection of a garage only on corner lots in said tract, nevertheless, there being no evidence in the case that the common grantor imposed a like or similar restriction universally against all corner lots or lots of like character in that tract, no neighborhood or community scheme against garages was proven.

6. Complainants-appellees failed to prove that the alleged restriction against the erection of a

garage as being an "outhouse" was uniformly imposed upon all other lots of like character brought within the grantor's alleged scheme. On the other hand, by stipulation made in open court, it appears that deeds to other corner lots in said tract contained the same exception as to the erection of a garage, as was contained in complainants' deed, though omitted from defendant's deed. Appellant contends that such alleged restriction, not being universal nor reciprocal, was merely a bare restrictive covenant reserved by the grantor for its own benefit, and is not enforceable by a subsequent grantee of adjoining or adjacent land as part of a general building scheme.

7. There is no evidence that the common grantor, either covenanted to subject its other lands out of the tract to the same alleged "garage" restriction, or ever represented in any way to anyone that it would do so; that therefore the covenants must have been reserved for the personal benefit of the grantor and terminable by the grantor at will, and there is no proof that the grantor has in anywise objected to the construction of defendant's garage.

8. There was no proof that the alleged restrictive covenant in the defendant's deed was made expressly for the benefit of the other or subsequent purchasers, and there can be no presumption that it was so made.

9. The proof discloses that garages have been erected on numerous corner properties in the tract and in close proximity, and in the neighborhood of the complainants' property, without objection from complainants, so that if any community scheme re-

striction against garages on corner plots ever existed, the same have been abandoned, the neighborhood having undergone a change.

10. The complainants were in laches in that they permitted defendant to proceed with the erection of a garage without taking any steps to prevent the defendant from doing so until after the garage was practically completed.

11. The proof shows that the tract involved, is a middle class residential neighborhood in an industrial community, and that the defendant being a school teacher employed in Newark, and the Court will take judicial notice that an automobile is a necessity under such circumstances, and that therefore a restriction against a "garage" is in violation of public policy.

12. Wherefore, there being no evidence either of an adequate community scheme, or of a covenant by grantor to embody a uniform "garage" restriction upon lots of like character in the "East Orange Park" tract, or of a covenant against a garage running with the land, or of a special restrictive covenant for the benefit of complainants, or of any existing interest on behalf of which the alleged restrictive covenant can be enforced, and there being proof that such restriction if it ever existed, has been abandoned as a community scheme, and if not abandoned, complainants were nevertheless in laches in permitting the defendant to erect the garage, without attempting to restrain her until the same was practically completed, and that in any event such restriction would be con-

trary to public policy, the decree entered herein was erroneous, and the Chancellor should have ordered, adjudged and decreed that the complainants' Bill of Complaint be dismissed with costs.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

JOSEPH A. FUERSTMAN,
Solicitor of Defendant-Appellant.
CHAS. KANTER,
Of Counsel.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants-Appellees,	On Appeal.
vs.	Answer to Petition of Appeal.
KATHERINE C. HAERLIN, Defendant-Appellant.	

The answer of William N. Bennett and Anna D. Bennett, appellees to the petition of appeal of Katherine C. Haerlin, the above named appellant.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was on the 4th day of January, 1932, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purpose in said petition mentioned and as therein set forth, but as to the substance and form of said decree, these appelles beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity and they pray that the same may be affirmed, with costs to be taxed, in favor of these appellees.

MAX A. STURM,
Solicitor for and of Counsel with
Appellees, William N. Bennett
and Anna D. Bennett.

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20 OCT.T.1932

New Jersey Court of Errors and Appeals

Between WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants-Appellees, and KATHERINE C. HAERLIN, Defendant-Appellant.	On Bill, etc. On Appeal from the Court of Chancery.

APPELLANT'S REPLY TO APPELLEES' BRIEF.

The Appellees' Brief, because of its evident disregard of the facts, calls for a short Reply.

"Statement of Facts" in appellees' brief really a "Misstatement of Facts."

Counsel for appellees here as in the Court below sets up a supposed "state of facts" with a consistent disregard of the proven and stipulated facts in the case. At the hearing the complainants rested their case on a stipulated set of facts made orally in open court by respective counsel. We challenge counsel to point to a single place in the record, to bear out his oft repeated assertion that there was a community scheme against corner garages, or that there was anything more than the insertion of separate and in many respects dissimilar covenants in individual grants out of the so-called "East Orange Park Tract." One vital respect in which the cov-

enants differed, was that some prohibited against erecting "stables or outbuildings of any kind," while others merely prohibited the erecting of "stables or outbuildings of any kind, except a garage." Yet, despite and with total obliviousness of the fact that it was expressly stipulated in open Court that "some of the corner plots have permits to erect garages the same as the inside plots," (State of Case, p. 34, l. 46), counsel for appellees keeps repeating throughout his "Statement of Facts" that a uniform scheme existed against garages on corner lots. He offers a plan to illustrate the mythical restriction, but that plan was not in evidence and proves nothing.

Under Point I counsel cites good cases, but predicates them on non-existent facts.

The stipulation in the case does not contain a single fact to warrant the application of any of the cases cited under Point I. The existence of a community scheme with regard to a specific restriction, was an accepted fact in each of the cases cited, but where in the record of our case do we find the slightest justification for the statement that "all the corner lots are restricted against outbuildings of any kind," when all that appears is that defendant's lot is so restricted.? Counsel also goes even further, and says: "There is no evidence that there was any change or deviation from this plan," to which we say that if the grantor ever intended to have such plan, he kept it a secret, and not only did he give numerous corner owners permits to build garages (State of Case, p. 34, l. 16), but a large number of corners have garages built on them (State of Case, p. 34, l. 25), even though those might have

had similar restrictions to the complainants or defendant's. Furthermore, by the stipulation, it expressly appears that there was no uniformity of restrictions whatever, as some deeds make no provision as to outbuildings, others prohibited outbuildings, and still others prohibited outbuildings, but excepted garages. (State of Case, p. 33, l. 10). The stipulation (State of Case, p. 30 to p. 37), negatives any idea of a uniform scheme of development universal and reciprocal in its application to all lots of the same character in that tract.

In Point II also, counsel cites good cases but inapplicable to the facts herein.

In each of the cases cited by counsel under Point II, there was either a proven uniform scheme of development and notice or knowledge of the existence of same on part of defendant, or notice to defendant, before acquiring title, of some special right of the (complainant's) adjoining landowner to have a certain restriction in defendant's deed observed for complainant's benefit. Neither one of these vital elements is present in the case *sub judice*. Here we have merely a covenant against "stable or outbuildings" in the defendant's deed, and a covenant against "stable or outbuildings "except a garage" in the complainants' deed, without reference being made in either deed of the other's covenant, and without any covenant by the grantor to impose either form of restrictions in other deeds in said tract (State of Case, p. 35, l. 21). It was also conceded (State of Case, p. 35, l. 26), that no deed in the tract makes any covenant run in favor of any grantee. These covenants we say were purely personal between the grantor and the individual grantees, the effect of which we argued

in our original Brief. (May we here call attention to the fact that *Howland* v. *Andrus,* 80 Eq. 276 was reversed in 81 Eq. 175).

Counsel makes repeated statements that the defendant had knowledge of the covenant in her deed, and sets up that allegation in his Bill of Complaint (State of Case, p. 18, l. 10), but nowhere does he allege, and nowhere can we find proof for his conclusion that the defendant acquired title "with full knowledge of the rights of adjoining owners." Counsel alleges that we had notice of a Decree pro confesso in a suit between other parties. This is denied in our Answer, and complainants offered no proof of their allegation.

Finally, counsel for appellees seems to be of the view that it is the duty of the defendant to show the lack of a community scheme, rather than that the burden is on complainants to show that there was a community scheme. In one place he says: "Because solicitor for defendant stated to the Court that there was no community scheme * * * does not necessarily say that this conception is correct." We respectfully again say that the stipulation made in open court, to which complainants must look to make out their affirmative case, far from proving the existence of a uniform community scheme against corner garages, proves conclusively that there was none.

Respectfully submitted,

JOSEPH A. FUERSTMAN,
Solicitor of Defendant-Appellant.

CHARLES KANTER,
Of Counsel with Defendant-Appellant.

20 OCT.T.1932

New Jersey Court of Errors and Appeals

WILLIAM N. BENNETT and ANNA D. BENNETT, Complainants-Appellees, vs. KATHERINE C. HAERLIN, Defendant-Appellant.	On Bill, &c. On Appeal from the Court of Chancery.

BRIEF OF DEFENDANT-APPELLANT.

Vice Chancellor Fallon Misunderstood the Facts.

This is an appeal from a decree entered January 5, 1932, directing the defendant-appellant *to remove* from her corner plot a garage which she erected thereon in March, 1929, complainants-appellees' contention being that the same was erected in violation of a community scheme restriction. The opinion of the Honorable John J. Fallon, Vice Chancellor who sat below, is reported in 107 N. J. Eq. 225, and appears in the State of Cases pp. 73, etc. *Unfortunately the Vice Chancellor fell into error on the facts,* and the main, if not the entire reason for this Appeal, is that the opinion and the Decree emanating therefrom, are based upon the *mistaken belief by the Court below,* that among other provisions (with which we are not concerned), in a restrictive covenant imposed upon numerous lots in a tract, there was included, in effect, a restriction against the erection of garages on the corner lots, while permitting same on the inside

lots. *One will search the record in vain for anything evidential to warrant the finding* that "All lots similarly located were treated alike;" that "The erection of garages on inside lots was permitted," while "No provision was made for the erection of garages on corner lots"; that "Deeds for corner lots contain the restriction *sub judice,*" evidently meaning *all corner lots,* or that "The erection of a dwelling house only on corner lots was planned." (State of Case p. 74, beginning at line 25).

The record, far more sustaining any of these findings, without which the decree must fall, actually proves the contrary, namely, that there was no general restriction against garages on corner lots contemplated as a community improvement scheme.

The Facts.

On February 1, 1917, Philip J. Bowers & Co. conveyed to the complainants lots No. 216 and 217 in the "East Orange Park" tract. (State of Case p. 14, l. 14), said conveyance containing the following covenant:

> The above described premises being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall is put twenty-five feet back from the front lot lines and shall be erected on not less than fifty feet fronts and shall cost at least four thousand dollars and shall be a one family house only; that no stable or any outbuildings of any kind shall be erected on said lots, *excepting a garage,* and that only on the rear end of the above described lots, and shall not be used for any purpose than for private use;

> and that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line.

There was nothing more in the deed, by way of restriction as against either grantor or grantee.

On April 16, 1917, the same grantor conveyed to Grace Holmes lots No. 212 and 213 in said tract (State of Case p. 16, l. 15), said conveyance containing the following covenant:

> The last above described premises (being the premises now owned by the defendant) being conveyed expressly subject to the following restrictions. That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot lines and shall be erected on not less than fifty feet fronts and shall cost at least four thousand dollars, and shall be a one family house only; that no stable or any outbuildings of any kind shall be erected on said lots; that no building shall be used for any business purposes whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line.

There was nothing more in the deed by way of covenants as against either grantor or grantee than this bare covenant. (See State of Case p. 32, l. 38), where it says: "That ends the restriction."

On February 19, 1925, said Grace Holmes conveyed said lots to this defendant.

The premises of the defendant are at the corner

of Netherwood Terrace and Cleveland Terrace, East Orange, New Jersey, and complainants' land adjoin on the East.

On February 27, 1929, the defendant, after some negotiations with complainants, advised complainants by mail that she was going to erect a garage on her premises (State of Case p. 39, l. 12), and the work was practically completed when on March 19, 1929, she was served with a Rule to Show Cause why she should not be restrained (State of Case p. 9, l. 20).

The original Bill (State of Case p. l. etc.), merely set up the bare restrictions embodied in the respective deeds, and was stricken out, as not alleging either a community improvement scheme, or any personal covenant in favor of the complainant, or any other basis for equitable jurisdiction (State of Case p. 13).

The Amended Bill (State of Case p. 14 etc.), alleges in general terms the existence of a uniform community improvement scheme, purporting to prohibit "stables or outbuildings of any kind," *not excepting garages,* on any corner lots in the tract. *The affidavit attached to either Bill of Complaint, and appearing in the State of Case are not evidence in the case, and have no evidential value in favor of the complainants.*

The Answer filed denies the existence of the alleged community scheme with respect to the alleged restriction against garages or corner lots in the tract, and further alleges that many corner lots in the tract and in the immediate vicinity of the complainants have garages on them, and that other corner lot owners have express permission from the original grantor to erect gaarges on their lots, and that a "garage" is not embraced within the true meaning of "a stable or outbuilding of any kind,"

and further that the complainants were guilty of laches in permitting defendant to proceed as they did. (Answer—State of Case p. 26, etc.).

It appears that the property of the complainants is on the westerly side of Netherwood Terrace, adjoining the property of the defendant, which is at the southwest corner of Netherwood Terrace and Cleveland Terrace. Both parcels come out of a tract known as the "East Orange Park" tract, owned and developed by Philip J. Bowers & Co. Both of these parcels, as well as most of the other conveyances out of the "East Orange Park" tract contain restrictions, but these restrictions, while similar as to set-back, minimum size of building plot, minimum cost of construction and type of house, as well as type and location of fence that might be erected, were significantly dissimilar in this vital respect, *the right to erect "outbuildings" and/or "garages."* An examination of various deeds out of the tract taken at random shows that some contained no restriction as to outbuildings or garages; others expressly prohibited the erection of outbuildings, at the same time excepting "a garage for private use"; others prohibited the erection of "outbuildings" without exception, while other prohibited "stable or outbuildings of any kind." In short, the restriction against "outbuildings of any kind" was not universal, and the variance in that regard was not dependent upon location, there being no uniformity among *inside* lots of the tract, as such, or *corner* lots, as such, or lots on one side of the street or the other, or lots running in one direction or the other. It also appears that garages have actually been erected and in use for some time all over the tract, irrespective of location. It does not appear that Philip J. Bowers & Co. in any of its deeds bound itself by a restrictive covenant as

to the remaining lands, nor did it covenant that it would impose any particular form of restriction in any subsequent deeds, or for whose benefit the restrictions were intended. It also appears that the deed to the complainants expressly permits the erection of a garage, while the deed of the defendant does not expressly permit the erection of a garage, but restricts against *"stable or outbuildings of any kind."* (See State of Case p. 33, l. 11). The complainants contend that under these facts, even though they have a right to erect a garage themselves, on their lands, and other inside and corner lot owners have the same right, they can nevertheless prevent the defendant from doing so on her lands. The defendant asks, if other corner lot owners have that right, why not she?

At the final hearing, *no evidence was taken to prove the affirmative case of the complainants with respect to the existence of the alleged neighborhood restriction against corner lot garages, but complainants' case was attempted to be made out by means of an oral stipulation* entered into in open Court, and which is part of the *State of Case p.* 30 *to* 37 *inclusive.*

The essential portions of said oral stipulation will best appear from a restatement of the *pertinent colloquy between counsel in the presence of the Court.* Beginning at page 30 of the State of Case:

Stipulation made in open Court showing:—

(*Covenants in individual deeds were dissimilar*).

Mr. Sturm: Your Honor, can we shorten this case to some extent by agreeing on the record as to the character of the layout of the plot which was formerly owned by Philip J. Bowers & Company, and called the East Orange tract, of which I think

the property owned by the complainants and defendant are a part, and that in practically all the deeds there are contained restrictions. *Some are similar to those contained in the deeds of the complainants as well as of the defendant.*

Mr. Fuerstman: *Some similar to those in the complainants' deed and some similar to those as contained in the defendant's deed, there being a difference between the restrictions in the complainants' and the defendant's deed,* both being grantees out of the tract derived from the common grantor originally.

Mr. Sturm: *The only difference appearing as of record between the restrictions contained in the complainants' deed is that the complainants are permitted to erect a garage on their lots. The two lots owned by the defendant contain a restriction similar to those of complainants except that it prohibits—*

Mr. Fuerstman: *Does not provide expressly for the building of a garage.*

Mr. Sturm: I want to read the exact language.

Mr. Fuerstman: The defendant's deed does not contain the express provision—

(Here follows the reading of the restrictions contained in the respective deeds), and the colloquy continues at the bottom of page 32 of the State of Case.

(*The restrictions lacked uniformity*).

Mr. Fuerstman: Some of the deeds out of that tract taken at random by the searcher are contained in an affidavit made by the searcher and will show the *lack of uniformity*—will show *a difference, a variance* between the restrictions contained in these deeds included in this affidavit.

The Court: *It is not a general building scheme restriction in that there are variances?*

Mr. Fuerstman: *And the variances consist in this.* One deed contains no recitals as to outbuildings. Another contains a restriction among other things against outbuildings but does not except the garage. Another says no outbuilding excepting garage for private use. Another says no outbuilding excepting a garage for private use. I am taking the deeds as they run. Another says no outbuilding except a garage. Another says no outbuilding except a garage. Another says no outbuilding excepting a suitable garage. Another says no outbuilding excepting a suitable garage. Another says no stable or any outbuilding of any kind excepting a garage. Another says no stable or outbuilding of any kind. Another says no stable or outbuilding of any kind excepting a garage. Another excepts a garage. Another excepts a garage. Five others in this affidavit in succession except garages. The next to the last one in the affidavit says no stable or outbuilding of any kind, and then the last one says except a garage for private use. These restrictions as I say are contained in deeds taken at random out of a very large tract and indicate the general run of the restrictions in that tract.
* * * *

Then the stipulation continues as at top of page 34 of the State of Case.

(*The restrictions were not universal*).

Mr. Sturm: We had better set forth that "no stable or outbuilding of any kind" generally refers to corner plots.

The Court: You mean the restrictions?

Mr. Sturm: Yes.

Mr. Fuerstman: *That is not universally so.*

The Court: *You say that restriction which you mentioned applies only to corner plots?*

Mr. Fuerstman: *Not universally.* He says it was inserted *more frequently* in corner plots out of that tract *but not universally. Some of the corner plots have permits to erect garages the same as the inside plots.* It can be stipulated that the property of the defendant is a corner plot; that the property of the defendant adjoins the property of the complainants on the east.

The Court: And the property of complainants is not a corner lot?

(*Many corner garages erected*).

Mr. Fuerstman: No, it is not a corner lot. It is also stipulated that *a large number of the corner plots in that tract actually have garages erected on them since the insertion of the restriction* * * *.

(*No covenant by grantor to bind others*).

Mr. Fuerstman: Now it will be stipulated that the grantor's deed, *the original grantor's deed, does not contain any covenant by him as to the manner in which he will restrict other conveyances out of the tract.*

The Court: Is that the Bowers deed?

(*Covenant not made for benefit of complainants*).

Mr. Fuerstman: Yes. *It will also be conceded that no deed in the tract which has been examined describes any covenant running in favor of any grantee as against any other grantee except as such grantees may derive their rights through a* general scheme.

The Court: Indicated by the original grant.

Mr. Fuerstman: Indicated by the original grant through the various deeds.

(No community scheme and no personal covenant in favor of complainants).

The Court: *Do you mean that there is no general building scheme restriction which is uniform and intended to be for the benefit of all parties in interest?*

Mr. Fuerstman: *Not only that, but there is no personal right given to any grantee to object to the nature of the construction of any other party's property. There is no express right given to him.*

Mr. Sturm: All the deeds contain this restriction, the only difference is about a garage.

The Court: Do the restrictions relate only to garage buildings?

Mr. Sturm: Some say "no buildings of any kind whatsoever" and some except a garage.

This is all that appears in the record from which a community scheme may in relation to the restriction against "corner lot" garages be deduced.

Despite what appears in the stipulation, complainants have contended and the Court found as a fact, that all corner lots had been restricted against "stable or outbuildings of any kind," without any exception as to "garages."

The principal point in the case therefore, is one of fact, *i. e.*

"Were *all* corner lots similarly restricted"?

The answer appears right in the stipulation (State of Case p. 34, l. 16).

> "Some of the corner plots have permits to erect garages, the same as the inside plots."

No community scheme was proven as to private garages.

The defendant believes that while the record may contain evidence of a uniformity of restrictions as to type, cost of building, set-back, type and location of fence, and there is no charge of violating such restrictions, that in one vital respect with which we

are concerned, namely, a garage (if same comes within the meaning of "stable or outbuilding of any kind)" the restriction, if any, "broke down in the making" by the series of garage "exceptions" which the grantor, more or less indiscriminately, made to the "outbuilding" restriction. If the "exception" had applied solely to "inside" lots, the question presented might have been considered more or less "moot," but the apparent lack of uniformity among corner lots brings the case within the case of Scull v. Eilenberg, 94 N. J. Eq. 759:

> "A neighborhood scheme of restrictions must be universal and reciprocal. The same restrictions must be imposed on all lots similarly situated. If the restrictions upon all lots similarly located are not alike, or some lots are not subject to restrictions, while others are, then the neighborhood scheme falls."

This conception of uniformity, mutuality and universality is the basis of all community schemes. Witness the language of the Courts:

(Each case refers to the language which follows:)

Ferraro v. Kozlowski, 101 N. J. Eq. 532:

> "In every case with which I am familiar, bearing upon the subject, the restrictive use has been incorporated in every deed by the common grantor."

Laverick v. Allen, 130 Atl. 615:

> "To constitute a neighborhood scheme, the scheme must be universal, that is, the restrictions must apply to all lots of like character brought within the scheme. Unless it be universal, it cannot be reciprocal. If it cannot be reciprocal, then it must as a neighborhood scheme fall."

Dettsloff v. Hochstetter, 96 N. J. Eq. 391:

"The theory upon which these community agreements are enforced is that there has accrued to everybody the rights as are defined in these uniform restrictive covenants."

DeGray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329:

" * * * and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan * * *."

~~This case applies to the language which follows:~~

Klein v. Sisters, etc. St. Elizabeth, 101 N. J. Eq 761. (766):

"A general scheme of restrictions, to be effective and enforceable, must have certain characteristics. It must be universal; that is, the restrictions must apply to all lots of like character brought within the scheme. Unless it be universal, it cannot be reciprocal. It it be not reciprocal, then it must as a neighborhood scheme fail, for the theory which sustains a scheme or plan of this character is that the restrictions are a benefit to all. The consideration to each lot owner for the imposition of the restrictions upon his lot is that the same restrictions are imposed upon the lots of others similarly situated. If the restrictions upon all lots similarly located are not alike, or some lots are not subject to the restrictions, while others are, then a burden would be carried by some owners without a corresponding benefit. The burden follows the benefit, and, where there is no benefit, there should be no burden. Scull v. Eilenberg, 94 N. J. Eq. 759, 14 A. 288. Hence the restriction in question cannot be considered as having been imposed on lot 19 pursuant to a general scheme of restriction applicable to all lots of the common owner similarly

located, and the covenant is not enforceable by a subsequent grantee of adjoining or adjacent land, as part of a general building scheme.

~~This case applies to the language which follows:~~

Enderle et. al. v. Leslie Const. Co., 102 N. J. Eq. 569:

"The covenants in the deeds, standing alone, do not furnish adequate evidence from which the existence of a common and obligatory neighborhood scheme may be deduced. The variety of the covenants, and their inclusion in some deeds and omission from others, preclude the inference."

And as was said in the same case, at p. 573:

"It is not intended to hold that there could be no neighborhood plan with a fractional part of the area not included, if that be the arrangement, but to emphasize what is already obvious, that if the scheme is not universal of application, as the covenantors intended to be, it would not be binding on any owner on the theory of mutual application and common benefit."

Finally, on this branch of the case, we beg to refer to the concurring opinion of Justice White in *Scull* v. *Eilenberg*, (*supra*) at p. 771 as follows:

"A neighborhood scheme, on the other hand, depends for its potency upon its reciprocal universality as affecting all the lands intended to be and actually brought within the scheme. As was said by this court in Sanford v. Keer, 80 N. J. Eq. 240, in neighborhood scheme restrictive covenants, 'the burden follows the benefit.' If this mutual reciprocal universal benefit intended to be

> conferred upon all by the scheme, fails by reason of one or more permitted violations of the covenant, whereby the benefit is destroyed, the burden ends with it, and the scheme is said to have been abandoned; but if it fails because of the omission from the restricted lots of a lot essential to the existence of the scheme, so that improvements may be put upon or uses made of that lot contrary to the terms of the covenant, and which would destroy the benefit of the scheme to the other lots included therein, the neighborhood scheme has not been established as to, and is, therefore, not binding upon, any lots which, because of such omission, may thus be deprived of the benefit of the scheme."

The complainants' case depended upon their ability to prove the existence of a community scheme against garages on corner lots, but in failing to prove uniformity, universality, mutuality and reciprocity, they have failed to prove their case.

It is apparent from grantor's failure to universally restrict the corner lots against the erection of garages, and from the further fact that there are any number of garages on corner lots, S. of C., p. 54, l. 40 to p. 55, l. 15, that if it ever had any idea of so restricting corner lots, it never carried out that purpose, or abandoned same at the very outset. It is only fair to ask why should the defendant be prohibited from building a garage on her corner lot, when a preponderating number of other corner lot owners have a right to build on theirs, and if the defendant is not to have the enjoyment of the absence of garages on other corner lots, is there any need for her to afford other lot owners in the tract the enjoyment of the absence of a garage on her corner lot?

Besides there not being a neighborhood scheme against garages on corner lots, there is no other equitable right in complainants to prevent defendant from erecting a garage.

It is to be noted that the suit is not by the Common Grantor; that there is no proof of privity between the parties hereto; that there is no proof that the restriction, even though it might be beneficial to the complainants, was inserted for their benefit; that there is no proof that the alleged restriction against garages, was only as against corners, and not as against inside lots; that there is no proof that the defendant had notice of a community scheme against garages, if there existed any such scheme, nor does it appear that the Grantor bound itself in any way to impose any restrictions whatever in any subsequent deed.

It does appear that the complainants are not subsequent grantees, and in this connection we take the liberty of referring to the opinion of Vice Chancellor Stevens in *Leaver* v. *Gorman,* 73 N. J. Eq. 129, at p. 131. He says:

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

chose to remain unbound. In none of the multitude of deeds offered in evidence does it appear that he covenanted to impose the restrictions in question upon the lands remaining in his hands. The consequence is that while a subsequent grantee of Mr. Bradley of one lot could enforce the covenant against a prior grantee of another lot, a prior grantee could not enforce the covenant against a subsequent grantee. The complainant attempted to take the case out of the operation of the general rule by proving that it came within the exception to it, prevailing where a general scheme or plan is shown, according to which every purchaser is to be subject to, and to have the benefit of the covenant as against every other purchaser, prior or subsequent. In this attempt the complainant failed, for no such scheme, obligatory upon Mr. Bradley, was proved. It appeared, on the contrary, that in the case of this very street, Mr. Bradley had, in several instances, exercised the right to convey without imposing upon himself this or a similar covenant."

So in *Enderle et al.* v. *Leslie Const. Co.,* 102 N. J. Eq. 569 (575):

"In the absence of a general scheme the complainants have no equities against the defendant, and it is immaterial whether the defendants took title free or encumbered by restrictive covenants, they being subsequent purchasers. We then have the situation dealt with in Beattie v. Howell, 98 N. J. Eq. 163. But it does not follow that the covenantors have lost all advantages of the restrictions. As between themselves they may still be bound to compliance, each to subsequent purchasers from the common grantor, if that be the intent of the covenants. Leaver

> v. Gorman, 73 N. J. Eq. 129; Sailer v. Podolski, 73 N. J. Eq. 129."

As was said in *Klein* v. *Sisters etc. St. Elizabeth,* (supra):

> "It is rather a bare restrictive covenant reserved by a grantor in favor of his retained lands, and which a *subsequent grantee* of the retained lands may enforce against the lands of the covenantor, if enforcement be equitable and reasonable, in view of the circumstances at the time enforcement is sought."

And as in *Jennings* v. *Baroff,* 104 N. J. Eq. 132, so in this case:—

(a) There is no proof that the grantor covenanted to subject its other and adjoining lands to like restrictions.

(b) Nor did it appear that the grantor represented in any way to anyone that it would do so.

(c) There was no evidence, except this one lone covenant itself, that at the time it was imposed, it was intended to comprise a part of a neighborhood improvement scheme.

(d) There was no evidence that the benefit of such covenant was intended to become appurtenant to and run with the title to the grantor's remaining land (in which case as was pointed out in *Jennings* v. *Baroff,* supra, not a neighborhood scheme, but a burden in the nature of an equitable easement would have resulted, citing *Hemsley* v. *Marlborough House Co.* (second case) 68 N. J. Eq. 596, with the conclusion as reached in *Jennings* v. *Baroff* (supra), that the "covenant must be construed to have been reserved for the personal benefit and convenience of the grantor in his

use or disposition of his remaining ground, and to terminate with his death or by virtue of an earlier release by him, or upon an earlier termination of his interest in its performance, citing *Hemsley* v. *Marlborough Hotel Co.* (first case), 62 N. J. Eq. 164; affirmed in 63 N. J. Eq. 804.

(e) The grantor did not impose like restrictions against all the lands falling within the sphere of the alleged scheme. Whatever similarity exists with respect to any other restriction in this tract, there obviously was none with respect to "outbuildings," insofar as that word, in its context must be deemed to embrace a "garage for private use." For as was unequivocally stipulated *"some of the corner plots have permits to erect garages, the same as the inside plots."* State of Case, p. 34, l. 16.

> "Such a failure of universality would have been equally fatal to a neighborhood scheme, had the grantor in the first instance intended to create a neighborhood scheme."
>
> *Jennings* v. *Baroff* (supra).

Except as appears in the colloquy of counsel as hereinabove recited, there is not a scintilla of evidence bearing on the existence of the alleged community scheme against garages on corner lots, or of any other equitable ground for Equity's intervention or interference with defendant's right to the unrestricted use of her lands, and this right, our cases say, is jealously guarded. *Fortesque* v. *Carroll,* 76 N. J. Eq. 583.

Under the rule of "Ejusdam Generis," having in mind the surrounding facts and circumstances, a garage is not included within the meaning of "stable or outbuildings of any kind."

Furthermore, due to the peculiar wording of the restriction, we question whether even if the restriction had been uniform, universal and reciprocal, the erection of the garage could be prevented. It will be noted that the restriction sought to be enforced is one against "stable or any outbuildings of any kind."

Under the familiar construction of *ejusdam generis,* the outbuildings prohibited must be those similar to a stable. If the words "any kind *whatsoever*" had been used, the case might have been different. See *Buchanan & Smock Lumber Co.* v. *E. Jersey Water Co.,* 59 Atl. 31. But in the absence of the word "whatsoever," the rule of *ejusdam generis* controls.

We are therefore brought to a consideration of the meaning of "stable" as contained in the deed.

In *Hilsinger et al.* v. *Schwartz,* 133 Atl. 184, our Court held that "A stable is not a garage, and a restriction against a stable did not prohibit a garage." This was held despite the fact that the Century Dictionary defines "garage" to be a stable for the storage of automobiles, or other horseless vehicles, but the court considered controlling the fact that the word "stable" implied *noises, odors and flies* usually incident to a stable, which, of course, had no application to a garage.

In *Holland* v. *Andrews,* 81 N. J. Eq. 175, 86 Atl. 391, this Court refuses to hold that a public garage was embraced in "Livery Stable and Sales Stable" restrictions.

In *Pierce* v. *Beyer,* 185 Pac. 348, it was held that *a garage* constructed as a part of a residence building is *not a stable or outbuilding* within the meaning of a deed restriction requiring that all stables and outbuildings shall be placed at the rear of the lots.

In *Gibson* v. *Maine,* 129 Atl. 259, (Del.), a restriction against "any stores or garages" was held not to prohibit the erection of a private garage.

To Doubt is to Deny.

In *Fortesque* v. *Carroll,* 76 N. J. Eq. 583, the court held that "To doubt is to deny," and re-enunciated the principle that 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, and in other cases such as *Meany* v. *Stork,* 80 N. J. Eq. 60; *Gooter* v. *Ely,* 80 N. J. Eq. 40, and in *Sutcliffe* v. *Eisele,* 62 N. J. Eq. 224, our courts have held that any uncertainty of meaning of the covenant in that respect contributes to render its enforcement impossible.

Complainants were in Laches.

If a valid covenant ever existed, the complainants have lost the right to enforce it.

In the case of *Ocean City Land Company* v. *Weber,* 83 N. J. Eq. 476, the Court held "The right of the covenantee to specifically enforce a restrictive building of this nature, which forms part of a general scheme for the development of the tract cannot be exercised by such covenantee after his failure to exercise the right has resulted in the erection of so many buildings contrary to the covenant in the vicinity of the property in question,

that the enforcement of the covenant in accordance with its terms may be properly said to have been abandoned in that locality," leaving the covenantee to his remedy at law.

Under the evidence and stipulation, while it appears that the neighborhood is a residential one, private garages appear to have been erected all over the tract, on inside lots and corners alike. It does not seem right that defendant should be the one to be prohibited. The complainants appeared to be willing to have the garage built, going so far as to ask for a sketch or plan, but demurred only as to the exact spot for the garage. (State of Case, p. 62, l. 20, etc.). They delayed action, however, until the defendant was practically finished. (State of Case, p. 51, l. 10). However, so far as any actual harm is concerned, there seems to have been none, as the photograph which was introduced in evidence indicated. (State of Case, p. 66, ll. 10-19). And although complainants moved away on account of change of employment since the garage has been erected, they rented the place at once. (State of Case, p. 65, l. 30).

Public Policy does not favor the Restriction.

It would seem against public policy in these days and times, when auto travel is so essential to one's comfortable existence and livelihood, to prohibit the storing of one's own auto-

mobile as near at hand as one can keep it. To compel the defendant to remove the garage now, after three years' use thereof without the showing of any damage to complainants, and without any other convincing and indubitable equity in favor of the complainants, would be to impose too extreme a penalty on the defendant.

But finally, we cannot help emphasizing again two vital points to which the Court apparently shut its eyes:

(1) Numerous corner lots of this tract did have the privilege of erecting garages (State of Case, p. 34, l. 16), and

(2) There were many garages actually erected within two blocks of the premises of complainants and defendant (State of Case, p. 34, l. 26 and State of Case, p. 55, ll. 12-14).

These and other admitted facts negativing a binding community scheme prompted the Court at the hearing to inquire on one occasion,

> "It is not a general building scheme restriction in that there are variances?" (State of Case, p. 33, l. 9),

and on another

> "Do you mean that there is no general building scheme restriction which is uniform and intended to be for the benefit of all parties in interest?" (State of Case, p. 35, l. 36),

to both of which the solicitor for defendant, in the presence of the solicitor of the complainants, and without objection from him, informed the Court that he was correct in his understanding that there

was no community scheme, so that on May 8, 1929, when the case was tried, the Court seemed thoroughly convinced that there was no community scheme, and how he came to conclude to the contrary on November 11, 1929, when the opinion was written, can be attributed only to his having forgotten the stipulation made and the evidence taken six months prior. Considering the vast amount of work a Vice Chancellor has to perform, such things are conceivable.

Respectfully submitted,

JOSEPH A. FUERSTMAN,
Solicitor of Defendant-Appellant.

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198 20 OCT.T.1932

New Jersey Court of Errors and Appeals

Between

WILLIAM N. BENNETT and ANNA D. BENNETT,
Complainants-Appellees,

and

KATHERINE C. HAERLIN,
Defendant-Appellant.

On Bill, &c.
On Appeal from Court of Chancery.

BRIEF FOR APPELLEES.

Statement of Facts.

This is an action by complainants praying an injunction against the defendant for an alleged violation of a covenant contained in her deed.

Both complainants and defendant derived title from a common grantor, viz.: Philip J. Bowers & Company, and both parcels were part of a large tract of land laid out into lots by Philip J. Bowers & Company and known as the "East Orange Park Tract" (State of Case p. 17, l. 5).

Complainants derived title directly from the developers on or about February 1st, 1917 (State of Case p. 15, l. 5).

Defendant acquired title on February 19th, 1925, from Grace M. Holmes and Robert D. Holmes, her husband (State of Case p. 15, l. 33), who had purchased directly from Philip J. Bowers & Company on April 16th, 1917 (State of Case p. 16, l. 14).

All the deeds made by Philip J. Bowers & Company, conveying the lots comprising said tract, contained similar restrictive covenants as

contained in the deeds of complainants or defendant (State of Case p. 36, ll. 8-14).

The restriction contained in complainants' deed is as follows:

> "The above described premises being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall is put twenty-five feet back from the front lot lines and shall be erected on not less than fifty feet fronts and shall cost at least four thousand dollars and shall be a one family house only; *that no stable or any outbuildings of any kind shall be erected on said lots, excepting a garage, and that only on the rear end of the above described lots,* and shall not be used for any purpose than for private use; and that no building shall be used for any business purpose whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line."

The restriction contained in defendant's deed is as follows:

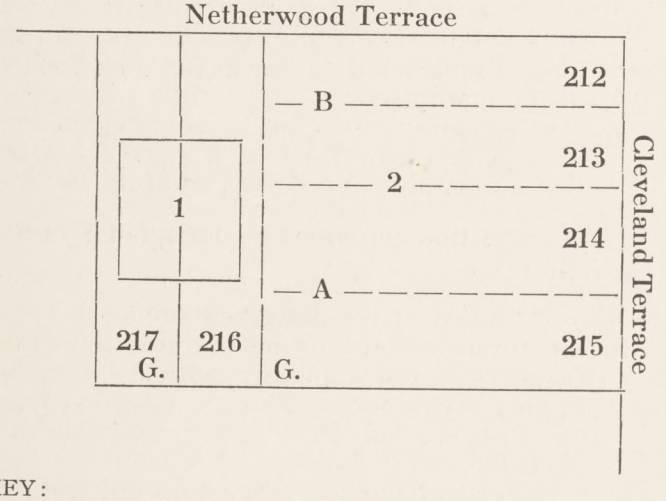
> "The last above described premises (being the premises now owned by the defendant) being conveyed expressly subject to the following restrictions: That no dwelling house shall be erected unless the foundation wall shall be twenty-five feet back from the front lot lines and shall be erected on not less than fifty feet fronts and shall cost at least four thousand dollars, and shall be a one family house only; *that no stable or any out-buildings of any kind shall be erected on said lots;* that no building shall be used for any business purposes whatsoever, and for no purpose except for private dwellings, and that no fence shall be erected other than a metal fence, and that not within twenty-five feet of the lot line."

From an examination of these covenants, it will be seen that they are identical in language except

that the defendant is prohibited from erecting *a stable or any outbuildings of any kind,* while the complainants are prohibited from erecting a stable or any outbuildings of any kind *except a garage,* and that only on the rear end of the above described lots, and shall not be used for any purpose than for private use.

The restriction contained in the defendant's deed against erecting a stable or any outbuildings of any kind was to prevent the owners of corner lots from erecting garages adjacent to the dwellings erected by owners of inside plots.

The following diagram may be helpful in illustrating the layout of the premises involved:



KEY:

1. Complainants' property on rear of which erection of garage is permitted.
2. Plot purchased by Holmes, defendant's grantor, from Bowers & Company.
3. On portion marked "A", being lots numbers 214 and 215 on rear of lot number 215, permission was granted to erect a garage.

   Portion marked "B" is property purchased by Haerlin, the defendant, from Holmes, upon which property no stable or any outbuildings of any kind were to be erected.

An examination of the entire tract discloses a similar situation respecting inside and corner lots forming said East Orange Park Tract.

The defendant, at the time she purchased the property in 1925, had knowledge of the restriction as contained in her deed and acquired the property with notice of such restriction (State of Case p. 46, l. 10).

Defendant made no attempt to erect a garage until some time in February, 1929 (State of Case p. 38, ll. 30-40, and p. 46, ll. 18 and 19), and on February 27th, 1929, mailed a letter to the complainants informing them that she would proceed to erect a garage (State of Case p. 39, ll. 10-20).

After defendant made known to the complainants her intention of erecting a garage, the complainants objected to her doing so (State of Case p. 42, l. 30).

That despite the objections on the part of complainants, the defendant persisted in proceeding and did proceed with the erection of said garage (State of Case p. 48, ll. 20-40, and p. 49, ll. 1-30).

That defendant was very slow in proceeding with the erection of the garage and could not have proceeded very far at the time she received notice of the pendency of this suit is borne out by the testimony of Mr. Wood, the contractor. His testimony is found in the State of Case page 54, lines 15 to 30, and pages 57 and 58. Especially on page 57, State of Case, line 20, he admits he stopped work on March 4th and did nothing for twelve or fourteen days (l. 26).

POINT I.

Complainants contend that defendant has no right to violate the restrictive covenants contained in her deed and of which she had notice and that the complainants have a right to enforce such restrictive covenants even though there is no separate special covenant on the part of the defendant running in favor of the complainants.

The complainants base their contention upon the fact that the title of both parties is derived from a common grantor; that previously to selling the lands to which the complainants and defendant are entitled, the vendor laid out his estate for sale subject to restrictions intended to be imposed and in fact were imposed on all the lots, and which, though varying in details as to particular lots, are consistent with some general scheme of development; that these restrictions were intended by the vendor to be and were for the benefit of other land retained by the vendor and that the complainants as well as the defendant or her predecessor in title, purchased the land which they hold upon the footing that the restrictions subject to which the purchases were made, were to inure for the benefit of the other lots included in the general scheme.

In *DeGray* v. *Monmouth Beach Club, &c.,* 50 Eq. 329, at page 340, after reciting several doctrines, &c., the Court holds:

> "The law, deducible from these principles and the authorities, applicable to this case, is, that where there is a general scheme or plan, adopted and made public by the owner of a

> tract, for the development and improvement of the property, by which it is divided into streets, avenue and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; *and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject matter of his purchase.*"

In *Sanford* v. *Keer,* 80 Eq., page 240, held: Where a tract of land is divided into building lots and a plan exhibited showing to prospective purchasers the streets and lots thereof, and such purchasers are induced to buy the lots by and in reliance upon representations, either public or private, that all conveyances would contain protective restrictions of a designated character and purpose, the restrictive covenants inserted in the conveyances of the lots in accordance with these representations, constitute a general or neighborhood scheme and may be enforced between the lot purchasers *inter sese.*

In *Polhemus* v. *De Lisle,* 98 Eq. 256, at page 262, held: The law in this State respecting the enforcement of restrictive covenants imposed upon lands in pursuance of a general scheme, as here, is so well settled that it seems idle to restate it. The following cases, however, may be said to state the law and record its development (citing cases):

> "Where a covenant on the part of a grantor, as to restrictions to be inserted in deeds of

> adjoining lots, was part of the consideration for the grantee's deed and was intended to impose a burden on all lots for the benefit of all, equity will restrain the violation, not only against the grantor-covenantor, but also against all subsequent purchasers with notice of the covenant."
>
> *Howland* v. *Andrus,* 80 Eq. 276.

Defendant, while admitting that all the deeds for lots comprising the entire tract contain the same restrictions, except as to garages and because the corner lots are restricted against out-buildings of any kind, contends the neighborhood scheme fails. This position of the defendant is untenable.

In order to establish a neighborhood scheme it is not necessary that each and every lot in the entire tract shall be subject to the identical restrictions.

In *Morrow* v. *Hasselman,* 69 Eq. 612, it is held:

> "It is true that these restrictions varied in different sections in accordance *with the designs of the promoters for the character of such sections, respectively, but this does not interfere with the integrity of a neighborhood scheme.* Under such circumstances, the covenants applicable to each section become, to a certain extent, a separate scheme for that section, the various covenants on the different sections forming a general scheme for the whole, only in so far as all contain features common and beneficial to all."

The above language is cited in *Sanford* v. *Keer,* 80 Eq., page 240, at page 245.

And again quoting from *Morrow* v. *Hasselman, supra,* at page 615:

> "And, although different building lines were adopted for different avenues, the line adopted for each street is the general plan or

scheme for that street upon which purchasers upon the street or avenue have a right to rely."

In the Bowers tract, of which lands of the complainants and defendant are part, all lots similarly located were treated alike and the inside lots were permitted garages and the corner lots were restricted against out-buildings of any kind and there is no evidence that there was any change or deviation from this plan in the entire tract.

Quoting from the case of *Sanford* v. *Keer,* 80 Eq., page 240, at foot of page 247 and continuing to page 249:

> "The other principle invoked by the defendant to justify his violation of this covenant is that by reason of other similar constructions (garages), in alleged similar locations, with reference to complainant's remaining property, the violated covenant, in so far as it is violated, has ceased to have any beneficial value to complainant's property, and, consequently, can form no ground for equitable relief. This principle, if applicable, would also be decisive. The foundation for equitable relief in these cases is that the first vendor, having arranged by the covenant to accept a part of the consideration for his grant *in a benefit* to accrue to his remaining property by the performance of the covenant, it would be unconscionable to permit the covenantor-vendee's assignee with notice to cheat the vendor out of this portion of his consideration *by depriving him of the benefit* which he would receive by the performance of the covenant.
>
> "It is quite true that complainant, whose interest (aside from what should be her natural desire to protect the purchasers of her ground in a general scheme of improvements upon which she had induced them to rely) is in the value of the mansion-house property directly opposite the lot in question, and in which she lives, and in the value

> of her other unsold lots, has permitted the erection of garages upon the rear of the lots and the back of the dwelling-houses which front toward her property on South Tenth Street, and having done so, it would be difficult to see what possible benefit she could have in preventing the defendant from constructing his garage on the rear of his lot and behind a dwelling-house built thereon in conformity with the dwelling-house restrictions. But this, so far as her property is concerned, situate as it is, is a very different proposition from substituting the probably unsightly outhouse garage instead of and in the exact location of a dwelling-house to cost at least $5,000, for which she stipulated. Her benefit which is invaded by what defendant has done not only equals, but is even greater than that of the neighboring lot owners, because if defendant may lawfully do what he has done, it can only be because both the dwelling-house general scheme and the dwelling-house individual covenants have become inoperative, and in that case all the other dwellings constructed on the east side of South Tenth Street may be turned into factories, or built out to the street line in the shape of stores, and the entire residential character of the neighborhood, which, by reason of her larger remaining interests, is obviously more valuable to complainant than to anyone else, may be completely destroyed."

In the case of *Schmidt* v. *Palisade Supply Co.*, 84 Atl., page 807, the Court at page 809, says:

> "This, then, brings us to the actual question involved, and the only real defense necessary to be considered. The law relating to building scheme, and the enforceability among purchasers from a common grantor of restrictive covenants, has been dealt with in so many cases and under so many different conditions of fact that the only satisfactory consideration of the subject as a whole can

be had by referring to the extensive treatment received in two recent notes where all the cases are gathered and considered. Judd *v.* Robinson, 41 Colo. 222, 92 Pac. 724, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018 *et seq.;* Korn *v.* Campbell, 37 L. R. A. (N. S.) 12, at page 27, note. Since, in my view, the facts as would entitle the purchasers *inter sese* to enforce the respective covenants contained in the deeds of each, it is not necessary to indulge in extensive citations from the mass of authority contained in the above reference. Neither the industry of counsel nor my own research have resulted in finding any case which deals with the precise question we are called upon to decide. In the case of Elliston *v.* Reacher (1908), 2 Ch. 374, affirmed (1908), 2 Ch. 665, the Court lays down the following rule as to the enforcement of restrictive covenants by purchasers *inter sese*: 'It must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants, are, respectively entitled, the vendor laid out his estate or a defined portion thereof (including the lands purchased by the plaintiffs and defendants, respectively) for sale in lots subject to restrictions intended to be imposed on all the lots, *and which, though varying in details as to particular lots,* are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to inure for the benefit of the other lots included in the general scheme, whether or not they were also to inure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plain-

> tiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor, irrespective of the dates of the respective purchases.' "

Case of *Enderle, et al.* v. *Leslie Const. Co.*, 102 N. J. Eq., page 569, cited by defendant, is not dispositive of the question involved in the case *sub judice.*

There was no fixed scheme nor were uniform restrictions inserted in all deeds made by the common grantor, as was done by the Philip J. Bowers Co. respecting the East Orange Park Tract.

Quoting from *Enderle* v. *Leslie Const. Co., supra,* at page 758:

> "The plot was never laid out in lots and mapped. The company sold in parcels to suit buyers, usually speculative builders. Most times the conveyances contained restrictions, sometimes not. The first three, of the thirty-five conveying all the building lots on the four avenues, contain none, nor do the last three. The restrictions in the remaining twenty-nine deeds are uniform in this only, that no house shall be higher than 2½ stories and shall not have a flat roof. In other respects they vary materially. In two, for lots on different streets, the setback is 23 feet and the covenants expire, one January 1, 1925, the other January 1, 1930. In the others the setback is 15 feet, except on the south side of Lehigh Avenue, where it is 6 feet. Some lots are restricted to one dwelling house; some to one and two family houses; some have no limit. All restrictions call for a minimum cost of house, and this varies, ranging from $3,500 to $8,000, irrespective of location."

POINT II.

The undisputed fact is that defendant purchased the property with full knowledge of the restrictions and rights of complainants in respect thereto.

This being so, she is bound by them and should not be permitted to arbitrarily disregard the rights of others to satisfy her own selfish interests.

In *Kirkpatrick* v. *Peshine,* 24 Eq., page 206, at page 213, held:

> "Covenants controlling the enjoyment of land, though not binding at law, will be enforced in equity, provided the person into whose hands the land passes, has taken it with notice of the covenants. Kerr on Injunctions, 530; Sugden *v.* Moxhay, 2 Ph. 774, 'is not whether the covenant runs with the land, *but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.*'
>
> "'Reason and justice', said Lord Justice KNIGHT BRUCE, in *De Matto* v. *Gibson,* 4 Deg. & J. 282, 'seems to prescribe that at least, as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully, and for a valuable consideration, made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use the property in a manner not allowable to the giver or seller.'" Kirkpatrick *v.* Peshine, 24 Eq. p. 213, and cases cited.

And on page 216:

> "A covenantee has the right to have the actual enjoyment of the property, *modo et forma,* as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept, as far as he is concerned, or whether he shall permit it to be violated."

In *De Gray* v. *Monmouth Beach Club, &c.,* 50 Eq., page 329, at page 332, held:

> "It is settled that a court of equity will restrain the violation of a covenant, entered into by a grantee, restrictive of the use of lands conveyed, *not only against the covenantor but against all subsequent purchasers of lands with notice of the covenant, irrespective of the questions whether the covenant is of a nature to run with the land or whether it creates an easement;* provided, however, that its enforcement is not against public policy, and cases cited."

And citing Chief Justice BEASLEY in *Brewer* v. *Marshall,* 19 Eq. 537, at page 543, referring to several of the cases, says:

> "It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagement enforced created easements or are of a nature to run with the land."

In *Laverack* v. *Allen,* 2 N. J. Misc. Rep. 637, 130 Atl. 615, it is held:

> "The defendant was fully informed of the restrictions before she accepted her deed. She knew she was accepting a deed subject to

them, and she must be held to have had notice of the complainants' rights under them."

In *Heyinger* v. *Levinsohn,* 87 Eq., page 471, the Court held:

"That defendant having had notice and knowledge of restrictive covenants was ordered to tear down so much of his building as violated the restrictions."

In *Howland* v. *Andrus,* 80 Eq., page 276, at page 282, held:

"Purchasers acquiring legal title to the lands subsequent to a restrictive contract made by their grantor and *with notice thereof hold the lands subject to the burden,*" and cases cited.

See also *DeRossett* v. *Bianchi,* 100 Eq., p. 439, at p. 441.

POINT III.

Complainants are not in laches as claimed by defendant nor is defendant's contention sound that because a few others violated the restrictive covenants on another part of the tract, without protest, complainants are estopped from proceeding against the defendant.

Quoting from *Sandusky* v. *Allsopp,* 99 Eq., p. 61, at page 63:

"The erection of the apartment house on Milford Avenue was, unquestionably, in violation of the restrictions upon the Milford Avenue lots, but with this the owners of lots on Johnson Avenue had no concern, and they

were not in a position to prevent it. The restrictions were not for their benefit."

"The fact that the neighborhood has undergone a change, in that many large apartment houses have been erected in the vicinity, does not commend itself as a sufficient reason for withholding from the defendants equitable protection from invasion of their group of properties. The parties bound to the observation of the covenant have not themselves permitted or suffered any infraction of its provisions nor relaxed in any degree any of its terms, so as to dissuade a court of equity from lending its aid, as in Scull *v.* Eilenberg, 94 N. J. Eq. 759, where it declined to interfere with the erection of a store in violation of a building location line because others in the neighborhood scheme had been allowed to violate the restriction."

Durham Essex Corp. v. *Schaffer,* 99 Eq., page 602:

"Where a restriction in all deeds in a neighborhood scheme prohibited flat or mansard roofs on any buildings erected on the land covered by the deeds, and evidence shows that the roofs on the major portion of the buildings so erected are flat, and also that the defendants had notice of the scheme of restriction against flat roofs, the fact that one grantee in a deed had violated this restriction does not permit another to do so, and as the complainant acted with reasonable promptness in bringing this suit, it is entitled to a decree to compel the defendants to comply with the restrictions."

Polhemus v. *De Lisle,* 98 Eq., page 256:

"A few violations of restrictive covenants, which in no substantial way affect the property of the complainants, are no bar to relief by way of enforcement of the covenants. The small number of such violations on a large

tract is really an indication of the general adherence to the general plan of development of the whole tract.

"Laches cannot be a bar to one who acts promptly after knowledge comes to him of an invasion of his rights."

Morrow v. *Hasselman,* 69 Eq., page 612:

"Immaterial violations of the restrictions, not showing an intention to abandon the plan, are no defence to such action.

"Where the complainant gave the defendant notice as soon as it appeared that the latter's building would violate the restriction, but the building was completed after suit for an injunction was commenced, complainant is entitled to a mandatory injunction."

In the case of *Barton* v. *Silfer,* 72 Eq., page 812, there had been twelve (12) violations of the covenant sought to be enforced and the Court in that case held:

"Where the deeds to all lots in a town contained a uniform restrictive building covenant, complainants' right to enforce it against a neighboring owner was not lost because there had been several violations of the covenant, where the violations in no substantial way affected their property, and did not show any intention to abandon the general plan in the district wherein the parties' property was located."

Dettsloff v. *Hockstetter,* 96 Eq., page 391, at page 394:

"But it has been held in this state by a long series of cases that there is all the difference in the world between a land company, the original land company, a town-site proprietor, undertaking to enforce a covenant of this nature and an individual lot owner, undertaking to enforce the same covenant as a part of

a general scheme. The ordinary land company is in most cases interested in the entire tract, and laches would be charged against it or acquiescence would be charged against it by reason of violation on any part of the tract, whereas it is held that the single lot owner is really interested only in violations that affect his particular interest, violations on lots near him, where if the covenant is violated the individual lot owner will suffer; therefore, a violation of the covenant on a distant part of the tract is not held to be a matter of material concern to the individual lot owner, and is not a matter of laches and not a matter that can be urged as acquiescence or abandonment on his part."

POINT IV.

Defendant is in error in her contention that the erection of a garage is not prohibited by the covenant "that no stable or any outbuildings of any kind shall be erected on said lots".

Our Court of Chancery in the case of *Bruce* v. *McClees,* 158 Atl., page 849, defining the word "outbuilding" held that a garage attached to a dwelling house was an outbuilding.

Quoting from the language of the Court found on page 850:

> "The Standard Dictionary defines an outbuilding as 'a small building appurtenant to a main building and generally separated from it; an outhouse.' And 'outhouse', is therein defined as 'a small building standing apart from, but appurtenant to, a main or large building or dwelling; an outbuilding.' The words 'outbuilding' and 'outhouse', are often used interchangeably. 46 Corpus Juris, 1156. Bouv. Law Dict. Vol. 3, page 2433, defines

'outhouse' as 'a building adjoining or belonging to a dwelling house,' 'a building, subservient to yet distinct from the mansion house, located either within or without the curtilage.' Wharton's Law Dictionary defines an 'outhouse' as 'a building belonging and adjoining to a dwelling house.' Other definitions will be found in Words and Phrases, First, Second and Third Series."

Also on page 851:

"The practice in modern building construction of including a garage as an integral part of a dwelling house was referred to by me *arguendo* in *Hilsinger* v. *Schwartz,* 99 N. J. Eq. 288, 133 A. 184. If the structure in question is an integral part of the dwelling house itself, is accessible from within as other rooms in the building are accessible, whether built at the same time as the mansion house or added thereto, at a later time, if it is one with the dwelling house, then it is not an 'outhouse' or 'outbuilding.' But, if the physical connection is merely by attachment on the outside, with no means of communication between that structure and the main building, if it is a mere makeshift, a shed, or a lean-to, and its only claim to being a part of the dwelling house itself rests upon a mere physical attachment, then in my judgment it is an outbuilding.'

The Supreme Court of Connecticut held a garage on a residence lot, constructed apart from the dwelling house, to be an "out-house", within a restrictive covenant forbidding the erection or maintenance of any "out-house" on land conveyed. *Basset* v. *Pepe,* 110 Atl. 56.

CONCLUSION.

Because solicitor for defendant stated to the Court that there was no community scheme (as

referred to in defendant's brief at foot of p. 22), does not necessarily say that this conception is correct.

The Court below before rendering a decision gave mature consideration to all points raised and argued in the lengthy briefs submitted by solicitors for both parties.

All deeds covering the entire tract, consisting of approximately 240 lots, contained the same restrictions, the only deviation being that garages were prohibited from being erected on corner plots.

Defendant before acquiring title to property she now owns, had knowledge that the erection of any outbuildings was prohibited on the property, but irrespective of this knowledge bought the same and contrary to and in spite of the rights of adjoining property owners, she deliberately set about to erect a garage in accordance with her own wishes, despite objections from complainants, and she should not be permitted to disregard the rights of others with impunity.

In conclusion, it is respectfully submitted that there was a community scheme; that the defendant acquired title with full knowledge of the rights of adjoining owners; was immediately notified by complainants of their objection to the erection of a garage when she proceeded with building operations; that complainants are not in laches; that the language *"No stable or any outbuildings of any kind"*, includes garages and that the decree of the Chancellor, advised by Honorable JOHN J. FALLON, Vice-Chancellor, be affirmed.

MAX A. STURM,
Solicitor for and of Counsel
with Complainants-Appellees.

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