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BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

Complainant, Katherine A. Kemble, of the City
of Ventnor City, County of Atlantic and State of 10
New Jersey, respectfully shows:

1. That she is the owner of the following land and
premises, namely:

ALL that certain lot or parcel of land and
premises, situate in the City of Ventnor City,
in the County of Atlantic and State of New
Jersey, described as follows:

BEGINNING in the Westerly line of Oak-
land Avenue (fifty feet wide) two hundred feet 20
Southwardly from the Southwest corner of
Oakland and Atlantic Avenues, and extending
thence Southwardly along said line of Oakland
Avenue (the same being parallel with and one
hundred and twenty-five feet Eastwardly at
right angles from Nashville Avenue) fifty feet;
thence Westwardly parallel with Atlantic Ave-
nue sixty-two and five-tenths feet; thence North-
wardly parallel with Oakland Avenue fifty 30
feet; thence Eastwardly parallel with Atlantic
Avenue, sixty-two and five-tenths feet to the
place of beginning.

2. That she became the owner of said premises
by virtue of a deed of conveyance made by Frances
C. Coryell and husband, dated the fourteenth day
of October, 1918, and recorded in the office of the

clerk of Atlantic County on December 9th, 1918, in Book of Deeds No. 596, page 324, &c.

3. That said lot was a part of a larger tract of land formerly owned by Kennedy Crossan, lying between Nashville Avenue and Oakland Avenue, and between Oakland Avenue and Austin Avenue, and bounded on the north by the south line of Atlantic Avenue, on the south by the interior or in-
10 land line of the City Park for boardwalk and other purposes, said Oakland Avenue being a public highway fifty feet wide, located midway between said Nashville and Austin Avenues, and extending from Atlantic Avenue to the exterior line established by the riparian commissioners of the State of New Jersey.

4. That all of said tract of land, including the premises owned by the complainant and the prem-
20 ises owned by the defendant, are subject to the following restrictions:

“(1) That every lot shall have a frontage upon either Nashville, Oakland or Austin Avenues of at least fifty feet with a depth at right angles thereto of sixty-two and five-tenths feet.

(2) That no portion of any building shall be erected nearer than fifteen feet of the front property line of Nashville or Oakland or Austin Avenues, bay windows and porches ex-
30 cepted, nor nearer than six feet of the South side property line of any lot, nor nearer than five feet of the rear line of any lot; provided, however, that the owner of two or more contiguous lots may erect a building or buildings on any portion of said lots, without regard to intervening line or lines, in which case such lots shall be considered as single lots; provided,

further that said building or buildings so erected shall not be erected nearer than fifteen feet of the front property line as aforesaid; provided, however, that bay windows may extend over said restricted lines, but not nearer than three feet of the South side property line nor nearer than twelve feet of the above mentioned front property line, and that no porch shall extend nearer than five feet of said front property line, nor nearer than two feet of the South side property line. 10

(3) That no building or buildings shall be erected upon any lot or lots aforesaid, except only a single dwelling house to be used for private residence purposes, and provided, however, that a garage for private purposes, in connection with such private residence is not prohibited, and that no building, except private garage, erected on any said lot or lots, shall cost less than four thousand dollars, and that there shall not be erected on any of said lots any outside privy, stable or other outbuilding. 20

(4) That no spirituous, malt, intoxicating or vinous liquors shall be sold on the above mentioned lots.

(5) It being expressly understood and agreed that the said several covenants shall attach to and run with the land, and it shall be lawful not only for party of the first part, his heirs and assigns, but also for the owner or owners of any such lot or lots hereinabove mentioned deriving title from or through party of the first part, his heirs and assigns, to institute and prosecute any proceeding at law or in equity against any person violating said covenants, **conditions or restrictions**, the object of the above covenants being to create a general build- 30

ing scheme to secure the health, beauty and ornamentation of the above designated lots.”

5. That said restrictions were imposed upon all of said premises under a covenant that they should be inserted in each and every deed, the object thereof being to create a general building scheme to secure the health, beauty and ornamentation of the
10 lots within the boundaries above mentioned.

6. That Nathan Joffe is the owner of the premises immediately adjoining complainant's premises on the north, bounded and described as follows:

BEGINNING in the Westerly line of Oakland Avenue (fifty feet wide) one hundred and fifty feet Southwardly from the Southwest corner of Oakland and Atlantic Avenues, and extending thence Southwardly along said line of Oakland Avenue (the same being parallel with and
20 one hundred and twenty-five feet Eastwardly at right angles from Nashville Avenue) fifty feet; thence Westwardly parallel with Atlantic Avenue sixty-two and five-tenths feet; thence Northwardly parallel with Oakland Avenue fifty feet; thence Eastwardly parallel with Atlantic Avenue sixty-two and five-tenths feet to the place of beginning.

30

7. That the land and premises owned by the said Nathan Joffe is a part of the land and premises formerly owned by the said Kennedy Crossan, upon which the restrictions above mentioned were imposed, and the said property of the said Nathan Joffe is subject to said restrictions, and each and every of them.

8. That erected upon the premises of the said Nathan Joffe is a brick residence, three stories in height. Attached to and forming a part of said residence is a one-car garage, the south side of which is approximately six feet from the south side property line of the lot belonging to the said Nathan Joffe. That said garage is about eighteen feet in length, and is capable of storing one car. The garage is built in the rear of the house, so that the rear wall of the garage is flush with the rear wall 10 of the house.

9. That within the last two or three days, the said Nathan Joffe has caused the south wall of said garage to be torn out, and has built a trench for the purpose of building a foundation for a new south wall, which trench is immediately along the south property line of the Joffe lot, and adjacent to the north property line of complainant's lot.

20

10. That it is the purpose of the said Nathan Joffe to extend said garage, so that the south wall thereof will be on the south property line of his lot; thus occupying the six feet of land between the present south wall of the garage and the new south wall of the garage, in violation of the restrictions above referred to.

11. That upon becoming aware of the intention of the said Nathan Joffe to construct his garage 30 over said six feet, in violation of said restrictions, complainant remonstrated with the said Nathan Joffe and told him that he, the said Nathan Joffe, was violating the said restrictions and that he must not continue to build said garage in violation thereof; whereupon Nathan Joffe replied to complainant that he was not aware that there was any restric-

tions preventing him from building over to the south line of his lot.

12. Notwithstanding, however, the said Nathan Joffe's pretended ignorance of the said restrictions, said restrictions are in fact imposed upon his premises, and his premises are subject to them.

10 13. Complainant further says that the building of said garage will cause irreparable damage and injury to her property, because it will make the south wall of said garage flush with her northerly property line, and within three feet of her residence, her residence being built three feet back from the northerly side line, in accordance with said restrictions. Said garage will cause great noise and disturbance to the complainant and her family, and to such tenants as she may from time to time rent the
20 property.

14. Complainant further says that she is not aware of any other violations of said restrictive covenant, other than the violation proposed and threatened by the said Nathan Joffe, and if there are any other violations of said restrictions, or if any garages or other parts of any buildings on any of said lots are nearer than six feet to the south side property line of said lots, complainant does not
30 know of it, and was not aware of it, and had no knowledge either at the time said buildings were erected, nor has she any knowledge at the present time, of said violations.

15. That so far as complainant knows, said restrictions have been strictly observed and obeyed.

Complainant is without relief save in and by the aid and intervention of this Honorable Court, and therefore prays:

1. That the defendant, Nathan Joffe, answer each and every of the allegations herein contained.

2. That the defendant, Nathan Joffe, his servants and agents, be restrained and enjoined from building a garage or any other part of his residence building nearer than six feet to the south side property line of his said lot. 10

3. That the defendant, Nathan Joffe, his servants and agents, be decreed to remove such portions of said garage as have been built nearer than six feet to the said south property line, so that the south wall of said garage shall not be within six feet of said south side property line. 20

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

BOURGEOIS & COULOMB,
*Solicitors for and of Counsel
with Complainant.*

PETITION.

IN CHANCERY OF NEW JERSEY.

Between
 10 KATHERINE A. KEMBLE, }
 Complainant, } On Bill, &c.
 and } Petition.
 NATHAN JOFFE, }
 Defendant. }

The petition of Mary Allan Elwood and James Stuart Lowry respectfully shows:

20

1. That on or about the 28th day of May, A. D. 1925, Katherine A. Kemble, the complainant in the above stated cause, filed her bill of complaint, to restrain defendant from violating certain restrictive covenants imposed on certain property and land situate between Oakland, Austin and Atlantic Avenues and the Boardwalk, in the City of Ventnor City, County of Atlantic and State of New Jersey.

30

2. That upon the filing of said bill and affidavit, order to show cause was called with temporary restraint, directing the said defendant to show cause, June 2nd, 1925, why he should not be restrained and enjoined from building a garage nearer than 6 feet from the south side property line of his lot, in violation of said restrictions. The hearing on

said order to show cause was continued until the 9th day of June, A. D. 1925, at the same time and place.

3. Petitioners further say that they are anxious to be made parties to said bill of complaint and rule to show cause to enforce said restrictions and to enjoin the defendant from building his garage nearer than 6 feet from the south side property line.

10

4. Your petitioner, Mary Allan Elwood, further says that she is the owner of a certain tract or parcel of land situate on the east side of Nashville Avenue, beginning 150 feet south of the south line of Atlantic and extending south 50 feet in breadth by easterly between parallel lines of that width $62\frac{1}{2}$ feet.

5. That your petitioner, James Stuart Lowry, is the owner of a plot of land situate on the west side of Oakland Avenue, extending south 50 feet in width by westerly between parallel lines at that width $62\frac{1}{2}$ feet.

20

6. Your petitioners further say that both of said tracts of land are within a larger plot of land, bounded on the east by Austin Avenue and on the west by Nashville Avenue, and on the north by Atlantic Avenue, and on the south by the Boardwalk, or interior line thereof; all of which property, including petitioners' property and the defendant's property, is subject to the restrictions set forth in the bill of complaint.

30

7. The petitioners further say that they are not aware of any violation of said restrictions imposed by the original owner of said tract of land, and if there had been any violations of said restrictions,

particularly the one prohibiting the erection of any building within six feet of south property line, the petitioners are not aware of it and had no knowledge of it.

Your petitioners therefore pray that they may be admitted as party-complainants, to said bill of complaint.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel
with Petitioners.

10

ORDER.

IN CHANCERY OF NEW JERSEY.

20	Between	KATHERINE A. KEMBLE, <i>Complainant,</i> and NATHAN JOFFE, <i>Defendant.</i>	On Bill, &c. Order.
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30 It appearing that due notice of the intended application for this order has been given: It is on this ninth day of June, 1925, on motion of Bourgeois & Coulomb, solicitors for complainant and petitioner, ordered that Mary Allan Elwood and James Stuart Lowry be and the same are hereby admitted as parties complainant in the above cause.

E. R. WALKER,
C.

Respectfully advised:
R. H. INGERSOLL,
Vice-Chancellor.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between
KATHERINE A. KEMBLE,
et al.,
Complainants,
and
NATHAN JOFFE,
Defendant.)

On Bill for Injunction.
Answer.

10

The defendant, Nathan Joffe, answering the bill of complaint of complainants says: 20

1. He has not knowledge or information sufficient to form a belief as to the allegations of paragraphs one, two, three, four and five.

2. He admits the allegations of paragraph six.

3. He has not knowledge or information sufficient to form a belief as to the allegations of paragraph seven. 30

4. He admits the allegations of paragraphs eight and nine.

5. He admits that it is his purpose to extend said garage so that the south wall thereof will be upon the southerly property line of his lot but denies

that upon completion he will occupy the six-foot of land between the present south wall of his garage and the new south wall thereof in violation of said restrictions for the reason that as hereinafter mentioned, the present south wall of his said garage is within five feet of the southerly property line of his lot.

6. He admits that prior to the filing of the bill of
10 complaint in this cause the complainant, Katherine A. Kemble, remonstrated with him and advised him that he was violating the restrictions mentioned in the said bill of complaint and objected to his erecting said garage in violation thereof and that this defendant stated to said complainant that he was not aware that there were any restrictions preventing him from building to the southerly property line of his lot.

20 7. He is without knowledge or information sufficient to form a belief as to the allegations of paragraph twelve.

8. He denies the allegations of paragraph thirteen.

9. He has not knowledge or information sufficient to form a belief as to the allegations of paragraphs fourteen and fifteen.

30 By way of defense this defendant says:

FIRST DEFENSE.

1. He is the owner of premises, 106 South Oakland Avenue, as alleged in paragraph six of the bill of complaint.

2. That there is erected upon said premises a brick residence of three stories in height; that the said residence was erected, as this defendant is advised and verily believes, by one, John W. Salmons, a building contractor in the summer of 1922 and that coincident with the construction of the said residence, there was built by the said Salmons a one car garage, the south line of which when completed extended to within five feet of the southerly property line of this defendant's lot; that the said garage was not changed in location or structure until on or about May 28, 1925, when defendant commenced, by his agents and servants, the alteration thereof, it being his purpose to tear out the southerly wall thereof and to extend the same to defendant's southerly property line so that the said garage when completed would be sufficiently large to accommodate two automobiles. 10

3. That the complainant, Katherine A. Kemble, 20 for several years resided in the premises, 108 South Oakland Avenue and prior to the filing of the bill of complaint in this cause, said complainant knew that the south line of this defendant's said garage extended to within five feet of his said southerly property line and prior to the commencement of the said alteration she spoke with this defendant about the location of the said garage and objected to further prosecution of the said alteration upon the ground that it was in violation of the restrictions 30 affecting the property.

4. That at the time the order to show cause why a preliminary injunction should not be allowed was served upon this defendant, said alteration had so far progressed that the southerly wall of said garage had been torn out, the foundation for the

new southerly wall upon the south line had been built as had all the other walls necessary to be constructed, to a height of three feet above the ground; that the restrictions mentioned and described in the bill of complaint have been so construed and interpreted as evidenced by the buildings and garages erected upon the said Oakland and Austin Avenues, that the said restrictions have been wholly abandoned so far as said avenues are concerned. More

10 particularly this defendant avers that the building on premises 100 South Oakland Avenue, including the garage thereupon erected, are so constructed that the southerly line thereof extends to within four feet of the southerly line of said property; that the building and garage constructed upon premises 101 South Oakland Avenue are so constructed that the southerly line thereof extends to within four feet of the south line of said property; that the building, including the garage, erected on

20 premises 102 South Austin Avenue, are so constructed that the southerly line thereof extends to within three and three-quarters feet of the south line of the said property; that the building, including the garage, erected upon premises 104 South Austin Avenue, are so constructed that the south line thereof extends to within three feet of the south line of the said property; that the building erected upon premises, 106 South Austin Avenue, is so constructed that the southerly line thereof extends to

30 within five feet of the south line of the said property; and that the building, including the garage erected upon premises, 108 South Austin Avenue, are so constructed that the southerly line thereof extends to within three and one-half feet from the south line of the said property.

SECOND DEFENSE.

Complainants are guilty of laches in that the violations mentioned in the first defense at premises, 101 South Oakland Avenue and 106 South Oakland Avenue, have existed with the knowledge of complainants since the summer of 1922 when the erection of said buildings was completed and that the other violations mentioned in the said first defense have existed with the knowledge of complainants over a period of years unknown to this defendant, wherefore, this defendant avers that the said complainants have acquiesced in the said violations and are thereby precluded from enforcing the said restrictions. 10

THIRD DEFENSE.

The said restrictions as set forth in the bill of complaint do not apply to the erection of garages. 20

BABCOCK & CHAMPION,
Solicitors for Defendant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

10

Between

KATHERINE A. KEMBLE,

et al.,

Complainants,

and

NATHAN JOFFE,

Defendant.)

On Bill for Injunction.

Replication.

20

The complainants join issue on the answer of the defendants filed herein.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel
with Complainants.

30

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
KATHERINE A. KEMBLE,
Complainant,
and
NATHAN JOFFE,
Defendant. } On Bill, &c. 10
Final Hearing.

Atlantic City, N. J., December 2, 1925.

TESTIMONY

Before HON. ROBERT H. INGERSOLL, Vice-Chancellor. 20

APPEARANCES:

For complainant: MESSRS. BOURGEOIS & COULOMB.

For defendant: MESSRS. BABCOCK & CHAMPION.

JAY C. KLINE, sworn for complainant.

Direct examination. 30

By Mr. Coulomb:

Q. You are connected with the South Jersey Title Company?

A. Yes, sir.

Q. In what capacity?

A. Assistant secretary.

Q. Have you with you the files from the title company which show the title to the tract of land between Nashville Avenue and Austin Avenue and Atlantic Avenue and the beach?

A. Yes; as used by this company.

Q. Going back, the title originally was in Crossan, wasn't it?

10 A. Kennedy Crossan.

Q. Can you tell us how many deeds he made for the lands lying between the restricted area mentioned?

A. Mr. Coulomb, you didn't prepare me on that. If you will bear with me a few minutes I can tell you. It would appear that Kennedy Crossan owned the entire block of ground between Austin Avenue, Nashville Avenue, Atlantic Avenue and the Atlantic Ocean, and then he opened a street and called it

20 Oakland Avenue.

Q. Where was that street opened?

A. Midway—or between Nashville and Austin Avenue. Whether it be midway or not I am not prepared to say. I don't have a map here before me, but I think it is about the center of the tract. Then he proceeded to sell off lots, and, according to our file, his first conveyance was on June fourteenth, 1911, recorded in Deed Book 457, page 486, to one Joseph M. Reber, four lots of land in which were

30 imposed this general scheme of restriction.

Q. Will you read those restrictions, please?

A. Following that were ten subsequent deeds to different grantees of record which conveyed a portion of the land and each deed imposing the same scheme of restriction. Do you wish me to read the restrictions?

Q. If you please.

A. "Under and subject, however, to the following conditions and restrictions which shall be binding upon both the grantor and grantees, their heirs, executors, administrators and assigns, which conditions and restrictions shall be inserted in every deed granting and conveying any part of the lands of the City of Ventnor City, New Jersey, lying between Nashville Avenue and Oakland Avenue and between Oakland Avenue and Austin Avenue and bounded on the north by the south line of Atlantic Avenue 10 and on the south by the interior or inland line of the city park for Boardwalk and other purposes. Said Oakland Avenue being a public highway fifty feet wide located midway between said Nashville and Austin Avenues and extending from Atlantic Avenue to the interior line established by the riparian commissioners of the State of New Jersey. One: that every lot shall have a frontage upon either Nashville, Oakland or Austin Avenues of at least fifty feet, with a depth at right angles thereto 20 of sixty-two and one-half feet. Two: That no portion of any building shall be erected nearer than fifteen feet of the front property line of Nashville or Oakland or Austin Avenues, bay windows and porches excepted, nor nearer than six of the south side property line of any lot, nor nearer than five feet of the rear line of any lot. Provided, however, that the owner of two or more contiguous lots may erect a building or buildings on any portion of said lots without regard to the intervening line or lines, 30 in which case such lots shall be considered as single lots. Provided, further, that said building or buildings so erected shall not be erected nearer than fifteen feet of the front property line as aforesaid. Provided, however, that bay windows may extend over said restricted line, but not nearer than three feet of the south side property line, nor nearer than

- twelve feet of the above mentioned front property line, and that no porch shall extend nearer than five feet of the said front property line nor nearer than two feet of the south side property line. Three: That no building or buildings shall be erected upon any lot or lots aforesaid except only a single dwelling house to be used for private residence purposes, and provided, however, that a garage to be used for private purposes in connection with such private residence is not prohibited, and that no building except private garage erected on any said lot or lots shall cost less than four thousand dollars, and that there shall not be erected on any of said lots any outside privy, stable or other outbuilding. Four: That no spirituous, malt, intoxicating or vinous liquors shall be sold on the above mentioned lots. Five: It being expressly understood and agreed that the said several covenants shall attach to and run with the land and it shall be lawful not only for the party of the first part, their heirs and assigns, but also for the owner or owners of any such lot or lots hereinabove mentioned, deriving title by, from or through the party of the first part, their heirs and assigns, to institute and prosecute any proceedings at law or in equity against any person violating such covenants, conditions or restrictions, the object of the above covenants being to create a general building scheme to secure the health, beauty and ornamentation of the above designated lots.”
- 30 Q. Is that all of the restrictions?
A. That is all of the restrictions.
Q. Are those restrictions contained in all of the deeds you have mentioned made by Mr. Crossan?
A. That same scheme of restrictions is inserted in every subsequent deed I alluded to first.
Q. Will you produce, please, the abstract of the deed for the property located on the west side of

Oakland Avenue beginning one hundred and fifty feet south of Atlantic Avenue and extending south fifty feet by west sixty-two and one-half?

A. Do you happen to have the reference to the book and page there?

Q. No, I have not.

A. All right. I will find it in a minute.

Mr. Champion: It is admitted by the answer that Mr. Joffe owns the property alleged in the bill. 10

Mr. Coulomb: Can you give me the deed for that?

Mr. Champion: No.

A. West line of Oakland Avenue one hundred and fifty feet south of Atlantic Avenue?

Q. Yes. The title is in Mr. Joffe.

A. I suppose you want the original Crossan deed now. 20

Q. Yes.

A. In this particular case it was apparently made by the heirs of Kennedy Crossan, he having apparently died. It was made by the executors and trustees. It was made to one James S. Taylor, dated September nineteenth, 1912, and recorded in Deed Book 499, page 17, and is made by Martha A. Crossan, Clarence K. Crossan, Arthur B. Crossan, Minerva Weston Crossan and Myrtle T. Crossan, executors and trustees under and by virtue of the last will and testament of Kennedy Crossan, late of Philadelphia, and Martha A. Crossan, widow. 30

Q. Does that contain the restrictions?

A. It covers from the west line of Oakland Avenue fifty feet south from the southwest corner of Oakland and Atlantic Avenues; then south along Oakland Avenue, parallel with and a distance of

one hundred and twenty-five feet at right angles from Nashville Avenue, one hundred and fifty feet. That carries to a point two hundred feet from Atlantic Avenue, which would include this lot. It begins fifty feet south and runs south one hundred and fifty feet. Does that include this lot?

Q. Yes. Does that deed to Taylor contain the restrictions?

A. That deed contains these restrictions.

10 Q. Contains the restrictions you read a few minutes ago?

A. Yes.

Q. What was the conveyance out of Taylor?

A. This file is apparently out on current work in our office.

Q. Have you the deed to Joffe?

A. Yes. Deed to Nathan Joffe dated November twentieth, 1922, recorded in Deed Book 695, page 152.

20 Q. Made by whom?

A. Made by one Alma G. Collins and Joseph M., her husband, but I take notice here subsequently there seems to be a foreclosure, a sheriff's deed as late as 1924.

Q. In the deed from Collins to Joffe is there any mention made as to restrictions?

A. "Subject to existing restrictions." That is the only reference.

30 Cross-examination.

By Mr. Champion:

Q. Mr. Kline, calling your attention to the deed by Crossan and others to Taylor, I notice that the word "restrictions" appears at the conclusion of the description. Did you make any comparison of

the restrictions in this deed with the restrictions in the original deed to which you referred?

A. The actual word for word comparison?

Q. Yes.

A. Not specifically in this case. That is the general conduct of our office. Those restrictions there are compared by our office force with the original restrictions before that word is put on there. Nothing specific in this particular case.

Q. You think before the use of the word “re- 10
restrictions” was made in this abstract that there had been a comparison with the original restrictions?

A. Oh, yes.

Q. Did you make any examination, Mr. Kline, with respect to any of the other lots on either Oakland Avenue or Austin Avenue to see whether they were sold subject to these restrictions?

A. Not in this particular case, Mr. Champion. I was called in at two minutes of ten, practically, on this case, and I am simply giving you the informa- 20
tion as called for. I have it here.

Q. That is only with respect to these specific cases you have referred to?

A. Just what you have asked me, yes.

Q. Therefore, the only restriction which you have personally examined was the restriction in the deed which you first mentioned as being the first conveyance?

A. The restriction I read here in full was the original restriction imposed in the first deed out of 30
Crossan. In the process of our office, each subsequent deed, instead of each time putting in these lengthy restrictions, they are compared and then simply the word “restrictions” is put on the subsequent deeds.

Q. My question was the only restriction which you examined was the one which was imposed in

the first conveyance, which you personally examined.

A. That is right.

Re-direct examination.

By Mr. Coulomb:

Q. I understood you to say, Mr. Kline, that there were ten or eleven or twelve deeds out of Crossan, and they all contained these restrictions.

10 A. Mr. Coulomb, that is correct, but Mr. Champion made a pointed remark to me. He asked me did I personally examine each one of these restrictions.

Mr. Coulomb: If there is any doubt about the correctness of these records—we have been using them almost from time immemorial and they have always been accepted as correct. I had assumed it would be so in this case, particularly so since Mr. Babcock very likely relies on them himself in passing titles when they are put up to him, as I know we did when we represented the title company. If there is any doubt about it I am going to ask your Honor for a continuance and will produce the records here.

20 Mr. Babcock: We are willing to take secondary proof. We have no objection to it. There is no objection to the form of proof, secondary or otherwise. What it shows, of course, is something else.

Q. Mr. Kline, I am going to ask you—I don't know whether you have had an opportunity of examining that particular thing—I am going to ask the Court's permission to have Mr. Kline withdraw from the stand for a few minutes until he examines it. Will you examine and see whether those ten or twelve deeds include all of the land which lies within the boundaries of Nashville, Austin and Atlantic Avenues to the Atlantic Ocean?

30 A. Yes.

KATHERINE A. KEMBLE, the complainant, sworn.

Direct examination.

By Mr. Coulomb:

Q. Mrs. Kemble, I show you a deed from Frances C. Coryell and husband to yourself dated October fourteenth, 1918, and ask you if that is the deed 10
whereby you became the owner of property situated 108 South Oakland Avenue?

A. Yes, that is the deed.

(Paper offered in evidence and marked Exhibit C1.)

Mr. Coulomb: The deed which has been marked Exhibit C1 conveys premises beginning in the west-
erly line of Oakland Avenue fifty feet wide, two hun- 20
dred feet southwardly from the southwest corner
of Oakland and Atlantic Avenues, and extending
thence southwardly along said line of Oakland Ave-
nue, the same being parallel with and one hundred
and twenty-five feet eastwardly at right angles from
Nashville Avenue, fifty feet, and thence westwardly
parallel with Atlantic Avenue sixty-two and one-
half feet; thence northwardly parallel with Oak-
land Avenue, fifty feet; and thence eastwardly,
parallel with Atlantic Avenue, sixty-two and one- 30
half feet to the place of beginning.

Q. I show you another deed, Mrs. Kemble, from Kennedy Crossan and wife to Frances C. Bellman. Do you know who Frances C. Bellman is?

A. Yes. She is now Mrs. Coryell.

Q. How did you come to have the deed from Crossan to Bellman?

A. They gave it to me when I bought the house.

Q. Have you had it in your possession ever since?

A. Yes, sir. It has been in my possession until I gave it to you.

(Deed offered in evidence and marked Exhibit C2.)

10 Mr. Coulomb: The deed, Exhibit C2, conveys the same tract of land as C1, and I will not read into the record the description contained in that deed, with your Honor's permission.

Q. How long have you resided at 108 South Oakland Avenue?

A. I think it is seven years last September since I bought the house.

Q. Was the house on the lot at the time you purchased, or did you build the house?

A. The house was there.

20 Q. And you have lived in it ever since?

A. I have lived in it from time to time, Mr. Coulomb. I have rented the house every summer and for a period of three years I rented the house to Mr. Bacharach. I was away from there for three years.

Q. When you purchased the property were there any houses or improvements on the lot adjoining you to the north, that is, between your house and Atlantic Avenue?

30 A. No, none whatever.

Q. Do you recall when those houses were built there?

A. They were built during the time that the house was rented to Mr. Bacharach, while I was away. That was during a period of, I should judge, about five years ago, and then on three years. I have been back in the house about two years.

Q. Since you have resided in the house since the time you leased it to Mr. Bacharach for a period of three years were the improvements there or were they put on the lots adjoining you, or were they put there before?

A. They were put there during the period that Mr. Bacharach lived in the house.

Q. And you know Mr. Joffe?

A. I know Mr. Joffe, yes.

Q. It has been shown here that he owns the lot 10 adjoining yours on the north immediately adjoining yours.

A. Yes.

Q. Was the house there when you came back into your property?

A. It was.

Q. Was there a garage attached to that house?

A. Yes.

Q. On what side of the house was the garage?

A. On the south side.

20

Q. How near did it extend to your line, your north line?

A. Well, so far as I can say, I should think within a couple of yards.

Q. About six feet?

A. About six feet. I couldn't say accurately.

Q. What sort of a garage was it?

A. Just a very plain brick garage.

Q. Was it attached to the house?

A. Attached to Mr. Joffe's house.

30

Q. How many cars did it hold?

A. One.

Q. Did it in any wise interfere with light or air in your house or in the basement of your house?

A. As it was?

Q. As it was.

A. Yes. It darkened my basement.

Q. No. As it was.

A. Well, yes, it darkened it slightly. Not to the extent that it does today, of course.

Q. Was it the house that darkened it or was it the garage that darkened it?

A. Well, both, I would say.

Q. Is the garage the same now as it was —

A. Pardon me just a moment. You must realize that the house was open all the way to Atlantic
10 Avenue prior to that.

Q. I understand that. That is the reason I am asking you whether it was the house that darkened it or whether it was the garage that darkened it. Is that garage at the present time the way it was when you moved back into your house?

A. No.

Q. What has been done to it?

A. It has been extended right on to what I would consider my line. I couldn't say accurately, but I
20 would say right up to the line.

Q. What is the character of the garage? Of what material is it built?

A. Brick.

Q. What sort of a roof has it? Has it got a peaked roof or flat roof?

A. Flat roof.

Q. Is there any guard or rail around the roof?

A. There is a rail around it.

Q. What is the top of that rail?

A. Wooden.
30

Q. Has the garage been lengthened as well as extended?

A. That I couldn't say. Not to my knowledge.

Q. What did they do with it when they started to extend this garage? What was the first thing they did as far as you observed?

A. Why, I went home from business one night about six o'clock and there was a trench dug along for concrete. I can't say whether it was filled with concrete or not, but there was a trench there, and wood.

Q. Where was the trench?

A. Right along the line, the dividing line.

Q. Of your lot?

A. Yes.

Q. What had been done, if anything, to the garage 10
itself as it then was?

A. The wall had been partly torn down.

Q. Which wall?

A. The south wall of the garage.

Q. Had any trenches been dug for concrete or otherwise at right angles to your line? That is, from the old line, the front and rear line of the garage, was there a newly dug trench that you just spoke of?

A. I couldn't say. I simply noticed the one on 20
the dividing line.

Q. What did you do when you saw the condition?

A. Why, I immediately called up Mr. Coulomb, yourself.

Q. Do you remember whether or not any proceedings were had to prevent him from proceeding further?

A. Yes, Mr. Coulomb. The next morning, before I went to business, I informed Mr. Joffe that he was violating the restrictions. I did that myself. 30

Q. And subsequently do you know whether there were any proceedings taken in this court to stop him?

A. Yes.

Q. Did he proceed immediately with the erection of the garage or did he wait for a few days?

A. They waited for a few days. There was some—there were men working around there, but they stopped after the injunction—is that it—was declared.

Q. Then after the injunction was raised, the preliminary injunction was raised, did they continue to complete the garage?

A. They must have continued, because when I went back in the fall the garage was completed. I
10 was away during the summer.

Q. Now, in its present condition what effect has that garage on your property?

A. In the first place, it is unsightly; in the second place, it darkens my basement very, very much. In fact, to the extent that we have to put on electric lights to go down the stairway from the living floor to the basement, and we have to light our basement to see even in the day time, even on a very bright day. We can't see either in the sitting room of the
20 basement or in the heater room, and the stairway is very dark.

Q. Was that so before this garage was extended to your side line?

A. No.

Q. Did you ever make any effort to have a garage built for your own use?

A. Yes, I did.

Q. Was there a contract let, do you know?

A. Yes.

30 Q. What did you find out when you came to start the work?

A. Mr. Thompson contracted to build a garage for me.

Q. Where was it to be put?

A. On the south side of my house. Before he would proceed with it he came to me and he said, "Mrs. Kemble, I would like to see your deed." I

showed them to him and he said, "You can not put this garage up; you haven't room."

Q. Did you put a garage there?

A. I did not.

Q. Is there any garage there?

A. There is no garage on my property whatever. I might say personally I didn't need one, but it would add to my property in the renting season.

Q. Is that the occasion of your making some effort to learn whether you could put a garage there? 10

A. That was it, absolutely.

Cross-examination.

By Mr. Champion:

Q. When did you first ascertain that there were restrictions imposed against your property?

A. Oh, I knew there were restrictions when I bought the property. I wouldn't buy a property 20 without inquiring into the restrictions.

Q. Had you read the restrictions over at the time you purchased the property?

A. Oh, yes, most assuredly.

Q. The restrictions were not contained in your deed, were they?

A. The restrictions are contained in the land deed.

Q. In the which deed?

A. In the land deed.

30

Q. That is the deed which preceded yours in the chain of title?

A. I couldn't know whether it preceded mine or not. That is something with which I am not familiar.

Q. As I understood you, you rented your house to the Bacharachs for a period of about three years?

A. Yes.

Q. Can you say just what three years they were?

A. Yes. I have been back in the house two years, two years last September, and it was prior—from the May preceding that September two years ago back a period of three years in February. In other words, that would mean six years next February, would it not?

Q. Yes. That would be about 1920?

A. Yes. I think it was 1919, 1920, 1921 and 1922.

10 And 1923, I guess.

Q. And you think in the interim between the time you rented your property to the Bacharachs and the time that you came back, the building to the northwardly of you was constructed?

A. Yes. Not only that building, but three other buildings between me and Atlantic Avenue. All those houses were built during the period that I was away.

20 Q. As a matter of fact, do you know that the building of Mr. Joffe was built about in the summer of 1922?

A. Well, it might have been. I couldn't tell you just when it was built.

Q. When you returned, did you make any examination of the building and of the garage that was then presently erected?

A. No, I made no examination.

Q. You saw it there, didn't you?

A. Yes.

30 Q. Had you the restrictions in mind when you saw the building and the garage there?

A. No.

Q. Didn't you think it was important for you at that time to examine and ascertain if this garage was built in conformity with your interpretation of the restrictions?

A. No.

Q. So that you didn't know, as a matter of fact, that the garage of Mr. Joffe was built to within five feet of the southerly line of his property?

A. I did not.

Q. When did you first find that out?

A. I have never found it out, that it was just five feet.

Q. What did you think it was?

A. Six.

Q. You never measured it, did you?

A. I never measured it.

10

Q. I understood you to say that the garage as constructed prior to the alteration darkened your house?

A. Slightly.

Q. What part of the house did you reside in?

A. We resided all over the house.

Q. Did you use the basement for residential purposes?

A. Of course we did.

Q. Using that now, are you?

20

A. Yes. We have a very nice sitting room in our basement.

Q. As a matter of fact, the garage as it is constructed at the present time, the roof is just about level with your first floor, isn't it?

A. It is higher than my first floor.

Q. It doesn't interfere with your first floor, though, does it, with respect to darkening the rooms on the first floor?

A. Well, no. It doesn't make it lighter, though.

30

Q. It only interferes with the basement?

A. It interferes very decidedly with the basement, making my kitchen stairway, the stairway from my first floor down, which is an open stairway, dark and really very dangerous. You must light an electric light or you cannot go up and down those stairs.

Q. How far had the work with the alteration progressed when you first noticed it?

A. Well, the day that they began that garage, when I went home from my business at six o'clock there was this trench along the side of the house, you know, alongside of the lot.

Q. You knew then, did you, that Mr. Joffe owned the property?

A. Oh, yes; I had known prior to that, of course,
10 that Mr. Joffe owned the property.

Q. Did you say anything to him when you first observed it?

A. I didn't. I spoke to Mr. Coulomb first.

Q. Then when was it you spoke to Mr. Joffe?

A. I spoke to Mr. Joffe the next morning about eight-thirty.

Q. What conversation did you have with him?

A. Had a conversation to the effect that Mr. Joffe had absolutely no right to build on that line, and I
20 warned him not to proceed.

Q. What did Mr. Joffe say?

A. I don't just remember what he said. He said he was unaware that there was any restriction or something to that effect.

Q. Said he was not aware of any restrictions?

A. Yes.

Q. Had you observed any of the other properties, Mrs. Kemble, on Oakland Avenue or on Austin Avenue, as to whether or not they conformed to
30 these restrictions prior to the time that Mr. Joffe started his alteration?
02

A. No. It never occurred to me to examine them. Of course, when I went back to my house I was somewhat indignant at the nature of the houses built between Atlantic Avenue and my property. They were much smaller and much—well, not such attractive properties as mine, and naturally one has

a feeling of resentment against houses that are in a measure inferior. Naturally, my house was built as an investment, and I am wide-awake to anything that I think lessens the valuation of the neighborhood.

Q. Well, having that in mind, did you have the restrictions before you at all?

A. No.

Q. And did you examine any of the properties with respect to ascertaining if the restrictions had been violated in the construction of them? 10

A. No.

Q. Do you recall whether or not you thought about the restrictions at that time?

A. When I went back?

Q. Yes, when you went back and saw these houses had been erected.

A. No, I don't recall that I did.

Q. What brought the restrictions to your mind when you saw that Mr. Joffe had started to make the alteration in his garage? 20

A. The very fact that I had wanted to put a garage up myself for the convenience of any tenant that I might rent to, which would give me a better rental for my house, and the fact that Mr. Thompson called my attention to the fact that I could not build a garage without infringing upon my neighbors' rights.

Q. When was it that you wanted to put up a garage there?

A. I think, as nearly as I can recall, it was March or February of 1924. It was during the Lenten season at some time or other of that year. That I am very confident of. 30

Q. That was after the property of Mr. Joffe had been constructed, wasn't it?

A. Oh, yes.

Q. Who mentioned the restrictions first, you or Mr. Thompson?

A. Mr. Thompson.

Q. What did he say to you with respect to the restrictions?

10 A. He said to me, "Mrs. Kemble, let me see your deed," and my mother went down to the bank and got the deeds out of the deposit box for me and brought them back and I read them over and he read them over and he said, "You haven't room to put this garage. If you do, you would infringe on your neighbors' rights and you might have to take it down." "Well," I said, "we won't build it, because we don't want to infringe upon anybody's rights."

Q. Had you had any plans prepared for the erection of the garage?

A. Yes.

Q. Who prepared them?

20 A. Mr. Thompson. I think he had even a permit. I am not sure about that.

Q. Whereabouts on your property had you proposed to place the garage?

A. On the south side.

Q. How near would the southerly wall of the garage be to the southerly line of your property when erected?

30 A. That I couldn't say. I would have to see the plans to tell you that. I can't remember. I know we were saying five feet away from the southerly line. I do know that, but I couldn't tell you what the rest of it was. I know we wanted to put up a garage large enough to take a high type car, a large car, because the only people who rent my house want a garage that will take a good sized car.

Q. Can you say how much space there is between the southerly wall of your main building to the southerly line of your property?

A. I could not say.

Q. But you think it would be at least five feet away from the southerly line? You think you discussed that with Mr. Thompson?

A. No. Five feet away from the dividing line between Mr. Coulomb and myself, from the two back lines.

Q. That would be the southerly line? Does Mr. Coulomb adjoin you on the south?

A. No, that wouldn't be the southerly line. The 10 southerly line is the ocean line. The westerly line, not southerly.

Q. What number is Mr. Coulomb's property?

A. I presume it is 108, isn't it?

Mr. Coulomb: I am 109 South Nashville Avenue.

The Court: The rear of these two lots are together.

20

Q. At the time you talked with Mr. Thompson about erecting your garage you had in mind that you could build to within five feet of the southerly line?

A. No, of the back line. The westerly line.

Q. You had in mind that you could build within five feet of the westerly line?

A. Yes.

Q. And how near to the southerly line?

A. Why, to the best of my knowledge now, I 30 thought—without reading my deed I thought I could come within three feet of my southerly line, and that was the question that he and I talked about. I did not recall or remember accurately the restrictions.

Q. Well, can you say, Mrs. Kemble, from where you received the impression that you could go to

within three feet of the southerly line with your garage?

A. I had just a general impression because most places that they run along the side of the house is three feet and I thought it had to be three feet on each side of the line, don't you see, instead of six feet on the southerly side. I just got an idea roughly that it was three feet.

10 Q. Isn't it a fact that you received that impression from having observed the other garages in the immediate neighborhood?

A. Most decidedly not.

Q. Had you observed the other garages?

A. I had not.

Q. You had observed none of them?

A. Oh, yes, I had observed the houses, of course.

Q. I am speaking now about the garages.

A. No, I had not observed the distances.

20 Q. Were you familiar with the property on the corner of Atlantic and Oakland, 100 South Oakland?

A. Yes, I am familiar with that.

Q. Do I understand that you pass and repass that every day going to and from your business?

A. No, I don't every day, because I usually go by way of the Boardwalk. I walk to business and at night when I come home, I frequently come home in a car. I don't pass that as much as you would think I would, living on the street.

30 Q. And you never observed the brick garage at 100 South Oakland?

A. Yes, I had observed it, but I had never estimated the distance of it. In the first place, the house on the corner is kept very nicely. They have a very nice garden, very nice yard around it, and a good deal of shrubbery, and the garage isn't as much in evidence as the other garages are, because the garden is kept so nicely and there is a good

deal of shrubbery and it sets back a good deal and one wouldn't observe it so much.

Q. You can't tell me from just where you received the impression you could build within three feet of the southerly line?

A. Just as I told you, from the pavement business at the side of the house, which is three feet wide, the asphalt that runs back, the concrete that runs back to the back of the lot, and I thought that I had to stay three feet from that. I just had a 10
general idea that I did.

Q. So that when you had that impression you didn't have the restrictions in mind?

A. Well, in a way I had the restrictions in mind. I wouldn't have had any impression on the three feet if I hadn't had the restrictions in mind. I knew it was restricted property. I wouldn't have bought it if it hadn't been.

Q. If you knew the restriction was six feet —

A. No, but I did not know absolutely that it was 20
six feet. I didn't remember that.

Q. When did you first find that out?

A. When this deed which is right here before me was brought to me by my mother from the bank for me to see.

Q. When was that?

A. That was sometime during the spring of 1924.

Q. When Mr. Thompson was about to build a garage for you?

A. When Mr. Thompson was about to build a 30
garage for me. I have Mr. Thompson's contract if you would like to see it.

Q. I think I should like to see that, Mrs. Kemble.

(Paper produced by witness.)

Q. You produce a paper signed by Charles D. Thompson, dated March thirty-first, 1924. Does that refresh your memory with respect to the date?

A. Well, it was somewhere around that period, yes. Around that time.

Q. You haven't the plans which accompanied this contract, have you, with you?

A. I think I have, but I can't be sure.

Q. Will you produce those plans?

10 A. If I have them.

Q. Will you make an examination to see if you have them and then if you have them, give them to Mr. Coulomb and he will produce them?

A. I will. It is possible Mr. Thompson may have them.

Mr. Coulomb: I will produce them and I am willing they shall go in evidence if you want them in evidence.

20

Mr. Champion: I should like to have them.

Mr. Coulomb: So we will not have to keep the case open to have them brought in. I offer this proposal or whatever it is of Mr. Thompson's.

(Paper marked Exhibit C3.)

30

Q. Mrs. Kemble, prior to the alteration of Mr. Joffe's garage, did you or any of your servants walk upon Mr. Joffe's property in going to your rear steps?

Mr. Coulomb: That is objected to as being immaterial and irrelevant.

The Court: The only ground on which the testimony could be received, as I see it, would be on the question of testing the credibility of this witness. I think I shall permit it.

(Question repeated.)

A. I never did, but the trades people may have. My servants never did.

Q. Do you know whether your trades people did 10 or not, Mrs. Kemble?

A. They may have done it. I couldn't tell you. I am rarely there when the trades people come. I go to business from nine to six every day, so you know I am not around very much to see whether trades people deliver my goods walking across Mr. Joffe's property or across Mr. Coulomb's property or across Dr. Hare's. It is impossible for me to tell you that.

Q. Your rear steps extend to within very close, 20 do they not, of Mr. Joffe's line?

A. They do. The steps are as they were when I bought my house.

Q. And those steps come out sideways towards Mr. Joffe's property?

A. Well, it is the back porch step.

Q. When Mr. Joffe made the alteration and erected his garage at his southerly line, that prohibited the use by the trades people, did it not?

A. Oh, no. You can walk right along the side of 30 the house and go right up those steps. You have to run under them, but you can use that part of the house.

Q. There is plenty of room there, is there?

A. Plenty of room. I much prefer people to use the other side of my house, but it doesn't make a particle of difference.

Q. I suppose you did ascertain at some time, did you not, that there were other violations of these restrictions on Oakland Avenue and Austin Avenue?

A. I did not.

Q. You know it now, do you not?

A. I do not.

Q. You do not know it now?

A. I do not. I have never measured any of the
10 garages whatever.

Q. Since this case was first started haven't you made any observation to ascertain if the garages were erected, in your judgment, nearer than six feet of property lines, southwardly property lines?

A. Do you mean have I personally ever gone and examined them?

Q. When you walked by didn't you look to see?

A. You mean did I ever look to see if they were actually anywhere from six feet or less?

20 Q. Yes.

A. Yes. I noticed that the one at the corner seems to be very much nearer than any of the others.

Q. When did you notice that?

A. Quite recently.

Q. But you didn't notice it until after you started your injunction suit against Mr. Joffe?

A. Oh, no.

30 Re-direct examination.

By Mr. Coulomb:

Q. Do you know how near any of these garages come to the side line?

A. Mr. Coulomb, I couldn't tell you.

Q. I mean in actual measurements.

A. I do not know the measurements of any of them. I am not familiar with the measurements of any of them.

Q. Are they considerably away from the side line?

A. Apparently, yes.

Q. They are not right up along the side line, are they?

A. There isn't any of them along the side line, no. They are all of them, I should say—well, over 10 a yard or more away. Maybe two yards, for all I know.

Mr. Coulomb: Mr. Rightmire has made a plan of the lots within this restricted area under discussion and Mr. Champion has agreed that it shall be admitted as showing the situation without calling Mr. Rightmire.

(Paper marked Exhibit C4.)

20

JAY C. KLINE, recalled.

Direct examination.

By Mr. Coulomb:

Q. Mr. Kline, have you examined the deeds and abstracts produced for the purpose of determining 30 whether or not Mr. Crossan or the Crossan estate has disposed of all of the lands between Austin and Nashville Avenues and Atlantic Avenue and the beach, and whether the restrictions were on all of the lots?

A. It would seem, upon examination of the abstracts, that of the entire block, all of the lands

have been conveyed by Crossan during his lifetime or by the Crossan heirs, except two beachfront lots lying between Oakland Avenue and Nashville Avenue, which by deduction would seem from our abstracts that those two lots much still be in the estate of Kennedy Crossan. Of the twenty-four lots conveyed, the original deed out of Kennedy Crossan or his heirs conveyed subject to the restrictions.

Q. Subject to the restrictions which you read a
10 few minutes ago?

A. Yes.

Cross-examination.

By Mr. Champion:

Q. Mr. Kline, can you say from the investigation which you have made, whether the descriptions refer to maps, a map of this tract?

20 A. Kennedy Crossan—the first deed conveyed by him was in June of 1911. In that deed there is no reference to any map.

Q. Mr. Kline, was that the deed which conveyed to Taylor?

30 A. No. I am just speaking from the earliest deed now and looking forward. As I follow it here, all through the year 1911 there was no reference to any map. Going to the year 1912 there appears to be no reference to a map. The deed to Taylor was made in September, 1912, with no reference to map. As late as 1916, no reference to map. In July of 1921, by the Crossan heirs to one Alma G. Collins is the first reference to a map, and after tract number one in said deed it recites "Being lot number one in block eleven, Section A, upon a map of beach front building lots made by E. D. Right-

mire, survey dated June, 1908." That is apparently the first reference to a map.

Q. Can you tell us where that lot began and how much was conveyed?

A. This particular tract began at the southeast corner of Oakland and Atlantic Avenue. That same deed also conveyed the southwest corner of Austin and Atlantic by reference to lot and block on the same map.

Q. How much land was conveyed on Oakland Avenue?

A. How much land?

Q. Yes.

A. The two corner lots; fifty feet.

Q. Two corner lots of fifty feet?

A. Corner lot of Oakland Avenue, fifty feet on Oakland, and corner lot on Austin Avenue, fifty feet on Austin. A deed made in December, 1921, the same year, again referred to lot and block and map. That deed conveyed the two corners, one at Nashville Avenue and Atlantic and the other at Oakland Avenue and Atlantic.

Q. And that referred, you say, to a map?

A. By lot, block and map.

Mr. Coulomb: What was the size of those two lots?

The Witness: Fifty by sixty-two and a half.

Q. They were all the lots, weren't they, conveyed by lot and block number?

A. Those four. Those corner lots were apparently the only lots sold by lot and block numbers.

COMPLAINANT RESTS.

DEFENDANT'S TESTIMONY.

JOHN W. SALMON, sworn for the defendant.

Direct examination.

By Mr. Champion:

- 10 Q. Mr. Salmon, what is your business?
A. Building; real estate.
Q. How long have you been a builder?
A. Fourteen years, about.
Q. Are you familiar with property at Nashville, Oakland and Austin Avenues between Atlantic Avenue and the Boardwalk?
A. I am.
Q. In your capacity as builder, did you erect any of the buildings on Oakland or Austin Avenues?
20 A. I erected five on Oakland Avenue.
Q. Which five did you erect?
A. The one on the southeast corner of Oakland and Atlantic, and four beginning at Atlantic and going down toward the ocean.
Q. Can you recall the numbers of them?
A. 100, 102, 104, 106 on the west side and 101 on the east side.
Q. Did you construct any on Austin Avenue?
A. I did not.
30 Q. At the time of the construction who owned the properties, if you know?
A. That I built on?
Q. Yes.
A. I took the properties in my daughter's name.
Q. What was your daughter's name?
A. Alma G. Collins.
Q. At the time of the construction of the buildings were you familiar with these restrictions?

A. I read the restrictions, yes.

Q. What interpretation did you place upon the restrictions respecting the erection of garages?

Mr. Coulomb: That is objected to as irrelevant and immaterial.

(Objection sustained.)

Q. At the time you constructed the buildings, Mr. 10
Salmon, had you made any observation of other
properties either on Oakland Avenue or Austin
Avenue —

A. Yes.

Q. — to ascertain as to whether or not there
had been any violation of the restrictions?

A. I had.

Q. What did you find?

A. Well, I found that the garages extended fur- 20
ther than the house line was permitted in the re-
striction.

Mr. Coulomb: I ask that be stricken out. It is
not responsive. He was asked what he found. He
is now telling what he found with respect to his
interpretation of the restrictions.

The Court: What do you mean by the latter
part of that clause as to the distance? What dis-
tance were you considering? 30

The Witness: Six feet.

The Court: I will permit it to remain.

Q. Can you state, Mr. Salmon, as to what par-
ticular properties you had observed before you con-
structed the properties you say you did construct?

A. Well, the properties on Austin Avenue. I don't think there were any on Oakland, if I remember.

Q. Did you keep any record of your examination at all?

A. Not at that time, no.

Q. Over how long a period of time were you in the construction of these buildings that you have mentioned?

10 A. These buildings? I began on November first, 1920, and, if I remember correctly, I finished about—well, maybe along July or August of the next year.

Q. That would be 1921?

A. Yes. If I remember correctly as to the year. I don't remember whether it was 1921 or 1922. I haven't looked that matter up recently.

Q. During the time that they were under construction were there any objections or protests made
20 to you that you were erecting them in violation of restrictions?

A. None whatever.

Q. Do you recall if, during the time of construction, you saw Mrs. Kemble, one of the complainants here, around the premises 108 South Oakland?

A. No, I don't recall ever having seen Mrs. Kemble before.

Q. Directing your attention to property 100 South Oakland Avenue, have you made an examination of that property recently?
30

A. Yes.

Q. When?

A. During the summer. I made an examination of it during the summer, but I know from when I built the building about what the conditions were.

Q. Is the building in the same condition, prac-

tically, now, that it was at the time you constructed it?

A. I don't think it has been changed any on the south side.

Q. What kind of a garage is erected there, Mr. Salmon?

A. A brick garage.

Q. Just a garage alone?

A. No. There is a room over the top of it, sun porch and room.

10

Q. What kind of a room?

A. Well, it could be used for a sleeping room. It has a bath in it.

Q. It has a bath with it?

A. Yes, bath and a closet, or it did have when I finished it.

Q. Can you give us any idea as to the size of that room?

A. It is ten feet wide by twenty feet long on the outside.

20

Q. Was that room built above the garage for purposes of occupation by a person?

A. Yes, of course.

Q. Directing your attention now to premises 101 South Oakland, did you also examine that property?

A. Yes.

Q. Can you say whether or not there is an apartment above the brick garage?

A. There is. Just the same, about.

30

Q. The same, about, as in 100?

A. Yes.

Q. Directing your attention now to premises 108 South Austin Avenue, did you examine that property at the same time?

A. Yes. I went down there and looked at those again at that time.

Q. What have you to say as to whether or not there is an apartment above that garage?

A. Well, now, I wouldn't be positive about the number. You say 108?

Q. 108 South Austin.

A. I know there is one there that has an apartment over it, I am sure of that, but I wouldn't say whether it is 108 or 106. I don't just recall that particular matter.

10 Q. Can you say, Mr. Salmon, from your examination of Mr. Joffe's garage, how near the southerly wall of the garage extended to within the southerly line of the property prior to the alteration?

A. Well, I built it for five feet. I intended to leave five feet.

Q. Well, did you make a measurement to ascertain if it was five feet?

A. At the time of building. I always have a lot surveyed before I start building, and I drew that
20 line through there just as nearly as I could to five feet from the surveyor's line.

Q. Now, directing your attention to premises 106 South Austin, did you make an examination there to ascertain as to how near to the southerly line of the property the southerly line of the building extended?

A. Yes.

Q. How near was it?

A. There were several properties there, but I
30 can't designate them by the numbers—there were some that were within three feet of the south line.

Q. I am not speaking about garages now. I am speaking about buildings, the main buildings.

A. Well, there is one building there that they have built the whole building, or practically the whole building, within the six feet, perhaps three feet from the south line.

Q. Did you make an actual measurement to ascertain as to how close to the line that came?

A. You see, I couldn't exactly do that without I had a surveyor's marks.

Q. Well, did you make measurements?

A. We made measurements there very closely, and Mr. Joffe made a note of the measurements at the time. I just don't recall the exact measurements.

Q. You can't recall the measurements? 10

A. Not now.

Q. Can you recall the number of the property?

A. I don't know just exactly the numbers, no.

Cross-examination.

By Mr. Coulomb:

Q. Mr. Salmon, taking 106 South Oakland Avenue, which is Mr. Joffe's property, what was the character of that garage as to its construction? That is, of what material was it constructed? 20

A. Originally?

Q. Originally, when you built it.

A. Ten feet wide, twenty feet long, and built of brick, slag roof, and extended within five feet of the south line.

Q. Did it project from the main building of the house, the main part of the house?

A. It was attached to the house, yes. 30

Q. There was no room over that garage, was there?

A. No room, no.

Q. Have you seen it lately?

A. Yes.

Q. It has been extended now to the side line, hasn't it?

A. It has.

Q. Is it the same length?

A. The same length as near as I can tell.

Q. Now, take the garage, 104 South Oakland Avenue; of what material was that constructed and what was its character?

A. 104 South Oakland?

Q. Yes.

10 A. That was of brick and the same construction, and it was six feet from the line.

Q. That was six feet from the line? Now take the one at 102 South Oakland.

A. That was the same. No. That was hollow tile. Otherwise the same. Stucco.

Q. Six feet from the line?

A. Six feet.

Q. And the one at the corner, 100 South Oakland?

20 A. That is the same dimensions on the ground, ten by twenty, and extends within four feet of the south line.

Q. What was the house on South Austin Avenue that you said extended within three feet of the line to the best of your judgment?

A. Which house?

Q. Yes. Which house is it?

A. I am unable to decide the number.

Q. What side of the street on Austin Avenue is it?

A. On the west side.

30 Q. What kind of a house is it?

A. It is a rather large house, has the garage on the south side, I believe, and the rooms right on up over it.

Q. How much of the house in length extends, as you have said, to within three feet of the side line?

A. The length from the street?

Q. Yes. Going back to the back end of the lot.

A. As near as I can recall, I think it was twenty feet or more on the side next to the line.

Q. What was the character of the construction on the south side? Frame, brick or what?

A. I think it was brick basement.

Q. Did it have a side porch?

A. I am not quite sure about that.

Q. Is there any other house there that extended that close to the south side line?

A. There was one there in particular that extended very near, and then the others were a little 10 further away.

Q. What part of the house extended to within that distance?

A. The part that was occupied on the ground floor by the garage.

Q. What kind of a garage was it?

A. The material?

Q. Yes. Take the material first.

A. As I recall, it was either brick or tile.

Q. What was over the top of the garage? A 20 porch? Porch floor?

A. I couldn't say what they used it for, but there was a room over the top.

Q. Was it a glass enclosed room such as you would enclose a porch?

A. Yes, there was considerable glass around there.

Q. And how high was the roof of the garage above the street level?

A. Why, the garage was either on top of the 30 ground, or maybe it was excavated a very little, and it was two stories high, as I recall.

Q. How do you mean, two stories high?

A. Well, the garage and the room above.

Q. What was the character of this room above?

A. Well, as I say, that was considerable of glass.

Q. Was the roof of this garage on the level with the other part of the porch of the house?

A. I haven't looked at it very recently.

Q. The house had a porch, didn't it?

A. In front?

Q. Yes.

A. Yes, I think so. Yes.

Q. And this garage was at one end of the porch, was it not?

10 A. I think it was.

Q. And the roof of that garage was the same level as the roof of the porch, or the floor of the porch, I should say?

A. Possibly. Not the floor of the porch, but the roof of the porch, the roof of the room above the garage.

Q. Take the floor of the room above the garage. Isn't that on the same level as the floor of the porch?

20 A. Yes, I think it was.

Q. And it was enclosed in glass along the side?

A. There is considerable glass there, I think.

Q. You don't know the number of that house?

A. I am not positive as to the number.

Q. Now, you said when you started to build on Oakland Avenue that you were controlled somewhat in the way you placed your houses with respect to lines, and so forth, by a house on Austin Avenue; is that correct? Did I understand you correctly?

30 A. When I first went there I started 102, and I built that, and I kept my garages six feet away, and as I kept on building, people wanted a little more room and I read the restrictions and I thought I had a right to go nearer the line with the garage.

Q. Mr. Salmon, you said something about being controlled or being guided by a house on Austin

Avenue, and I would like to know what house it was.

A. I looked around there at those houses and they had gone nearer, so I thought the restrictions were construed that way.

NATHAN JOFFE, the defendant, sworn.

10

Direct examination.

By Mr. Champion:

Q. Mr. Joffe, have you your deed with you for the property which you purchased?

A. I haven't the deed here.

Q. Will you produce that?

A. I will.

Mr. Champion: With Mr. Coulomb's consent may I offer that deed later? 20

The Court: Yes.

Mr. Coulomb: I consent.

Q. When did you purchase the property, Mr. Joffe?

A. In November, 1922.

Q. What is the character of the building?

30

A. Brick.

Q. How many stories?

A. Three-story brick.

Q. At the time you purchased it was there anything erected upon the property besides the main building?

A. A house and garage.

- Q. What was the character of the garage?
A. It was a brick garage attached to the house.
Q. What size?
A. About ten by twenty.
Q. Do you know to within how close of the southerly line of the property the southerly line of the garage extended?
A. Five feet.
Q. How do you know that?
10 A. I measured it.
Q. When?
A. Well, I measured it when I first bought the house, thinking that I might, if there was room enough, to make it larger, and I measured it recently before we started to make a change.
Q. When did you start to make the alteration?
A. About June, 1925.
Q. What was it your purpose to do?
A. Just to enlarge the garage to hold two cars.
20 Q. And in order to do that to how close of the southerly line would you be obliged to build?
A. Obligated to build right to the line. That would make it very scant.
Q. Did you start upon the alteration?
A. Yes.
Q. Anyone make any complaint to you about it?
A. Not until after three feet of the south wall was up.
Q. Who made the complaint then?
30 A. Mrs. Kemble.
Q. Just how far had the work proceeded when she complained to you?
A. The south wall was up three feet, and the rear wall, I think, was almost to the top.
Q. At that time had the existing southerly wall of the garage been torn down?
A. Yes, sir, that was torn out.

Q. That was the first part of the operation, was it?

A. That was the first part of the operation.

Q. How high was the garage, the existing garage?

A. About probably seven feet high, seven and a half, something like that..

Q. Was the addition to it proposed to be of the same height?

A. Exactly the same height.

10

Q. And of what width?

A. Well, it would be five feet wider. It would make it about fifteen feet wide.

Q. What about the length? Was that to be the same as the old garage?

A. The length was exactly the same.

Q. Were papers served upon you from this court respecting the cessation of work?

A. There was.

Q. And you stopped work, did you?

20

A. Stopped work immediately.

Q. Subsequently, after the injunction was lifted, did you continue the work of construction of the garage?

A. Yes.

Q. And what is the status of it at this time?

A. Well, the garage goes to the line, the same height and the same length, excepting five feet wider, and the front railing, there is a front rail on it to set it off.

30

Q. Is it fully completed?

A. It is fully completed.

Q. Large enough for two cars?

A. Large enough for two cars, yes.

Q. At the time of the service of the restraining order, how long had your workmen been working?

A. Prior to the restraining order?

Q. At the time the restraining order was served, how long had your workmen been working?

A. I think two days.

Q. Two days? At the time the restraining order was served, what was the condition of the work?

A. Well, the wall had been up about three feet on the south line, and the back wall was pretty near to the top, and that is all there was done. The south wall had been torn out. The old wall was
10 torn out first.

Q. Did you make any measurements of the properties on Oakland Avenue or Austin Avenue to ascertain whether or not any of these restrictions had been violated?

A. I did.

Q. When?

A. That was after my attention was called to any violations.

Q. Anyone accompany you in making those
20 measurements?

A. Mr. Salmon.

Q. Do you recall whether or not you made measurements of property 106 South Austin?

A. Yes.

Q. Who made the measurement?

A. Well, I think Mr. Salmon had the ruler and I marked down what he called.

Q. What was the measurement of the distance between the southerly line of the building and the
30 southerly line of the property at 106?

A. I think it was three feet.

Q. Prior to Mrs. Kemble making the complaint to you about your garage, had you ever had any conversation with her respecting the building of the garage, prior to that time?

A. No.

Q. Or the restrictions?

A. None whatever.

Cross-examination.

By Mr. Coulomb:

Q. Mr. Joffe, do you remember taking an affidavit in this cause last June, on the application for a preliminary writ?

A. I might have. I don't recall.

Q. Do you tell me that you don't now recall whether you took such an affidavit or not?

A. I won't say positive. I think I remember taking an affidavit.

Q. Do you remember saying in that affidavit that "on or about May twenty-eighth I caused the alteration to said garage to be commenced, it being my purpose to tear out the south wall thereof and extend the said south wall to the southerly property line so that the said garage when completed would be sufficiently large to accommodate two automobiles?"

A. Yes.

Q. Was that when you commenced this work, on the twenty-eighth day of May?

A. Yes. About that date. I don't recall the exact date now.

Q. Certainly it wasn't more than a day or two away, was it?

A. Probably. I was probably more accurate at that time than my memory now.

Q. Do you remember the morning that Mrs. Kemble spoke to you about the work?

A. I remember when she came, yes.

Q. Did you do any work that day, your men, after she had spoken to you? Did they continue to work?

A. I believe they did continue that day. That was the last day, I think, they did work.

Q. That was about the twenty-seventh of May, wasn't it?

A. I wouldn't recall what day it was now.

Mr. Coulomb: I would like to call your Honor's attention to the fact that the rule to show cause in this cause was allowed by your Honor on the twenty-eighth of May.

DEFENDANT RESTS.

10

COMPLAINANT'S TESTIMONY IN
REBUTTAL.

KATHERINE A. KEMBLE, recalled.

Direct examination.

By Mr. Coulomb:

20 Q. Mrs. Kemble, there has been some testimony about a house, 106 South Austin Avenue, being at least three feet or thereabouts from the south side property line. Did you know that?

A. I did not.

Q. Did you know anything about it?

A. No, I did not, Mr. Coulomb.

Q. Are you familiar with that property, 106 South Austin Avenue? Do you know it at all by number?

A. No, I am not. I am familiar with 108, but not 106.

30 Q. 108 South Austin?

A. Yes.

Q. Do you know how long the house has been at 106 South Austin?

A. I do not, no. I couldn't say.

No cross-examination.

TESTIMONY CLOSED.

EXHIBIT C1.

Documentary 50 Cents—Documentary 1 Dollar—
Documentary 3 Dollars

THIS INDENTURE, MADE THE Fourteenth day of October in the year of our Lord one thousand nine hundred and eighteen (1918), BETWEEN FRANCES C. CORYELL and CHARLES N. CORYELL, her husband, of New York City, in the State of New York of the first part, and KATHERINE A. KEMBLE, of the City of Atlantic City, in the County of Atlantic and State of New Jersey, of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of One Dollar lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, and other good and valuable consideration, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, her heirs and assigns, ALL THAT certain lot or parcel of land and premises situate in the City of Ventnor City, in the County of Atlantic and State of New Jersey, described as follows:

BEGINNING in the Westerly line of Oakland Avenue (fifty feet wide), two hundred feet Southwardly from the Southwest corner of Oakland and Atlantic Avenues, and extending thence Southwardly along said line of Oakland Avenue (the same being parallel with and one hundred and

twenty-five feet Eastwardly at right angles from Nashville Avenue) fifty feet; thence Westwardly parallel with Atlantic Avenue sixty-two and five tenths feet; thence Northwardly parallel with Oakland Avenue, fifty feet; thence Eastwardly parallel with Atlantic Avenue, sixty-two and five tenths feet to the place of beginning.

10 BEING the same premises that Kennedy Crossan and wife, by Deed dated June 13, 1912, and recorded in the Clerk's Office of Atlantic County in Book No. 484 of Deeds, page 346, &c., granted and conveyed unto Frances C. Bellman, in fee.

AND the said Frances C. Bellman afterwards intermarried with and became the wife of Charles N. Coryell.

20 TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof:

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances:

30 TO HAVE AND TO HOLD the said premises, with all and singular the appurtenances, unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever. Subect to the payment of a certain Mortgage made by said parties of the first part to The Hammonton Loan and Building Association of Hammonton, New Jersey, to secure Eight Thousand Dollars, dated July 20, 1916, and recorded in said Office in Book No. 157 of Mortgages, page 249 &c.

AND the said parties of the first part, for themselves, their heirs, executors and administrators, DO by these presents covenant, grant and agree to and with the said party of the second part, her heirs and assigns, that they the said parties of the first part and their heirs, all and singular the hereditaments and premises herein above described and granted, or mentioned and intended so to be, with the appurtenances, unto the said party of the second part, her heirs and assigns, against them 10 the said parties of the first part and their heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, SHALL and WILL, subject as aforesaid, WARRANT and forever DEFEND. IN WITNESS WHEREOF, the said parties of the first part to these presents have hereunto set their hands and seals dated the day and year first above written.

FRANCES C. CORYELL (SEAL) 20
 CHAS. N. CORYELL (SEAL)

Signed, Sealed and Delivered
 in the Presence of
 SADIE H. SASS,
 Notary Public
 New York County No. 550
 New York Register No. 10439.

State of New York }
 New York County, } ss.

30

BE IT REMEMBERED, that on this Fourteenth day of October in the year of our Lord one thousand nine hundred and eighteen (1918) before me, Sadie H. Sass, Notary Public personally appeared Frances C. Coryell and Charles N. Coryell, her husband (both being above the age of twenty-one years), who, I am satisfied are the grantors mentioned in the above deed or conveyance, and hav-

ing first made known to them the contents thereof they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

(SEAL) SADIE H. SASS,
Notary Public of New York
County No. 550 New York
Register No. 10439.

10 State of New York }
County of New York } ss.

No. 76743 Series B

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same Being a Court of Record, DO HEREBY CERTIFY THAT SADIE H. SASS whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon
20 written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that
30 the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I
(SEAL) have hereunto set my hand and affixed the seal of the said Court and County the 14th day of Oct. 1918.

WM. F. Schneider, Clerk.

Exhibits

65

(Endorsed.)

5489

12-9-18

App. 27372.

DEED.

FRANCES C. CORYELL et vir

TO

KATHERINE A. KEMBLE

C1

12-2-25

M.

Dated 19

10

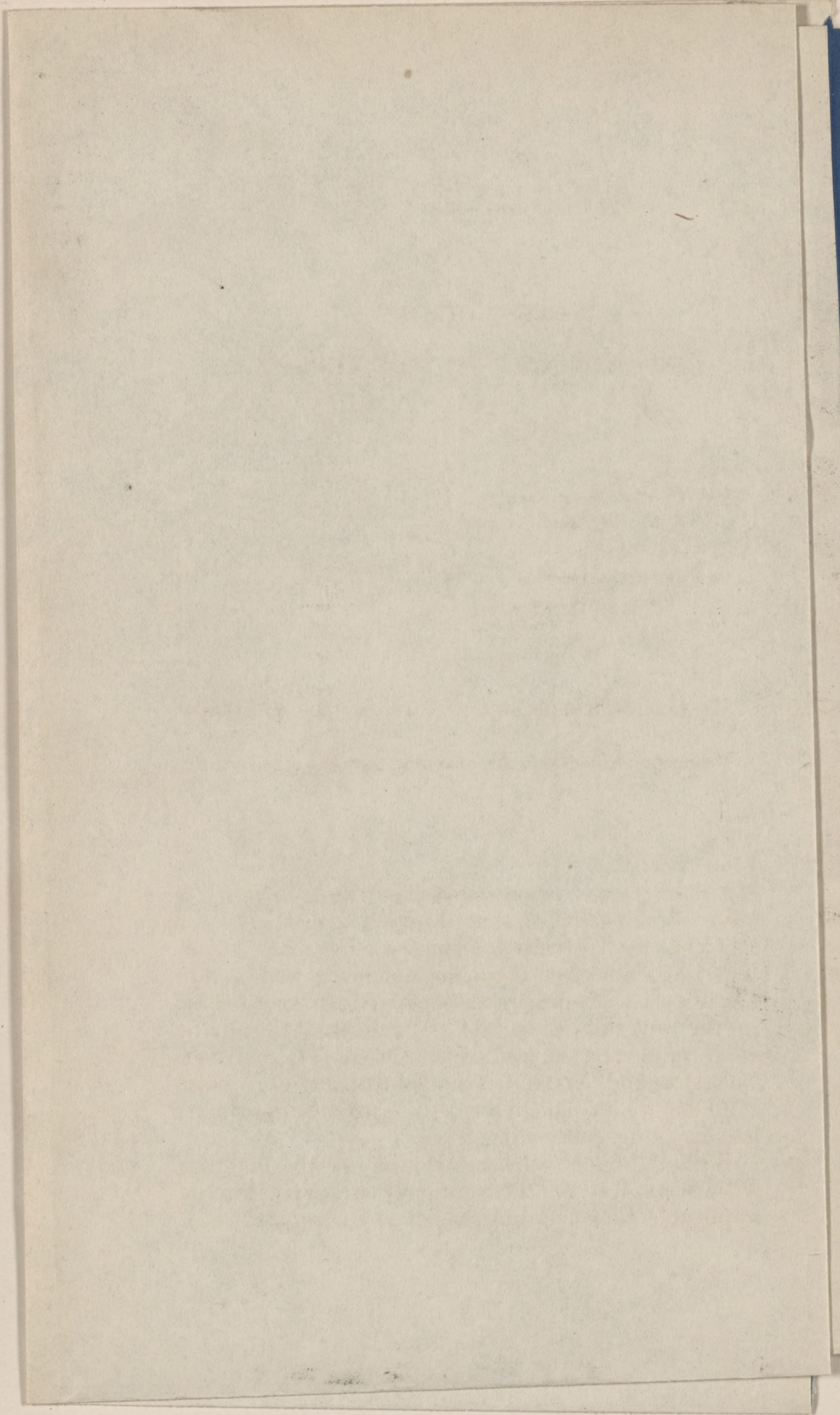
Received Dec. 9, 1918, at 8 A. M. and
recorded in the Clerk's office of At-
lantic County, at May's Landing, N. J.
in Book of DEEDS No. 596, page 324,
&c.

EDWIN A. PARKER, Clerk,
O. G. O.

Law Offices
BOURGEOIS & COULOMB
Atlantic City, N. J.
25-28 Law Building

20

30

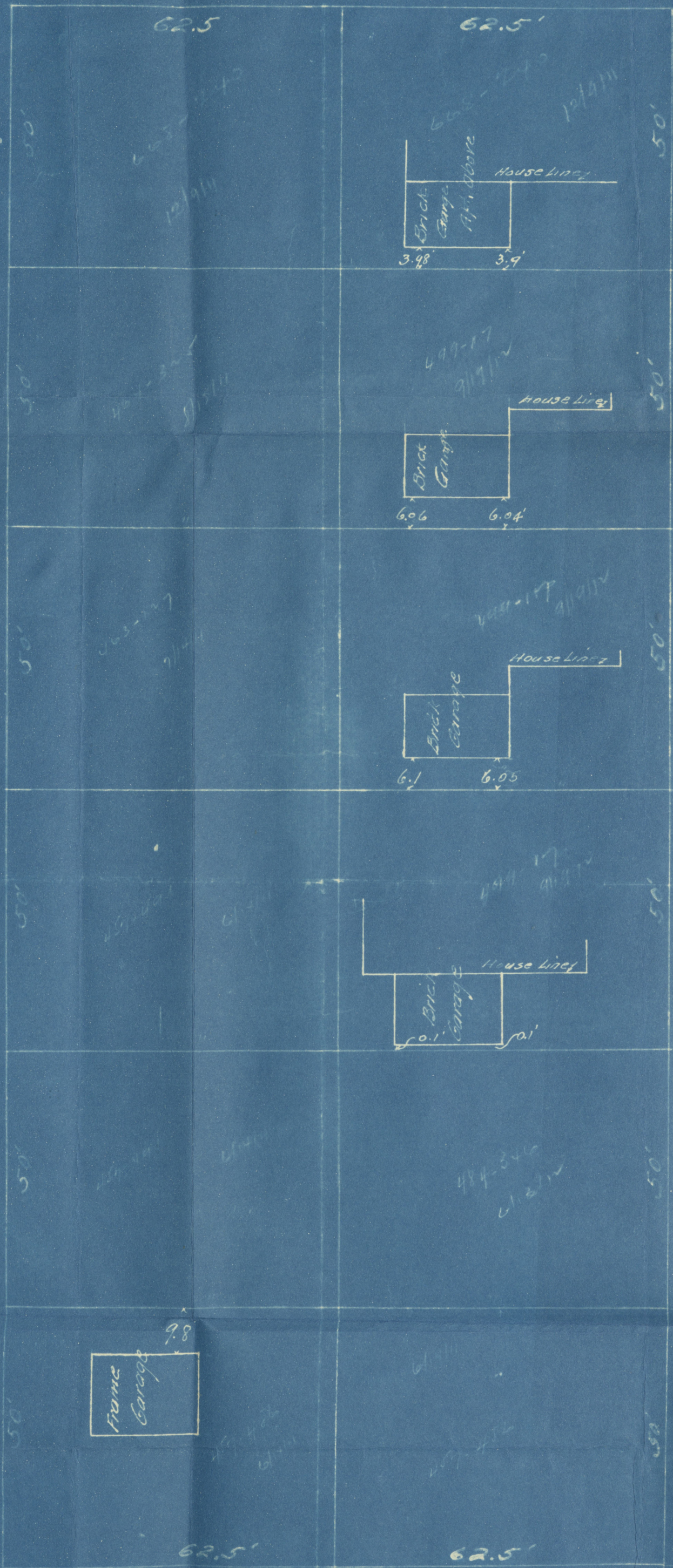


Atlantic

Ave.

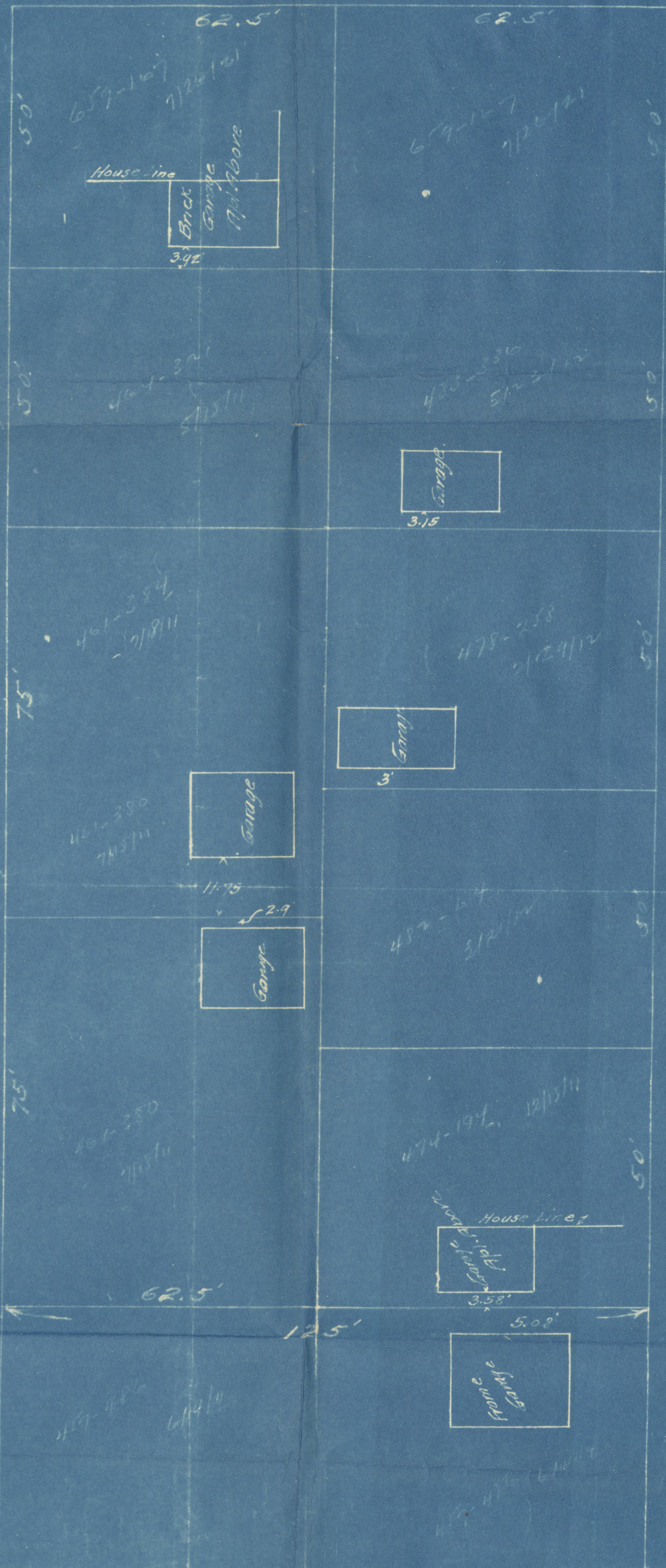
Ave.

Nashville



Ave.

Oakland



Ave.

Austin

MAP SHOWING GARAGES
 on
 OAKLAND AVE. and ADJOINING AVE'S
 in
 VENTNOR CITY, N.J.

Scale ~ 1 in = 20 ft.

Plotted from survey Nov. 28, 1925.

3 D. [unclear]
 [unclear]

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between KATHERINE A. KEMBLE, <i>Complainant,</i> and NATHAN JOFFE, <i>Defendant.</i>	}	On Bill, &c. On Final Hearing. Conclusions (Oral).	10
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MESSRS. BOURGEOIS & COULOMB, for the complainant.

MESSRS. BABCOCK & CHAMPION, for the defendant. 20

INGERSOLL, V. C.:

I think I can express my views as well now as later. I am satisfied that this is a general scheme in which the restrictions may be enforced. All of the land sold by Crossan or his heirs within this territory is covered by the restrictions specifically in the several deeds. It is true that there are what might be termed beach front lots between Nashville and Oakland Avenues that have not been sold, but we are not presently engaged in determining anything concerning them. 30

Without doubt, the restriction as to building within six feet of the southerly property line is applicable to a building which is to be used as a

garage for private purposes in connection with a private residence.

The second clause is a clause concerning the location in which buildings may be erected.

Clause three refers to the use to which any building can be put, and whether the building is used for private residence purposes or a garage for private purposes in connection with such private residence, the restriction is applicable.

10 Considerable stress has been laid upon the fact, that two or more of these so-termed garages have apartments above. I am unable, from the testimony, and that includes the map which was offered and marked Exhibit C4, to determine whether those rooms above, which are marked on this map "apartments above," are part of the house or not, because, although there is a line marked "house line," that wall is a part of the garage, and whether or not the garage itself is a physical part of the house,
20 I am unable to determine. But whether that be so or not, there is nothing before me now which would indicate that the use of a room above a garage would change the use of that building from a building for private garage purposes, and for this purpose it is unnecessary to determine that.

It is alleged that these restrictions have been abandoned by reason of the fact that two garages on Oakland Avenue are approximately four feet from the southerly line and that the garage in
30 question as originally built was approximately five feet from the southerly line, and that three or more garages on Austin Avenue are approximately, one three feet and two four feet from the southerly line. For this purpose, I am not considering the effect of the garages on Austin Avenue. A violation, if a violation, on an adjoining street, and which does not affect, or is, perhaps, not reasonably within

the notice of the complainant, would not tend to bind her to prevent her from enforcing violations on the avenue on which she lives. *Brode v. Smith* and the cases cited therein sustain that proposition. It is true that in *Brode v. Smith*, although they were adjoining streets, they were physically separated by a basin of water; but the principle is the same principle, and in this case, I think, is applicable.

This brings the matter, then, to the question, does 10
the fact that two garages were built approximately
four feet from the southerly line and one within
approximately five feet of the southerly line, that
being an adjoining property, estop Mrs. Kemble
from enforcing this restriction? I think not. The
testimony is such that there is no denial of the
fact that she had no knowledge of any of these
violations. It is reasonable to think that she would
not have. There is nothing before me to indicate
that there is anything physically upon the land to 20
mark the boundary line, and for a person not apt
in surveying land or measuring land to know ex-
actly the distance of a building from a division line,
the division line not being marked—that is, no tes-
timony showing it to be marked—certainly such
person is not bound to know where that point ac-
tually is on the land in question.

Therefore, so far as 100 and 101 South Oakland
Avenue are concerned, I am convinced that those 30
two violations, neither prove an abandonment of
the general scheme, nor do they produce the effect
of estopping Mrs. Kemble from enforcing the re-
striction. I have also the same view of the prop-
erty of the defendant. The property was placed
five feet from the property line, and it is somewhat
hard to understand why the builder placed two of
the properties approximately six feet, a little over

six feet in each case, and in the next property he cuts it down to five feet. He explains that by saying that the people wanted to get all the land they could. I think that the difference of that one foot adjoining Mrs. Kemble's property does not prevent her from enforcing the restriction against building any closer to her line than that. It is quite clear that after that was built and remained there for several years, she could not now come into court and say it must be torn down; but when the defendant, of his own volition, seeks, not to violate this restriction by one foot, an immaterial matter to the complainant and one which she is not bound actually to know when he proceeds and not only come within the six feet but takes up the entire six feet, she then is in a position to prevent him from further in extent violating that restriction. The notice, I think, she gave very promptly. It is a building which could be completed very quickly, and more notice was given by the complainant in this case than in the case of Rothholz v. Stern, which was also the building of a garage.

Under the circumstances, I am bound to advise a decree in favor of the complainant to the extent that this violation cannot proceed beyond the point at which the outer wall was prior to the change.

Mr. Champion: Will your Honor fix the distance it was prior to the alteration?

30 The Vice-Chancellor: Whatever it was. There is some testimony that it was five feet.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between
KATHERINE A. KEMBLE, *et*
 al.,
 Complainants,
and
NATHAN JOFFE,
 Defendant.

} On Bill, &c.
} Final Decree.

10

This matter coming on to be heard in the presence of Bourgeois & Coulomb, solicitors for and of counsel with complainants, and Babcock & Champion, solicitors for and of counsel with defendant, and the Court having read and considered the pleadings, and having heard and considered the proof, and having examined the exhibits offered herein, and being of the opinion that the complainants are entitled to the relief prayed for in their bill of complaint; and being further of the opinion that the said defendant, in extending his garage to the south side line of his lot and curtilage, has violated one of the restrictive covenants imposed upon said lot and curtilage by Kennedy Crossan; and being further of the opinion that so much of said garage as is erected between a line five (5) feet from and parallel with the southerly line of the defendant's said lot and curtilage, and the southerly line there-

20

30

of, should be removed, to the end that no part of said garage should extend any nearer to the southerly line of his said premises than a line five (5) feet from and parallel with the southerly line thereof;

It is, on this 15th day of December, 1925, on motion of Bourgeois & Coulomb, solicitors for and of counsel with complainants, ordered, adjudged and decreed that the said defendant be and he is
10 hereby enjoined from erecting or maintaining his said garage, or any part thereof, upon any portion of his said lot and curtilage between a line nearer than five (5) feet from the southerly line thereof.

It is further ordered, adjudged and decreed that the said defendant be and he is hereby enjoined and commanded to remove all that portion of said garage and building now erected on said premises, and lying and being between a line five (5) feet
20 from and parallel with the southerly line of said premises and the said southerly line thereof.

It is further ordered, adjudged and decreed that the complainants are entitled to their costs of suit to be taxed, together with a counsel fee of one hundred dollars, to be allowed to the complainants' solicitors and taxed with their costs.

E. R. WALKER,
C.

Respectfully advised:

30 R. H. INGERSOLL,
Vice-Chancellor.

NOTICE OF APPEAL.
IN CHANCERY OF NEW JERSEY.

Between
 KATHERINE A. KEMBLE, *et*)
 al.,)
 Complainants,) Notice of Appeal.
 and)
 NATHAN JOFFE,)
 Defendant.)

10

The defendant, Nathan Joffe, hereby appeals
 from the final decree made in the above entitled
 cause on the fifteenth day of December, nineteen
 hundred and twenty-five, and from the whole and
 every part thereof to the Court of Errors and Ap-
 peals in the last resort in all cases.

20

Dated January 2, 1926.

BABCOCK & CHAMPION,
Solicitors for and of Counsel
with Defendant.

30

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 KATHERINE A. KEMBLE, *et* }
al., }
Complainants-Appellees, } *Petition of Appeal.*
v. }
NATHAN JOFFE, }
Defendant-Appellant. }

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

The petition of Nathan Joffe, the appellant, in the above entitled cause respectfully shows that:

30 1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the fifteenth day of December, nineteen hundred and twenty-five, in a certain cause in said Court of Chancery, wherein the said Katherine A. Kemble, *et al.*, were complainants, and the said Nathan Joffe was defendant, in this respect, to wit: that the said decree adjudges that the defendant be and he is thereby enjoined from erecting or maintaining a certain garage or any part thereof erected upon his property as described in the bill of complaint upon any portion of his lot and curtilage between a line nearer than

five feet from the southerly line thereof and that he be and is thereby enjoined and commanded to remove all that portion of his said garage and building now erected on his said premises lying and being between a line five feet from and parallel with the southerly line of his said premises and the southerly line thereof and further adjudges that complainants are entitled to costs of suit and a counsel fee of \$150 to be taxed with the costs; and

Your petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that: 10

1. The restriction claimed to be imposed upon the property of the defendant and other lands, upon the violation of which the bill of complaint is based and the said decree made, does not apply to, affect or prohibit the erection of garages within the restricted area.

2. The complainants were guilty of laches and by their conduct consented to the violations of the restrictions by defendant and the Court of Chancery should have held that they were, therefore, barred and estopped from the granting of the relief prayed for and granted by the said decree. 20

3. The violations of the said restrictions not only upon the avenue upon which the properties of the complainants and defendant are situate, namely, Oakland Avenue, but upon other avenues included within the area upon which the said restrictions were imposed, as appear from the record, clearly show that the said restrictions were in fact abandoned and of no effect on Oakland Avenue and on Austin Avenue, and because of the abandonment thereof, the Court of Chancery should not have enforced the same as against this defendant. 30

Your 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.

BABCOCK & CHAMPION,
Solicitors for and of Counsel
with the Appellant.

10

ANSWER TO PETITION.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

20	Between KATHERINE A. KEMBLE, <i>et</i> <i>al.</i> , Complainants-Appellees, and NATHAN JOFFE, Defendant-Appellant.	}	On Bill, &c. On Appeal. Answer to Petition.
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30 The answer of Katherine A. Kemble, Mary Allan Elwood and James Stuart Lowry, the above named appellees to the petition of appeal of Nathan Joffe, the above named appellant:

These appellees, not admitting the truth of all, or any, of the matters in the said petition of appeal contended for, answer thereto, nevertheless, admitting that a decree was, on the 15th day of December, 1925, 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 appellees 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.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel 10
with Complainants.

20

30

These are the names of the persons
and their addresses who have been
found to be in possession of
the same.

Persons of whom
the same have been
found.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

KATHERINE A. KEMBLE, *et al.*,
Complainants-Respondents,

and

NATHAN JOFFE,
Defendant-Appellant.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF FOR APPELLANT.

FACTS.

This is an appeal from a final decree advised by Hon. Robert H. Ingersoll, Vice-Chancellor, under date of December 15, 1925, in the Court of Chancery, awarding an injunction, mandatory in its effect, requiring the defendant to remove all that portion of a certain garage erected by him upon premises 106 South Oakland Avenue, Ventnor City, New Jersey, owned by him, lying and being between a line five feet from and parallel with the southerly line of said premises and the said southerly line thereof (p. 71).

The bill for injunction was filed by the complainant, Katherine A. Kemble, the owner of premises 108 South Oakland Avenue, in said Ventnor City. While Mary Allan Elwood, the owner of property on the east side of Nashville Avenue, and James Stuart Lowry, the owner of land on the west side of Oakland Avenue, both of which streets are subject to the restrictions hereinafter mentioned, were made parties complainant on June 9, 1925 (p. 10), they did not actively participate in the prosecution of the suit, Mrs. Kemble being the only complainant to appear and testify.

One, Kennedy Crossan, was at one time the owner of the entire block of ground bounded by Nashville Avenue, Atlantic Avenue, Austin Avenue and the Atlantic Ocean (p. 18). He opened a street approximately through the center of the tract known as Oakland Avenue, between Nashville and Austin Avenues, running north and south, and proceeded to make sale of lots from the said tract, his first conveyance being made on June 14, 1911, to one, Reber. All of the lots included in the said tract were sold by him with the exception of two beach-front lots lying between Oakland and Nashville Avenues (p. 44), and were sold subject to certain restrictions which are specifically set forth upon pages 19 and 20 of the state of the case, the pertinent parts of which are as follows:

"Two: That no portion of any building shall be erected nearer than fifteen feet of the front property line of Nashville or Oakland or Austin Avenues, bay windows and porches excepted, nor nearer than six feet of the south side property line of any lot, nor nearer than five feet of the rear line of any lot. Provided, however, that the owner of two or more contiguous lots may erect a building or buildings

on any portion of said lots without regard to the intervening line or lines, in which case such lots shall be considered as single lots. * * *

“Three: That no building or buildings shall be erected upon any lot or lots aforesaid except only a single dwelling house to be used for private residence purposes, and provided, however, that a garage to be used for private purposes in connection with such private residence is not prohibited,” etc. * * *

The complainant, Katherine A. Kemble, purchased premises 108 South Oakland Avenue, by deed dated October 14, 1918, (p. 25), and the defendant Nathan Joffe, purchased premises 106 South Oakland Avenue, November 20, 1922, (p. 22). The restrictions above referred to were not set forth in detail in the deed to the defendant, Joffe, the conveyance being made merely “subject to existing restrictions” (p. 22).

The buildings on numbers 100, 102, 104 and 106 South Oakland Avenue, being upon the westerly side thereof, and on number 101 South Oakland Avenue, being upon the easterly side thereof, were constructed by John W. Salmon, a builder, the construction being commenced on November 1, 1920, and completed in July or August of 1921, (p. 48), although Mr. Salmons was not sure whether they were completed in 1921 or 1922. During the construction work, no protests were made by any person in interest that the said restrictions were being violated in any respect. Said Salmons was familiar with the said restrictions and before starting the building operation, examined other properties on Oakland and Austin Avenues to ascertain if the restrictions had been violated, and found that the line of the garages extended further than the house lines were permitted under the restrictions (p. 47).

Violations of the restrictions appear as follows:

100 South Oakland Avenue: There is a garage constructed of brick, with a room built thereover, in size about ten feet by twenty feet with bath and closet, said room being built for the occupation of a person ((p. 49). The southerly line of the garage thereupon extends to within three and ninety-eight hundredths feet of the south line of the property (See Complainant's Exhibit C2, p. 66).

101 South Oakland Avenue: There is a garage constructed with an apartment similar to that over the garage upon No. 100 South Oakland Avenue, and the southerly line thereof extends to within three and ninety-two hundredths feet of the south line of the property (p. 66).

106 South Oakland Avenue: (Property of the defendant.) There was constructed upon this property by Mr. Salmons, in addition to the residence, a garage, the southerly line of which extended, from the time of its completion to the time of its enlargement by defendant, to within five feet of the southerly line of the property of the defendant (p. 51). As now completed the said southerly line of the garage extends to within one-tenth of an inch of the southerly line (p. 66.).

102 South Austin Avenue: There is a garage erected upon this property, the southerly line of which extends to within three and fifteen hundredths feet of the southerly line of the property (p. 66).

104 South Austin Avenue: There is a garage erected upon this property, the southerly line of which extends to within three feet of the southerly line of the property (p. 66).

106 South Austin Avenue: The southerly line of the residence erected thereupon extends to within

three feet of the southerly line of the property ((p. 50).

108 South Austin Avenue: There is a garage erected upon this property with an apartment over the same, similar to that over the garage at No. 100 South Oakland Avenue, the southerly line of which extends to within three and fifty-eight hundredths feet of the southerly line of the property (p. 66).

The property of the defendant, together with other land, was conveyed by the executors and trustees of the said Kennedy Crossan to one, James S. Taylor, by deed dated September 19, 1912, and contains the restrictions in question (p. 21) the land conveyed being one hundred and fifty feet upon the west side of Oakland Avenue.

The complainant, Kemble, was not living in her property at the time of the erection of the five properties above mentioned by Mr. Salmon, she having rented the same, ((p. 32), but she had resided therein over two years, and when she first took up her residence there after the vacation thereof by her tenant, she observed the garage of defendant (p. 32), she was familiar with and had observed the property at the corner of Atlantic and Oakland Avenues, No. 100 South Oakland Avenue (p. 38), she made observation to examine other garages to ascertain if their southerly lines were nearer the property lines than six feet (p. 42), and she thought that the restrictions provided that a building could be erected to within three feet of the southerly property line (p 38).

The conclusions of the Vice-Chancellor are found at page 67, the final decree at page 71, notice of appeal at page 73, petition of appeal at page 74, and answer to petition of appeal at page 76 of the state of case.

ARGUMENT.

The grounds of appeal presented in the petition of appeal are three in number and will be here considered in order (p. 75).

I.

THE RESTRICTION CLAIMED TO BE IMPOSED UPON THE PROPERTY OF THE DEFENDANT AND OTHER LANDS, UPON THE VIOLATION OF WHICH THE BILL OF COMPLAINT IS BASED AND THE SAID DECREE MADE, DOES NOT APPLY TO, AFFECT OR PROHIBIT THE ERECTION OF GARAGES WITHIN THE RESTRICTED AREA.

The part of the restriction which it is claimed the defendant violated is as follows:

“Two: That no portion of any building shall be erected nearer than fifteen feet of the front property line of Nashville or Oakland or Austin Avenues, bay windows and porches excepted, nor nearer than six feet of the south side property line of any lot, nor nearer than five feet of the rear line of any lot. * * * *”

“Three: That no building or buildings shall be erected upon any lot or lots aforesaid except only a single dwelling house to be used for private residence purposes, *and provided however, that a garage to be used for private purposes in connection with such private residence is not prohibited,*” * * * *

The restriction provides, among other things, in effect, that no portion of any building shall be erected nearer than six feet of the south side property line of any lot. It then defines the mean-

ing of the term "building" used in paragraph two to mean " a single dwelling house to be used for private residence purposes." It then expressly except garages for private purposes in connection with private residences from the operation of the restriction.

The Vice-Chancellor said with respect to this phase of the restriction, "Without doubt, the restriction as to building within six feet of the southerly property line is applicable to a building which is to be used as a garage for private purposes in connection with a private residence." He then says that clause two, in effect, concerns the location in which buildings may be erected and that the third clause refers to the use to which any building may be put.

It is clear that if the owner of a restricted lot desired to erect thereupon a building, the southerly line of which extended to within six feet of the southerly property line of the lot, he would have the right so to do by the express language of the restriction, provided the building was to be used for residential purposes. If, after the completion thereof, he decided that he would like to erect a garage to be used in connection with the residence upon said lot to extend within the restricted area of six feet, he would not have the right so to do, if the construction placed upon the restriction is upheld, in which event the exception would be entirely meaningless.

That the restriction was not intended or has not been construed to apply to garages is evidenced by the location of the garages upon the entire tract, thus showing that by practical construction upon the ground, the restriction does not apply to garages. The exhibit of complainants, C4, shows that twelve garages have been erected upon the

tract, and an examination of the said exhibit discloses that six of the twelve garages are in violation of the said restriction if it is to be held applicable to garages used in connection with private residences. In this connection, attention is called to the fact that the survey shows only the construction of said garages with respect to the side lines.

It is submitted that it is extremely doubtful under all the facts in this case if the restrictions in question apply to the erection of garages used in connection with private residences, so much so that the right of the complainants to relief is not clear. It is so well settled in this State by this Court that a mandatory injunction such as was allowed in the cause at bar will not be awarded unless the right thereto is clear from all doubt that citation of authorities are unnecessary, and it is respectfully urged that the decree of the Court of Chancery should be reversed for the cause aforesaid.

II and III.

2. THE COMPLAINANTS WERE GUILTY OF LACHES AND BY THEIR CONDUCT CONSENTED TO THE VIOLATIONS OF THE RESTRICTIONS BY DEFENDANT, AND THE COURT OF CHANCERY SHOULD HAVE HELD THAT THEY WERE, THEREFORE, BARRED AND ESTOPPED FROM THE GRANTING OF THE RELIEF PRAYED FOR AND GRANTED BY SAID DECREE.

3. THE VIOLATIONS OF THE SAID RESTRICTIONS NOT ONLY UPON THE AVENUE UPON WHICH THE PROPERTIES OF THE COMPLAINANTS AND DEFENDANT ARE SITUATE, NAMELY, OAKLAND AVENUE,

BUT UPON OTHER AVENUES INCLUDED WITHIN THE AREA UPON WHICH THE SAID RESTRICTIONS WERE IMPOSED, AS APPEAR FROM THE RECORD, CLEARLY SHOW THAT THE SAID RESTRICTIONS WERE IN FACT ABANDONED AND OF NO EFFECT ON OAKLAND AVENUE AND ON AUSTIN AVENUE, AND BECAUSE OF THE ABANDONMENT THEREOF, THE COURT OF CHANCERY SHOULD NOT HAVE ENFORCED THE SAME AS AGAINST THIS DEFENDANT.

The facts concerning the violations of the restrictions are not in dispute, all appearing in the testimony of the complainants and defendant as set forth upon pages 3, 4, and 5 of this brief in the statement of facts.

The entire tract of the restricted area is not very large, originally consisting of one block of land on Atlantic Avenue a distance of three hundred feet, extending southwardly of that width to the inland line of the City Park for boardwalk purposes, through the center of which was subsequently opened a fifty feet wide street known as Oakland Avenue, so that Austin Avenue to the east, and Nashville Avenue to the west, of Oakland Avenue, the avenue upon which the property of the complainant Kemble, and that of the defendant Joffe, are situate, are only but about half a block to the east and west respectively of the property of the complainant Kemble, the lots being only sixty-two and one-half feet deep, so that she would certainly be interested in violations existing upon the entire tract in such close proximity to her property.

The violations upon Oakland Avenue, three in number, were all material violations. In two of them, Nos. 100 and 101, the garages were each con-

structed with a living apartment, including bath and a closet therein. If the restrictions applied to the erection of garages, there was clearly no right to construct living quarters therein, and to do so was to violate them.

The property of the defendant, No. 106 South Oakland Avenue, immediately adjoining that of the complainant, Kemble, was so constructed that the southerly line of the garage extended to within five feet of the southerly line of the property. It is insisted that a violation of one foot was a material violation, and the said complainant either knew or should have known of the violations on Oakland Avenue, especially when the property of the defendant and those of the other violators were such a short distance away.

The violations upon Austin Avenue, but half a block away, were four in number, and were all material violations, three of which were with respect to the garages and one with respect to the residence thereupon erected.

The Vice-Chancellor, in his conclusions states at page 68:

“For this purpose, I am not considering the effect of the garages on Austin Avenue. A violation, if a violation, on an adjoining street, and which does not affect, or is, perhaps, not reasonably within the notice of the complainant, would not tend to bind her to prevent her from enforcing violations on the avenue on which she lives” citing *Brode v. Smith*; 118 *Atl. Rep.*, p. 742.

It is urged that the violations on Austin Avenue should be considered in determining whether the operation of the restrictions as to garages has been abandoned because of the close proximity of the

properties in which they have occurred to that of the complainant, Kemble, who actively prosecutes the suit. The case cited by the Vice-Chancellor, it is respectfully suggested, should be held not to apply to the facts in the case in hand for the reason that in that case the property of the common grantor upon which the restrictions were placed, consisted of two separate tracts, divided by a waterway, called a basin. Two violations were alleged to constitute acquiescence by the complainants, one seven hundred feet distant from the property of Mr. Brode, and the other within the restricted area.

In the case of *Camp, et al., v. Krulewitch*, reported in 3 A. R. 377; 127 Atl. Rep., p. 669, it was held that

“Both acquiescence and laches creating an estoppel, to deny the equitable right to enforce, must be based on knowledge of violations or a duty to know of them, and it has been repeatedly recognized in this State, that while it may be a duty of the original townsite proprietor to know of all violations on the entire tract and to prevent them, a similar duty does not obtain as to a single lot owner touching violations at a distance from his lot, and touching which he is not so vitally concerned.”

The quoted language is from the opinion of Vice-Chancellor Leaming, and this Court affirmed the decree upon his opinion.

Mr. Justice White, speaking for this Court, in the case of *Sanford v. Keer*, 80 N. J. Eq., 240, 83 Atl. Rep., 225, at page 227, of 83 Atlantic Reporter, said:

“In a neighborhood scheme, the burden follows the benefit. It is the mutual benefit ac-

cruing to all and to each which makes it inequitable for any one so benefited to repudiate the burden to the injury of the others. If, therefore, the parties in interest, by express act or passive acquiescence, permit such violations of the plan or scheme as destroy, wholly or partially, the benefited therefrom, they have to a corresponding extent absolved each other from its burdens. * * * * It is not a question of mere acquiescence; but, in every instance in which the grantor suffers grantees to deviate from the general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all."

In the case of *Ocean City Land Co. v. Weber*, reported in 83 N. J. Eq., p. 476, 91 Atl. Rep., p. 600, and affirmed in this Court in 84 N. J. Eq., p. 505, 94 Atl. Rep., p. 1102, Vice-Chancellor Leaming, speaking in this Court below, (the decree being affirmed in this Court upon his opinion), said:

"The right of the covenantee to specifically enforce a restrictive building covenant of this nature which forms a part of a general scheme for the development of the tract cannot be exercised by such covenants after his failure to exercise the right has resulted in the erection of so many buildings contrary to the provisions of the covenant in the vicinity of the property in question that the enforcement of the covenant in accordance with its terms may be appropriately said to have been abandoned in that locality. Covenants of this nature in the contemplation of the remedial jurisdiction of this Court are to preserve the specific plan

defined in the covenant, and not a plan which differs from that defined in the covenant, whether that difference has arisen by popular construction of the covenant or by common consent; and when the covenantee has permitted the specific plan to be materially violated by the erection of many buildings in the locality in question which are clearly erected contrary to the terms of the covenant, this Court cannot equitably enforce the covenant at the instance of such covenantee against a subsequent violation. The covenantee's remedy in such cases must be sought in a court of law."

In the case now before the Court, while it is true that a general or neighborhood scheme was adopted by Kennedy Crossan in the first instance, which he probably intended to carry out, the facts show that it has not been enforced within the restricted area insofar as garages are concerned, fifty per centum of the number of which erected within said restricted area have been constructed in violation of the covenant over a period of two years in some instances and in others for a term unknown so far as an examination of the evidence discloses, the violations being of two separate and distinct kinds, first, in that the southerly lines thereof, were located within the restricted area, and secondly, that living quarters were installed in the garages in the second stories thereof.

While the complainant claimed that she did not reside in her property at the time of the erection of the properties by Mr. Salmon, she does admit that when she took up her residence therein over two years ago, she observed the garage of defendant, (p. 32), she had observed the property at the corner of Atlantic and Oakland Avenues, being

No. 100 (p. 38), she had made examination of other garages in the neighborhood to ascertain if their southerly lines were nearer the property lines than six feet (p. 42), and she had received the impression and had so construed the restrictions that buildings could be erected to within three feet of the southerly property lines (p. 38). She would not admit that she had received such impression from her examination of the garages in the vicinity of her property, but it is insisted that her observation of the location of the buildings and garages had resulted in the belief by her that the restrictions were as evidenced by the practical location thereof upon the ground, which belief is further evidenced by her making a contract with builder Thompson, to construct a garage in violation of the restriction (p. 35).

It is therefore, clear in this case that the said restrictions insofar as garages are concerned, at least, by practical construction and by common consent, have been abandoned, and that the conduct of the complainant, Kemble, with respect thereto, has amounted to an acquiescence and that she is also guilty of laches, particularly with relation to the violation of the defendant, and the Vice-Chancellor should have held that said restrictions are abandoned as to garages and that the complainant is estopped by her acquiescence and laches from relief by mandatory injunction.

It is respectfully submitted that the decree of the Court of Chancery appealed from, should be set aside, and reversed for the reasons above set forth.

BABCOCK AND CHAMPION,
Solicitors for Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
KATHERINE A. KEMBLE, *et al.*,
Complainants-Respondents,
and
NATHAN JOFFE,
Defendant-Appellant.

ON BILL FOR INJUNCTION.

ON APPEAL.

BRIEF FOR RESPONDENTS.

The appeal in this cause is to review a decree of the Court of Chancery advised by Vice-Chancellor Ingersoll, restraining the appellant from building a garage on his lot in violation of a restrictive covenant.

FACTS.

The respondent is the owner of a lot of land 50 feet x 62.5 feet known as 108 South Oakland Ave-

nue, Ventnor City, N. J. The appellant is the owner of an adjoining lot known as 106 South Oakland Avenue. Both of these lots are part of a larger tract of land formerly owned by Kennedy Crossan, now deceased, extending to Nashville Avenue on the west, Austin Avenue on the east, Atlantic Avenue on the north, and the interior line of the Ventnor City Park for boardwalk and other purposes on the south. Oakland Avenue lies midway between Nashville and Austin Avenues.

The whole of the said tract of land was subjected by Crossan to a number of restrictive covenants set forth at length in paragraph 4 of the bill of complaint (p. 2, l. 18).

The particular covenant involved in this suit is paragraph 2:

“That no portion of any building shall be erected nearer than fifteen feet of the front property line of Nashville or Oakland or Austin Avenues, bay windows and porches excepted, nor nearer than six feet of the south side property line of any lot, nor nearer than five feet of the rear line of any lot; provided, however, that the owner of two or more contiguous lots may erect a building or buildings on any portion of said lots, without regard to intervening line or lines, in which case such lots shall be considered as single lots; provided, further that said building or buildings so erected shall not be erected nearer than fifteen feet of the front property line as aforesaid; provided, however, that bay windows may extend over said restricted lines, but not nearer than three feet of the south side property line nor nearer than twelve feet of the above mentioned front property line, and that no porch shall extend

nearer than five feet of said front property line, nor nearer than two feet of the south side property line.”

The testimony of Mr. Kline (pp. 43-44), shows that all of the deeds made by Kennedy Crossan, for the several lots of land lying within the above described area, contain the restrictive covenants in question, including the lots now owned by the appellant and the respondent.

At the time the respondent, Mrs. Kemble, purchased her present home there were no houses erected on the west side of Oakland Avenue between her lot and Atlantic Avenue. In November, 1920, John W. Salmon, a builder, erected houses on lots known as 100, 102, 104 and 106 South Oakland Avenue, 106 South Oakland Avenue being the property now owned by the appellant. At the time of the erection of the house at 106 South Oakland Avenue the respondent, Mrs. Kemble, was not occupying her property, and did not know these houses had been built until she returned to her home (p. 32, l. 13).

It appears that of the garages erected by Mr. Salmon appurtenant to the residences built by him, the garage built at 100 South Oakland Avenue extends to within about 4 feet of the south property line; 102 and 104 South Oakland Avenue to within 6 feet of the south property line; and 106 South Oakland Avenue, appellant's property, to within 5 feet of the south property line. With respect to the appellant's garage, the respondent testified that she had assumed that it was 6 feet from the property line, there being no physical division line between the premises.

In May of 1925, the appellant tore out the south wall of his garage and started to extend it to within

1/10 of an inch of the southerly line. The respondent, on the day after the appellant started work, notified him that the extension was in violation of the covenant (p. 29, l. 28), and the next day, namely the 28th of May, the respondent applied for and obtained a rule to show cause (p. 60, l. 4).

There was some testimony that other garages had been built nearer to the line than 6 feet. None of these, however, affected the defendant's property. None of them were as gross a violation as that of the appellant, and Mrs. Kemble testified that she knew nothing of them, had not seen them (p. 60, l. 11, p. 34, l. 11).

ARGUMENT.

1.

The appellant contends that the third restrictive covenant which reads as follows:

“Three: That no building or buildings shall be erected upon any lot or lots aforesaid except only a single dwelling house to be used for private residence purposes, and provided however, that a garage to be used for private purposes in connection with such private residence is not prohibited.”

Permits the building of garages on any part of the lot.

We submit that this contention is entirely without merit. It is obvious that the two covenants are entirely different in their purpose. The second covenant, which is the one in question, has regard to the location of buildings on the lot; the third

covenant, above quoted, has regard to the character of the buildings which may be built upon the lots.

It will be observed that in the second covenant reference is made to buildings generally and not to dwellings only. The third covenant, after providing that no buildings shall be erected on a lot excepting dwelling houses, provides that garages used in connection with such dwelling houses are not prohibited.

We submit that the permission to build garages in connection with dwelling houses, as provided in the third covenant, does not permit the erection of either garages or dwelling houses within 6 feet of the property line, as provided in the second covenant.

2.

The contention that the respondent in this case is in laches is equally without merit. The testimony shows that the building was started on May 27th, and that a bill was filed and a rule to show cause obtained on May 28th. Just upon what theory appellant's counsel claims this is laches, he does not state. We submit that there is no case in our courts in this state where action was more promptly taken.

3.

The appellant also contends that he should be permitted to build his garage to the south side property line, because other garages in the area were erected in violation of the restrictive covenant. Mrs. Kemble testified, as we have above pointed out, that she was absolutely without knowledge of these vio-

lations, and knew nothing of them whatsoever.

The Vice-Chancellor, in disposing of the appellant's contention in this respect, cited the case of *Brode v. Smith*, 118 Atl. Rep. 742 (not yet officially reported). In this case it appeared that there were violations of the covenant sought to be enforced on an adjoining street. Vice-Chancellor Ingersoll, applying the principle laid down by all of the cases, held that:

"The passive acquiescence of a purchaser in breaches of the covenant by which he sustains no particular injury has been held not to deprive him of his equity to protection, where the breach affects his enjoyment of his home. *Pearson v. Stafford*, 88 N. J. Eq. 385, at page 389, 102 Atl. 836, Chancellor Walker, quoting Vice-Chancellor Leaming in *Brigham v. H. G. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185, citing *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899; *Morrow v. Hasselman*, *supra*."

In the case of *Camp v. Krulewitch*, 3 A. R. 377; 127 Atl. Rep. 669 (not yet officially reported); the covenant sought to be enforced was one prohibiting the erection of more than one building for dwelling house purposes on any one lot. It appeared that there were a number of violations of this covenant in the immediate vicinity of the defendant's property, and close to where the complainants resided. It was contended by the defendant, both in the Court of Chancery and in the Court of Errors and Appeals, that these violations in close proximity to the residences of the complainants amounted to an acquiescence in the general abandonment of the covenant in question, and estopped the complainants from attempting to enforce them. In reply to this contention Vice-Chancellor Leaming said:

“Both acquiescence and laches creating an estoppel, to deny the equitable right to enforce, must be based on knowledge of violations or a duty to know of them, and it has been repeatedly recognized in this state, that while it may be a duty of the original townsite proprietor to know of all violations on the entire tract and to prevent them, a similar duty does not obtain as to a single lot owner touching violations at a distance from his lot, and touching which he is not so vitally concerned.”

The principle laid down in *Camp v. Krulewitch* and in the cases cited in the opinion in the present case, was correctly applied by Vice-Chancellor Ingersoll.

We submit that the decree in this cause should be affirmed.

BOURGEOIS & COULOMB,
*Solicitors for and of Counsel
with Respondents.*