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(Filed April 17, 1928.)

In Chancery of New Jersey

Between

REFORSO KNITTING MILLS, INC.,
Complainant,

and

M & N CONSTRUCTION COMPANY,
Defendant.

On Bill, &c.

NOTICE OF APPEAL.

To:

MESSRS. GROSS & GROSS, Solicitors for Defendant.

Sirs:

PLEASE TAKE NOTICE that Reforso Knitting Mills, Inc., the complainant herein, hereby appeals from the whole of a final decree entered in the above entitled cause made by the Chancellor on the advice of Honorable James F. Fielder, one of the Vice-Chancellors, dated the 29th day of February, 1928, to the Court of Errors and Appeals in the last resort in all causes.

ELMER W. DEMAREST,
Solicitor for Complainant-Appellant.

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

ELMER W. DEMAREST,
Of Counsel with Complainant on Appeal.

Bill of Complaint.

(Filed March 22, 1927.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, Reforso Knitting Mills, Inc., a body corporate of the State of New Jersey having its principal office and doing business in the City of Jersey City in the State of New Jersey, respectfully shows that:

1. In 1924 the Metzger Realty Company, a body corporate of the State of New Jersey, was the owner of the lands of both the complainant and defendants herein, and intending to construct an apartment building upon both lands, caused to be prepared a perspective picture of one G. Jack Ashby which picture was signed by the Metzger Realty Company, March 28th, 1924, by A. K. Metzger, president of said Company, and is now in the possession of the complainant and is hereinafter referred to.

2. Said Metzger Realty Company erected upon the lands now owned by the complainant, the westerly half of said building and intended to complete the same as shown by said picture but postponed the construction of that portion of the building upon the defendant's land until a later date because of the high cost of building. By deed recorded in the Hudson County Register's Office in Book 1529 of Deeds, page 197, said Metzger Realty Company conveyed the premises now owned by the complainant to Henry Richards, said deed contains the following covenants, agreements and restrictions:

"It is understood and agreed that the two sections for the entire length thereof of the northwesterly wall of the building standing erected upon the lands hereinabove conveyed (which two sections are respectively about ninety-eight (98) and one hundred and forty (140) feet southwesterly from the southwesterly side of Harrison Avenue and immediately adjoining the westerly line of the lands hereby conveyed) shall, as between the parties hereto, their heirs, successors and assigns, be considered as party walls for the purpose of enabling the party of the first part, its successors and assigns, to insert beams from the building to be erected by the party of the first part, its successors and assigns, on the lands adjoining the premises hereby conveyed on the west, in order to carry out the plan of the twin apartments hereinafter referred to.

"The Metzger Realty Co., the party of the first part hereto, covenants and agrees that it is the owner in fee simple of the tract and parcel of land adjoining the lands and premises hereby conveyed on the west and that the same are of the same dimensions, both as to width and depth, as the lands hereby conveyed. Said Metzger Realty Co., the party of the first part hereto, for itself, its successors and assigns, doth COVENANT AND AGREE to and with the party of the second part, his heirs, executors, administrators or assigns, that it, the said Metzger Realty Co., its successors and assigns, will not build or erect, or cause to be built or erected on the lands immediately adjoining on the west the lands and premises hereby conveyed, and being, as above covenanted, of the same dimensions as the lands hereby conveyed, anything but a brick apartment house of the same height, depth, width, character, style and color as the apartment house now on the lands hereby conveyed, so that when built and erected the

new apartment house to be erected by the said party of the first part, its successors and assigns, on the lands adjoining the premises hereby conveyed on the west, shall in all respects be like and resemble the twin apartments shown in a picture drawn by G. Jack Ashby, which said picture is in the possession of the party of the second part herein, signed and initialed by the parties hereto, and represents the present building and the proposed new apartment house to be erected on the lands adjoining those hereby conveyed on the west so that when erected the said new apartment house, and the present building on the lands hereby conveyed, will constitute the twin apartments shown on Ashby's said picture. It being the intention of these presents that the said lands immediately adjoining the premises hereby conveyed on the west which are owned by the party of the first part and are represented by the party of the first part herein to be of the same dimensions as the lands hereby conveyed, shall be used for no other purpose than the erection and construction of an apartment house of the height, depth, style and character as that shown in the drawing by G. Jack Ashby hereinbefore referred to, the color of the brick and stone and other materials necessary to be used on the exterior of said premises, to be identical with that of the apartment house now on the premises hereby conveyed."

And said premises were by several mesne conveyances conveyed to the complainant whose grantors were Henrich Cohen and Rosie Cohen. Complainant's deed is dated February 1st, 1927, and is recorded in the Hudson County Register's Office in Book 1630 of Deeds at page 554 &c. Each of said mesne conveyances from said Metzger Realty Company to the complainant contained said covenants, agreements and restrictions above mentioned and in the language above set forth.

The lands and premises formerly owned by the Metzger Realty Company and now owned by the complainant are described as follows:

Beginning at a point in the southwesterly side of Harrison Avenue distant two hundred and nineteen and thirty-nine one-hundredths (219.39) of a foot southeasterly from the corner formed by the intersection of the southwesterly side of Harrison Avenue with the southeasterly side of Westside Avenue; and running thence (1) southwesterly and at right angles to Harrison Avenue, a distance of about ninety-eight (98) feet to a point opposite the northerly corner of the northwesterly wall of the building standing erected on the premises herein described; thence southeasterly parallel with Harrison Avenue eleven one-hundredths (.11) of a foot to the northwesterly corner of said wall; thence southwesterly and along the northwesterly or outside face of said wall to the westerly corner of the same; thence westerly parallel with Harrison Avenue six one-hundredths (.06) of a foot; thence southwesterly at right angles to Harrison Avenue and continuing in the line of the first course run, and along the northwesterly wall of said building to a point distant one hundred and seventy-five (175) feet at right angles from Harrison Avenue; thence (2) southeasterly and parallel with Harrison Avenue sixty-nine (69) feet and sixty-five one-hundredths (.65) of a foot; thence (3) northeasterly and at right angles to Harrison Avenue one hundred and seventy-five (175) feet to a point in the southwesterly side of Harrison Avenue aforesaid; thence (4) northwesterly and along the southwesterly side of Harrison Avenue sixty-nine and sixty-five one-hundredths (69.65) of a foot to the point or place of beginning.

2. Subsequent to the conveyance of the complainant's lands and building by the Metzger Realty Company to said Richards, said Metzger Realty Company conveyed the lands adjacent to the complainant's lands and line immediately west thereof by several mesme conveyances to the defendant herein. Said several conveyances contains practically the same clause respecting the buildings to be erected thereon as appears in the deed to the complainant and gives to the owner of said lands the right to insert the beams of any building to be constructed in the complainant's party wall. Complainant is unable to set out verbatim a copy of said covenants because the record of said conveyance in the Hudson County Register's office is not accessible. The deed to the defendant is dated November 30th, 1926, and is recorded in Book 1632 of Deeds, page 159, and the grantors therein are Louis Mirner and Sonia his wife and Jacob Nosenchuk and Dora his wife.

4. The picture referred to in the deed from the Metzger Realty Company to said Richards is in exact accord with the expressed intention of the portion of said deed hereinabove referred to showing the windows of said building on the complainant's land and those of the building intended to be constructed upon the defendant's land to be of the same height and design, that the steps of the main entrances to said buildings on either side of a court receding from the front line of said building be of the same height and with the same number of steps, that the two terra cotta copings on the front of said buildings above the first story and fourth story windows to be of the same design and at the same level and that the front of said buildings should be of the same height so

that the said two buildings should have the appearance of one building in all respects.

5. The neighborhood where said lands are located is strictly and exclusively residential. The grade of Harrison Avenue on the street differs slightly from the picture above referred to inasmuch as there is a decline to the west toward Westside Avenue, but there is nothing to prevent the floors, windows, coping and top of said buildings being kept at the same level, except that the foundation of the building upon the defendant's land would necessarily have to be built somewhat higher to meet the first floor of said building of the complainant. At the time of the construction of the complainant's building by said Metzger Realty Company, places for insertion of the beams of the buildings to be erected upon the defendant's land were left being filled in by bricks which are easily removable for the purpose of the insertion of the beams on defendant's land when a building should be constructed thereon.

6. The officers of the complainant do not live in the vicinity of said building and see the same only occasionally. In the month of February complainant's officers observed the excavating upon the defendant's lands apparently for the purpose of constructing a building thereon but assumed that the covenants of the said Metzger Realty Company would be observed and the building upon said lands constructed in similar design with that upon the complainant's lands. The officers of the complainant some time thereafter observed that the cellar windows in the front of said building of the defendant, with the exception of two, were larger and of different design from those of the

complainant's building but as said larger openings were used for conveying materials into the cellar of the building under construction assumed that they were left larger only for that purpose. When the defendant's building advanced to the point where the lower tier of terra cotta was being laid, complainant noticed that said terra cotta as well as the windows already constructed and the front entrance of the building were about two feet lower than those of the complainant's building. Said entrance to the new building was on a level with the street and has not more than one step. Complainant thereupon observed that the floor beams of the building under construction were not being inserted into the apertures left in the party wall of the complainant's building but were run in a direction at right angles to the floor beams in the complainant's building. Complainant thereupon met the builder of the defendant's building and remonstrated with him about the method of construction and showed him the said Ashby's picture. Said contractor thereupon refused to talk, except to say that he knew what he was doing and that he was acting upon the advice of his lawyer, Isaac Gross, to whom he referred the complainant.

7. Complainant immediately thereafter on the 15th of March consulted his attorneys, who are the solicitors in this suit, who thereupon summoned Isaac Gross to their office and with whom consultation was held. Said Isaac Gross agreed to get in communication with his clients immediately and was told by deponent's solicitors that an injunction bill would be filed immediately unless the front of the defendant's building was made to conform to the covenant in said deed and said picture. Said Isaac Gross agreed from day

to day to get in communication with his client, the said defendant herein, who was until this time unknown to the complainant, and on March 15th, 1927, informed the complainant's solicitors of his client's willingness to raise the coping to correspond with those of complainant's building which the complainant submits is not in accordance with the covenants and agreements contained in said deed inasmuch as it will leave the cellar windows in the defendant's building of entirely different size and design from those of complainant's building, that the entrances to said buildings will not be at the same grade and of the same design as was intended and as shown on said picture; that the top of said buildings will not be at the same level and that the brick courses as now constructed will not be upon the same line, which will give the two buildings the appearance of having been erected at different times and by different designs contrary to the intention of the parties, the covenant in said deed and the perspective of said buildings as shown in said picture.

8. That if the said building is permitted to be constructed as is now planned and being constructed by the defendant it will cause irreparable injury to the said complainant and to its lands and property, that the complainant has remonstrated with the defendant and its attorneys with respect to the said construction and has been delayed in bringing this suit by the actions of and at the request of the said defendants.

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

1. That the said M & N Construction Company, the defendant in this suit, may answer this

bill of complaint and each and every statement therein made.

2. That an injunction final shall issue and that during the pendency of this suit and until the further order of this court the defendant, its agents and servants be restrained from continuing the construction of the said building as the same is now being constructed and from constructing said building in any other manner other than that expressed in the covenant in said deed above recited the said picture drawn by G. Jack Ashby, which is made a part of this bill of complaint and as the intention of the parties is shown by the construction of the party wall on the westerly side of the complainant's present building.

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

HUDSPETH & DEMAREST,
Solicitors and of Counsel with Complainant.

Affidavit of Roy C. Piscitello.

(Filed April 4, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

REFORSO KNITTING MILLS, INC., a corporation of the State of New Jersey,
Complainant,

and

M & N CONSTRUCTION COMPANY, a corporation,
Defendant.

On Bill, &c.
AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

ROY C. PISCITELLO, being duly sworn according to law on his oath, deposes and says:

I am an officer of the complainant in this cause. I was absent at the time the bill of complaint was filed herein and for that reason did not make affidavit thereto.

The building owned by the complainant was purchased as an investment for surplus funds not in use and intended to provide a future income upon the capital invested.

I reside at #190 Freemont Avenue, Jersey City, some distance from the lands which are the subject matter of this suit and do not visit the property frequently. Early in March I first noticed that a building adjoining that of the complainant was being erected and that the cellar front windows were not of the size and design of the complainant's building. I met a man whose

name I do not know but who I believe is an officer of the defendant corporation, and called his attention to the windows. I asked him why the size of the cellar windows was different from that of the complainant's building. He said he didn't think they were. I replied they were large enough for a store. He said he knew what he was doing and that he had been advised by his lawyer and that he might put another family in that part of the building. I replied I cared nothing about the interior arrangements of the building but that I insisted upon the fronts of the two buildings being similar. He then said he had to take the materials through these windows and that in the end he would make them all right. I called his attention to the fact that the lintels and sills were set and that the sides of the windows were finished.

ROY C. PISCITELLO.

Sworn to and subscribed before me this 28th day of March, 1927.

FRED W. RUGGE,
Master in Chancery,
of New Jersey.

Affidavit of James J. Harkins.

(Filed April 4, 1927.)

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

JAMES J. HARKINS, of full age, being duly sworn, according to law on his oath deposes and says:

I am employed in the office of Hudspeth & Demarest, Counsellors at Law, as a title searcher. I

find on record in the office of the Register of Hudson County deed dated November 30, 1926, recorded December 8, 1926, in Book 1632 of Deeds for said Hudson County at page 159 made by Louis Mirner and Sunia Mirner, his wife, and Jacob Nosenchuk and Dora Nosenchuk, his wife, to the M & N Construction Company, a corporation of the State of New Jersey, conveying the property situated in the City of Jersey City, County of Hudson and State of New Jersey on the southwest side of Harrison Avenue two hundred nineteen and thirty-nine one-hundredths (219.39) feet southeast of Westside Avenue, in which deed appears the following covenants:

"Together with the right to use the two sections of the northwesterly wall of building standing erected on the lands adjoining the above described premises on the southeast as party walls with the right on the part of the said party of the second part, its successors and assigns, to use the same as such for the insertion of beams for the erection of the building on the lands hereby conveyed and also

Together with the right to use the westerly wall of said building, which is on the line of the westerly portion of the walls upon which the same stands erected and located a distance of about one hundred (100) feet southwesterly from Harrison Avenue and that portion of the wall of the said building which is on the westerly line of said lands and located a distance of about one hundred forty (140) feet southwesterly from Harrison Avenue as a party wall for the new twin apartment house to be erected by the said party of the second part, its successors and assigns, on the lands hereby conveyed, it being the intention of these presents to convey to the said party of the

Affidavit of James J. Harkins.

second part, its successors and assigns, all of the rights reserved by it to the use of said wall upon the conveyance of the lands and premises immediately adjoining the lands hereinabove described to the southwest by deed of Metzger Realty Co. to Henry Richards by deed dated May 15, 1924, recorded in the Register's Office in Book 1529 of Deeds for Hudson County, page 197.

And the said party of the second part does covenant and agree to and with the said parties of the first part that it, the said party of the second part, its successors and assigns will not build or erect or cause to be built or erected on the said lands and premises anything but a brick apartment house of the same height, depth and width, character, style and color as the apartment house now erected on the lands adjacent easterly to the lands hereby conveyed so that when built and erected, the said new apartment house shall in all respects be like and resemble the twin apartments so situated easterly thereof."

JAMES J. HARKINS.

Sworn to and subscribed before me this 25 day of March, 1927.

JACOB E. MAX,
Atty. at Law,
of New Jersey.

Affidavit of William Neumann.

(Filed April 4, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
REFORSO KNITTING MILLS, INC.,
Complainant,
and
M & N CONSTRUCTION COMPANY,
Defendant.

On Bill, &c.
AFFIDAVIT.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

WILLIAM NEUMANN, being duly sworn on his oath deposes and says:

I am a duly licensed practicing architect of the State of New Jersey, having practiced as such in the City of Jersey City, County of Hudson and State of New Jersey for 25 years last past. My practice in my said profession has been very considerable, extensive and varied and during the course thereof, I have had occasion to draw plans and specifications, as well as supervise the erection of innumerable apartment houses in Jersey City and elsewhere.

I have been requested to make an inspection and examination of the building of the complainant, located on the southerly side of Harrison Avenue in said City of Jersey City, and also the building now being erected by the defendant immediately adjoining the complainant's building to the west.

Hudson County Boulevard is the first street or highway to the east of the properties in question,

and Westside Avenue is the nearest highway westerly thereto, both said highways running approximately at right angles to Harrison Avenue. Harrison Avenue has a gradual downward slope from the Hudson County Boulevard to about the westerly wall of the complainant's building, and thence the slope becomes abrupt, so that there is a difference in the grade between the westerly wall of the complainant's building and the westerly wall of the building now being erected by the defendant, of about eight (8) feet downward in the direction of Westside Avenue.

I have examined the terms of the restriction which is contained in the deed made by Metzger Realty Company to Henry Richards, of the completed or easterly building belonging to the complainant, and have thoroughly familiarized myself with the terms thereof. It would be entirely impracticable and impossible to construct the building upon the defendant's land to have the copings, windows and window sills on a level with those of the complainant's building, and at the same time build it on the same height as the complainant's building. The height of a building is measured from grade, and if the windows, cornices and window sills of the defendant's building were to be made on the same level or plane as those of the complainant's building, the defendant's building would be at least two feet higher than the building of the complainant, and the westerly end, about eight feet higher.

In erecting its building, the defendant was obliged to, and did take account of the differences in the grade of the street. I examined the plans under which the defendant is erecting its building, as well as the plans of the complainant's building, and find that they require the erection

of the building to be of the same height as that of the complainant's, and as far as the building has already progressed, the dimensions on the plans have been complied with and the building, in accordance therewith, will result in the completed structure, being of the identical height as the complainant's building. The building of the defendant is also of the same width, depth, character, style, color, design and identical in every substantial respect with the building of the complainant. The defendant's building, as the same is being erected by them, is in every sense the twin building of the complainant's building.

I have been informed that the complainant's contention is that the defendant's structure might have been so constructed as to have the cornices thereon, windows and window sills level with those of the complainant's building, by increasing the height of their foundation wall. This could not be done for several reasons. First, because the building above grade would have been considerably higher than the building of the complainant, contrary to the express language of the restriction. Secondly, because with the increased height above grade, it would in effect be a six-story building instead of a five-story building; and thirdly, that in order, under such circumstances, to give the two buildings an approximately similar appearance, it would be necessary to build an artificial terrace in front of this new building, which would be contrary to regulations of the Tenement House Department of New Jersey.

A view of the two buildings, either going up or down Harrison Avenue, substantially shows that the two buildings are identical, and in fact the

copings, windows, sills, and other parts of the buildings appear to be on the same level, because the grade of the street, having been properly taken care of, aids in giving that impression, as it should be. If, in fact, the copings, windows and window sills had been on the same level they would not appear to be so by a view looking up or down the street.

The use of the term "twin buildings" does not indicate that the buildings were required to have their several exterior decorations, windows, etcetera, on the same level regardless of street grades, as that term merely means that the buildings are to be as two separate and independent buildings, but should have substantially the same appearance and be substantially of the same design.

I am also informed that there exists a drawing or picture, showing that the two buildings were to be of such construction that windows, copings and window sills were to be on the same level; but I am likewise informed that this picture or drawing fails to show any slope in the grade of the street, which in this case is very substantial. The fact is that the differences in the level of the copings, and windows between the defendant's building in course of construction, and that of the complainant, could be observed only in the inner court where the buildings meet, and this does not in the slightest degree, in my judgment, effect the complainant or its property.

During my entire professional experience, it has always been my understanding, and that of my brethren in the profession, that a twin building is not one which with an adjoining building appear to be one building, but as above stated, a

building of substantially similar design as the adjoining building.

WILLIAM NEUMANN.

Sworn and subscribed to before me this 4th day of April, 1927.

MARY E. McMAHON,
Notary Public of N. J.

Affidavit of John T. Rowland, Jr.

IN CHANCERY OF NEW JERSEY.

Between REFORSE KNITTING MILLS, INC., Complainant, *and* M & N CONSTRUCTION COMPANY, Defendant.	On Bill, &c. AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

JOHN T. ROWLAND, JR., being duly sworn on his oath, deposes and says:

I am a duly licensed practicing architect of the State of New Jersey, having practiced as such in the City of Jersey City, County of Hudson and State of New Jersey for 33 years last past. My practice in my profession has been very extensive

and varied, and during the course of such have had occasion to draw up plans and specifications of apartment buildings.

I have examined the apartment house of the complainant, situate on the southerly side of Harrison Avenue, between Hudson County Boulevard and Westside Avenue, and also the apartment house now in course of construction by the defendant immediately adjoining the apartment house of the complainant to the west. I have also read the restrictions contained in the deed made by the Metzger Realty Company to Henry Richards affecting the construction of a building on the defendant's property. I am thoroughly familiar with the conditions surrounding both these properties and particularly with the abrupt or steep grade upon which the defendant's property is located.

The building being erected by the defendant is of the same height, depth, width, character, style, color and design as the complainant's building adjoining, even to the extent of having the design of the stone work precisely similar to that on the complainant's building, and the defendant's building is in every sense a twin building to that of the complainant. The stone coping and window sills on the defendant's building are about two feet lower than those on the complainant's building, but that is absolutely necessary because of the difference in grade, and there is nothing in the restrictions requiring these to be on the same level; in fact, they could not be made on the same level and have the height of the buildings identical.

During my entire professional experience it has always been my understanding, and that of my brethren in the profession, that a twin building is

not one which with which an adjoining building appear to be one building, but as above stated, a building of substantially similar design as the adjoining building.

JOHN T. ROWLAND.

Sworn and subscribed to before me this 4th day of April, 1927.

MARY E. McMAHON,
Notary Public of N. J.

Affidavit of Abraham K. Metzger.

IN CHANCERY OF NEW JERSEY.

Between REFORSO KNITTING MILLS, Inc., Complainant, *and* M & N CONSTRUCTION COMPANY, Defendant.	On Bill, &c. AFFIDAVIT.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

ABRAHAM K. METZGER, being duly sworn on his oath, deposes and says:

I am President of the Metzger Realty Company and have been such since the incorporation of the said company and also on behalf of my said company negotiated for the sale of the property now owned by the defendant M. & N. Construction Company, to Louis Mirner and Jacob Nosenchuk

of Jersey City, Hudson County, State of New Jersey.

Said Metzger Realty Company had theretofore sold the property adjoining east the defendant's property to Henry Richards. The property which we sold to Henry Richards consisted of an apartment house which said Metzger Realty Company constructed, and for which Nathan Welitoff, Architect, drew the plans and specifications. Shortly after the sale of the property to Mr. Richards we opened negotiations for the sale of the adjoining property to the west to Messrs. Mirner and Nosenchuk and informed them of the extent of the restrictions concerning building up said property, which restrictions we had included in our deed to Mr. Richards.

We informed Mr. Nosenchuk that Mr. Richards had a drawing or picture conveying the idea of the manner in which the apartment house should be constructed. He thereafter advised me that he had been to see Mr. Richards and had been informed by him that he had been unable to find the drawing or picture and asked me whether I had a duplicate of it. I informed him there was but one such picture and Mr. Richards had taken possession of it upon our closing title with him. Mr. Nosenchuk thereafter again advised me that he had again seen Mr. Richards and had been told by him that the picture had been thrown away and was not available. I met Mr. Richards myself several weeks thereafter and asked him about the picture and he told me that Mr. Nosenchuk had been to see him about it but that he had thrown it away. I so informed Mr. Nosenchuk.

About a year later, after considerable negotiations, we sold the said property to the west of Mr. Richards' apartment house to Messrs. Mirner and Nosenchuk and conveyed the same to them.

I am engaged in the building business and have been for many years and know that the defendant's building is a twin building of that of the compalinant and is and will be of the same height, width, depth, character, color and design as that of the complainant's apartment house, and to build the defendant's building on the same level with the complainant's building, would present the appearance of a six story building and in fact would be considerably higher from grade than complainant's building.

Defendant's building is an exact replica of the complainant's building but built on a lower grade. I have seen innumerable twin buildings built on a slope and they have all been built on the same plan as the defendant's building is being built. The fact that the window sills, windows and copings are either lower or higher than on the adjoining building is of no consequence at all.

ABRAHAM K. METZGER.

Sworn and Subscribed to before me this 4th day of April, 1927.

THEODORE H. MATTIL,
Attorney at Law of New Jersey.

Affidavit of Nathan Welitoff.

IN CHANCERY OF NEW JERSEY

Between Reforso Knitting Mills, Inc., Complainant, *and* M & N Construction Company, Defendant.	On Bill, &c. Affidavit.

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

Nathan Welitoff, being duly sworn on his oath deposes and says:

I am a duly licensed practicing architect of the State of New Jersey, having practiced as such in the City of Jersey City, County of Hudson and State of New Jersey for seventeen years last past. During my professional experience I have drawn many plans and specifications as well as supervised the erection and construction of numerous apartment houses in Jersey City and elsewhere and believe that I have prepared the plans and specifications for most of the apartment houses in Jersey City.

I was the architect for the Metzger Realty Company and drew the plans for the erection of the apartment house on the southerly side of Harrison Avenue now owned by the complainant and also drew the plans and specifications for the apartment house now being erected by the defendant adjoining the property of the complainant to the west.

Affidavit of Nathan Welitoff.

I am thoroughly familiar with the construction of the complainant's building and in fact supervised its construction, and am thoroughly familiar with the construction of the defendant's building which is now in progress.

I had handed to me before preparing plans of the defendant's building a copy of the restrictions or provisions contained in the deed from the Metzger Realty Company to Henry Richards included in the conveyance of the company's property and relating to the character of the building to be constructed on the property to the west thereto owned by the defendant and upon which it is constructing its building. I prepared the plans and specifications for the defendant's building so as to strictly comply with all of the provisions of the said restrictions or covenant and provided that the height, depth, width, character, style, color and design of the defendant's building should in all respects be identical with that of the complainant's.

I have examined the building in course of construction by the defendant and find that it is in all respects substantially identical with the building of the complainant. The only difference between the two buildings is that in the defendant's building there will be but three steps in the main entrance in the court yard whereas the complainant's building has four steps. There is also a slight difference in the size of three of the basement windows being erected in the defendant's building and am told that the complainant claims that these might be used for store windows. It is impossible that these could be so used because they are not of the character of store windows, they are of the general character and style of windows found in apartments and besides these windows do actually lead into the janitor's apartment. They are made

somewhat larger than those in the complainant's building because of the drop in the grade in front of defendant's building leaves more exposed wall space above ground and admits of the larger window for the purpose of introducing more light and air into the basement spaces which as above stated is to be used for janitor's apartment.

The design of the main entrance to the defendant's building is identical with that of the complainant's building as is also the coping and all of the stone and ornamental work of the front or exterior of the said building with that of the complainant.

As to the openings left in the westerly wall of the complainant's building for the insertion of the beams therein I recall that during the construction of the building, now owned by the complainant, such openings were left on two stories when the attention of the builder was called to the fact that these openings could not be used for the construction of building on the property westerly thereto because of the abrupt or steep drop in the grade. The making of such further recesses or openings in the wall were discontinued. These openings for the insertion of the beams as left in the complainant's westerly wall could not practically be used for the purposes of constructing the building on the defendant's lands because there was not taken into account the drop in the grade of Harrison Avenue which slopes downwardly towards Westside Avenue. The difference in the grade between complainant's westerly wall and the westerly wall of the defendant's property being approximately eight feet of which it is absolutely necessary to take into account in the construction of a building on the defendant's property.

The restrictions affecting the character of the building to be built on the defendant's lands are more fully set forth in the bill of complaint requiring the defendant to build a structure of the same height as that of the complainant. The height of a building is measured from grade and when there is an abrupt slope or drop in grade as there exists in front of premises of the defendant it is necessary to take an average grade and figure the height from that. In the instance in this case the defendant's building would be exactly the same height as that of the complainant. If the window sills, windows and copings on the front of the defendant's building were to be made on the same level or plane as of the complainant's building the defendant's building would on the average be about four feet higher than the complainant's building, and at the westerly end of the defendant's building would be eight feet higher than the complainant's building and would present the appearance of being a six-story building, whereas the complainant's building is only five stories high. The windows, sills and copings on defendant's building are in fact at the same height above grade as are the complainant's.

It also has been suggested that the windows, window sills and coping of the defendant's building could have been made level with those of the complainant's building by erecting the first story of the defendant's building two feet higher so that the apartments located on the first floor would have about two feet more of ceiling space. If this were done the entire symmetry of the two buildings would be destroyed and instead of being similar would present an appearance of being entirely dissimilar at the expense of a mere attempt of keeping the exterior decorations of both

Affidavit of Nathan Welitoff.

buildings on a level; but there is nothing in the restrictions which require these to be on the same level and if it could be made so the buildings would not be of the same height or appearance. The defendant's building is in every respect the twin building of the complainant's building.

NATHAN WELITOFF.

Sworn and subscribed to before me this 4th day of April, 1927.

MARY E. McMAHON,
Notary Public of New Jersey.

Affidavit of Jacob Nosenchuk.

IN CHANCERY OF NEW JERSEY.

Between

REFORSO KNITTING MILLS, INC., a corporation, Complainant,

and

M & N CONSTRUCTION COMPANY, a corporation, Defendant.

On Bill, &c.
AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

JACOB NOSENCHUK, of full age, being duly sworn on his oath, deposes and says:

I am secretary of defendant M. & N. Construction Company, and in charge of the building being constructed by it on Harrison Avenue, Jersey City, N. J., immediately adjoining the building of complainant to the west. Mr. Louis Mirner and myself purchased the lands upon which this building is being constructed from Metzger Realty Company and acquired the same by deed from it dated December 8, 1925, recorded in the Hudson County Register's Office December 11, 1925, in book 1584 of deeds, page 354, and thereafter on November 30, 1926, conveyed the same to the defendant corporation. We purchased said property from Metzger Realty Company and paid therefor the sum of $40,000.00 for the purpose of

erecting an apartment house thereon. We had been carrying on our negotiations for the purchase of this property from Metzger Realty Company for a period of about eighteen months before Mr. Mirner and myself actually acquired it, as aforesaid. During my negotiations with Metzger Realty Company for the purchase of said property I was told about the restriction for the building upon it, and also that there was a picture showing the proposed new building which would have to be put upon the property offered to Mr. Mirner and myself. Mr. Metzger, who is president of the Metzger Realty Company, advised me that Mr. Henry Richards, to whom he had sold the adjoining building to the east, which is now owned by the complainant, was in possession of the picture. Said Mr. Richards was at that time the owner of the said building now owned by complainant and I went to see him, and in fact met him at the property and asked him to let me see the picture, in as much as I was negotiating for the purchase of the adjoining property now owned by us and contemplated building thereon. He stated to me that he had the picture at home and if I would call there the following day, he would show it to me. I went there, pursuant to our appointment, I believe it was some time in the summer of 1924, to see the picture and met Mr. Richards. He told me that he made a thorough search and could not find it, but that he believed that he had thrown it away with some other papers and old photographs which he had. He suggested that I see Mr. Metzger as he believed Mr. Metzger had a duplicate of it. I then went to see Mr. Metzger and advised him of what Mr. Richards had told me, but Mr. Metzger stated to me that he had no copy of the picture and that the only copy thereof had been given to Mr. Richards when he acquired his property. I met Mr. Richards again several days thereafter and asked him whether it was not possible for him to make a more thorough search for the picture and possibly locate it, but he then informed me that he was sure that he did not have it and had thrown it away. I have never seen this picture although I made every effort, as aforesaid, to locate and examinine it and even requested Mr. Gross, my attorney, to ascertain from the records whether it had been lodged for record, but was advised that it had not.

I am a builder and have been such for the last twelve years and in Jersey City for the last eight years, and thoroughly familiar with every branch of building. I have, before having the plans for the new building drawn by Mr. Nathan Welitoff, our architect, carefully examined the restriction referred to in the bill of complaint, and likewise had it examined by our said architect. The building which we are erecting upon the lands adjoining the complainant's property to the west is in every substantial respect similar to the building standing on the complainant's property and is a twin building thereto. In constructing our building I was obliged to take account of the steep drop in the grade of Harrison Avenue from the westerly wall of complainant's building to our westerly line and beyond westerly to West Side Avenue. There is a drop in the grade of the street between the easterly and westerly lines of our property of approximately 8 feet over a distance of about 69 feet. Our building, when completed, will be the same height, depth, width, character, style, color and design as that standing on the complainant's property. Our main entrance on our side of the court will be exactly of the same design as that of the complainant's building, but instead of there being four steps to the main hallway from the court, we intend to build but three,

as the drop in the grade will not permit the building of any more. The style of cornices used by us and the style of all stone work is exactly the same as that on complainant's building. It would be entirely impractical for us to build our cornices and windows on the same level with those on complainant's building because, if we did, our building would be at least two feet higher than complainant's building, contrary to the restriction, and at the westerly end of our building the same would appear as a six story building. As to the windows in the cellar of our building being larger than those in the complainant's building, it is true that three of the windows are somewhat larger than those in the complainant's building, but the same is hardly noticeable at all and can only be observed on a most captious and painstaking examination. We made these windows somewhat larger because of the abrupt drop of the grade in the street in front of our building, but these can be altered if necessary to the same size as those on complainant's building, without any difficulty and at very little expense. These are not intended and cannot be used for stores and lead to the janitor's apartment in basement.

It is true that representatives of the complainant spoke to me about the difference in the sizes of the windows in the basement, but it is also the fact that I told them, and they admitted to me, that it would not make any substantial difference to them. They first spoke to me when our building was already up to the third story and it was at that time that they first showed me the picture, which surprised me very much because Mr. Richards had told me that he had thrown it away as aforesaid. I pointed out to them that the picture did not represent the true condition existing at the property, because it showed the grade of the

street level, whereas that is not the fact. The only place on the buildings where it appears that the copings are not on a level is at their juncture in the interior of the court. As to the openings alleged to have been left in the complainant's westerly wall for the insertion of beams, these were left on but one floor or story for the reason that after these were left, it was immeditaely ascertained that the building on the lands which we are now building would have to be built lower, and that these openings could not be utilized. A building could not be constructed on our property of the same height as that on the complainant's building and use the openings existing in that wall. I was likewise advised that there was nothing in the restriction which required us to construct our building on the same level and have our cornices, windows and window sills on the same level as those on the complainant's building. It would have been and is impossible to do so and comply with the restriction as to the height of our building. I have observed many twin buildings in course of construction and completed where they are building on a sloping grade and nowhere have I found them to have the exterior cornices, window sills, &c., meet or be on an exact level or plane. They are required to be and are of substantially similar design and appearance and the building we are constructing is in every respect identical with that of the building on complainant's land.

JACOB NOSENCHUK.

Sworn and subscribed to before me this 4th day of April, 1927.

THEODORE H. MATTIL,
Attorney at Law of New Jersey.

Answer.

(Filed April 16, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

REFORSO KNITTING MILLS, Inc., a corporation,

Complainant,

and

M & N CONSTRUCTION COMPANY, a corporation,

Defendant.

On Bill &c.,

ANSWER.

Defendant, a corporation of the State of New Jersey, having its principal office in the City of Jersey City, County of Hudson and State of New Jersey, answering the bill of complaint herein, says that:

1. This defendant admits that in 1924 the Metzger Realty Company was the owner of the lands of both the complainant and defendant, but has no knowledge or information sufficient to form a belief as to whether it, said Metzger Realty Company, intended to construct an apartment building on both lands, or that it caused to be prepared a perspective picture by G. Jack Ashby, as referred to in paragraph one of the complainant's bill, which said alleged picture this defendant was informed, but a few days before the filing of bill of complaint herein, was in possession of the complainant and had been signed by said Metzger

Realty Company, but this defendant alleges and insists that said picture or drawing so made by said G. Jack Ashby is of no force or consequence whatever and is not binding upon this defendant for the reasons hereinafter set forth.

2. This defendant denies that said Metzger Realty Company erected upon the lands now owned by the complainant, the easterly half of a building, or intended to complete the same as shown by said picture, but avers the fact to be that said Metzger Realty Company erected upon the lands owned by the complainant, a fully completed structure, in and of itself a separate and independent building. This defendant has no knowledge or information as to the reason or intention of the said Metzger Realty Company in postponing the construction of a building upon the lands now owned by defendant. This defendant admits the contents of the deed made by said Metzger Realty Company to Henry Richards as alleged in paragraph 2 of complainant's bill and as to the conveyance of said lands by mesne conveyances to the said complainant as in said paragraph alleged.

3. This defendant admits that subsequent to the conveyance of the complainant's lands and building by Metzger Realty Company to said Richards, said Metzger Realty Company conveyed the lands adjacent to the complainant's land immediately westerly thereof to Louis Mirner and Jacob Nosenchuk, who conveyed the same to this defendand and that it is still the owner thereof, but this defendant denies that said conveyances under which this defendant owns its said lands contained practically the same clause respecting the building to

be erected thereon, as appear in the deed to the complainant, but admits that said deeds give this defendant the right to insert the beams of any building to be constructed by it in complainant's party wall. The provisions in the deed to the defendant with respect to the erection of a building upon its lands is in substantially the following words; to which original deeds of conveyance, defendant begs leave to refer for greater certainty, to wit:

> "Together with the right to use the two sections of the northwesterly wall of building standing erected on the lands adjoining the above described premises on the southeast as party walls with the right on the part of the said party of the second part, its successors and assigns, to use the same as such for the insertion of beams for the erection of the building on the lands hereby conveyed and also
>
> Together with the right to use the westerly wall of said building, which is on the line of the westerly portion of the walls upon which the same stands erected and located a distance of about one hundred (100) feet southwesterly from Harrison Avenue and that portion of the wall of the said building which is on the westerly line of said lands and located a distance of about one hundred forty (140) feet southwesterly from Harrison Avenue as a party wall for the new twin apartment house to be erected by the said party of the second part, its successors and assigns, on the lands hereby conveyed, it being the intention of these presents to convey to the said party of the second part, its successors and assigns, all of the rights reserved by it to the use of said wall upon the conveyance of the lands and premises immediately adjoining the lands hereinabove described to the southwest by

> deed of Metzger Realty Co. to Henry Richards by deed dated May 15, 1924 recorded in the Register's Office in Book 1529 of Deeds for Hudson County, page 197.
>
> And the said party of the second part does covenant and agree to and with the said parties of the first part that it, the said party of the second part, its successors and assigns will not build or erect or cause to be built or erected on the said lands and premises anything but a brick apartment house of the same height, depth and width, character, style and color as the apartment house now erected on the lands adjacent easterly to the lands hereby conveyed so that when built and erected, the said new apartment house shall in all respects be like and resemble the twin apartments so situated easterly thereof."

4. This defendant denies that the picture referred to in the deed from Metzger Realty Company to said Richards is in exact accord with the expressed intention of the portion of the deed so made by said Metzger Realty Company to said Richards, but presented merely the artist's perspective or idea, and that the same failed to take account of natural conditions existing upon and about the premises of both the complainant's and defendant's properties which substantially affected the manner in which the lands now owned by the defendant could or might be built upon, and this defendant says and insists that both it, and said Louis Mirner and Jacob Nosenchuk, who really and in fact compose the defendant corporation, had not any legal notice or knowledge of the contents or representation shown on said picture nor were they legally chargeable with notice thereof.

Answer.

5. This defendant admits that the neighborhood where said lands are located, is strictly and exclusively residential, but denies that the grade of Harrison Avenue on which said properties of complainant and defendant's abutt, differs slightly from the picture referred to, but says and insists that the grade of Harrison Avenue declines gradually in a westerly direction until about the westerly wall of complainant's property, and then drops abruptly in a westerly direction and in front of defendant's property so that there is a decline in the grade between defendant's westerly wall and its easterly wall of approximately 8 feet over a distance of approximately 69 feet, which is substantially different from the natural condition shown on said picture. This defendant therefore says and insists that it is not and was not practical, proper or within the purview of said restrictive covenant or condition, to erect the floors, windows, coping and top of defendant's building, at the same level with the building of the complainant. This defendant says and insists that at the time of the construction of complainant's building by Metzger Realty Company, places for the insertion of beams of the building to be erected on the lands now owned by the defendant were left on but one story and partly on another, when the further leaving of such places was discontinued for the remainder of the five stories of said building because it was thereupon ascertained that the building to be erected upon the lands now owned by the defendant could not be erected on the same level with respect to windows, copings, window sills and top of building, as that on complainant's land because of the steep and abrupt drop in grade so as aforesaid existing upon defendant's property.

Answer.

6. The defendant is constructing its building of the same height, color, depth, width, character, style and design in every respect and particular as the building now standing erected upon complainant's land excepting that three of the windows on the grade floor leading to the janitor's apartment in the basement are of somewhat larger dimensions than those in the complainant's building, due to the fact that there is in the complainant's building more wall space in the basement floor above grade, but such difference in size of said windows is not apparent nor does the same in any wise affect the similarity between the building of the complainant and that of this defendant. This defendant intends to erect three steps leading into the main entrance of its building instead of four as upon complainant's building, because the drop in grade upon defendant's property will not admit of the erection of more than three steps, but such difference is entirely insignificant and does not in any wise affect the similarity of the two buildings. This defendant admits that complainant objected to the manner in which it was constructing its building and showed defendant said Ashby's picture, but defendant says and insists that it had, at said time, already constructed the third floor of its said apartment house, and although said conditions now complained of were apparent when it had completed the erection of the first story of its said apartment house, no complaint was made with respect to the manner in which it was constructing its said building until as aforesaid, when defendant could not have remedied the situation, excepting by pulling down two stories of

its said building at an expense and cost to it of $20,000.00 or over.

7. This defendant admits that its solicitors were consulted by the solicitors of the complainant on or about March 15, 1927, and that its solicitor, Isaac Gross, agreed to get in communication with defendant, and that its said solicitor did, on March 18, 1927, inform the complainant's solicitors of defendant's willingness to raise the coping to correspond with those of complainant's building, which, however, this defendant says and insists was done without prejudice and with a view of satisfying the unjust demands of the complainant, although defendant was and is under no legal or equitable duty to do so.

8. The allegations of paragraph 8 of complainant's bill are denied.

Further answering the complainant's bill, this defendant says:

I. That in May and June of 1924 Louis Mirner and Jacob Nosenchuk were negotiating for the purchase of the lands now owned by defendant from Metzger Realty Company, and that at the time of said negotiations Henry Richards was the owner of the lands now owned by complainant upon which said Metzger Realty Company had theretofore erected complainant's building.

II. That said Mirner and Nosenchuk, who are in fact the defendant corporation, were informed of the existence of the covenants contained in the said deed from Metzger Realty Company to said Richards mentioned in the bill of complaint, and

that a picture had been made showing the style of a building required to be erected upon the lands so to be acquired by defendant. That said Mirner and Nosenchuk caused an examination to be made of the records in the Office of the Register of Hudson County in which said county said lands are located, to ascertain whether said picture or any copy or duplicate thereof, had been lodged for record or for public inspection, and had ascertained that the same had not been so recorded or lodged; and that thereupon said Mirner and Nosenchuk made due and diligent inquiry of said Henry Richards and of said Metzger Realty Company to ascertain whether the said picture was extant and for permission to examine the same but were informed that there was but one such picture which had been in the possession of said Richards, but which had been lost or destroyed, and that no copy or description thereof was available and that defendant would have to rely or depend upon the language of said covenant to determine the character of building which it was permissible for it to construct upon its said lands.

III. That said Mirner and Nosenchuk and this defendant did thereafter purchase the lands now standing in the name of defendant, from said Metzger Realty Company at a cost of $40,000.00 and did thereafter cause plans and specifications to be prepared for the erection of the said building and did proceed to erect the same at great cost and expense so that when the complainant first exhibited said picture to defendant as alleged in complainant's bill, the defendant had already expended in the work of said construction, the sum of about $50,000.00 which would be lost to it if it were required to conform to said picture, of

Answer.

which defendant had no notice at the time of its acquisition of said lands and the construction of its said building.

IV. That the building now being constructed by the defendant is in every respect similar in style, design, color, height, width, depth and character as the building standing upon the complainant's land and is a twin building thereto.

V. That no loss or injury has resulted nor can result to the complainant by the method of construction adopted by the defendant, and that said complainant is estopped and in laches in asserting its claim set forth in its bill of complaint herein.

GROSS & GROSS,
Solicitors of defendant.

Replying Affidavit.

(Filed Nov. 22, 1927.)

IN CHANCERY OF NEW JERSEY.

Between REFORSO KNITTING MILLS, INC., Complainant, *and* M & N CONSTRUCTION COMPANY, Defendant.	On Bill, &c. REPLYING AFFIDAVIT

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

CHRISTIAN H. ZIEGLER, being duly sworn according to law on his oath deposes and says:

I am a duly licensed practicing architect in the State of New Jersey, having practiced said profession in the City of Jersey City, County of Hudson and the State of New Jersey for the past 22 years.

During that period of time my practice has been extensive and varied and I have, during said period, drawn plans and specifications of numerous apartment houses and have also, during said period, supervised the erection of numerous apartment houses.

I have made an inspection of the building of Reforso Knitting Mills, Inc., the complainant in this suit, and the building of the M. & N. Construction Company, the defendant herein, which said buildings are situated on the Southerly side of Harrison Avenue in the City of Jersey City, County of Hudson, New Jersey.

Replying Affidavit.

I have also examined the restrictions and covenants contained in the deed made by the Metzger Realty Company to Henry Richards recorded in Book 1529 of Deeds for Hudson County at page 197, which said deed is referred to in the Bill of Complaint filed in this cause.

The building erected by the defendants on the land owned by them, adjoining the building of the complainant, is not in accord with said restrictions and covenants in that it is not in all respects like, and does not resemble the twin apartments shown in a picture drawn by G. Jack Ashby. Said picture shows the windows, window sills, doors, cornices, etc., all to be on the same level while an examination of the buildings shows that they are not on the same level.

Said buildings do not constitute the twin apartments shown on the said Ashby's picture.

CHRISTIAN H. ZIEGLER.

Sworn to and subscribed before me this 26th day of October, 1927.

FRED W. RUGGE,
Master in Chancery of New Jersey.

Stipulation.

(Filed Nov. 22, 1927.)

IN CHANCERY OF NEW JERSEY.

Between REFORSO KNITTING MILLS, Complainant, *and* M & N CONSTRUCTION COMPANY, Defendant.	On Bill, &c. STIPULATION.

It is hereby stipulated and agreed between the counsel of the respective parties hereto that the above entitled cause be heard and determined by this court upon bill and answer, and the affidavits and exhibits filed herein, and that the cause may be moved for argument thereon by either party, upon five days' notice to the other.

Dated, Nov. 18, 1927.

HUDSPETH & DEMAREST,
Solicitors of Complainant.

GROSS & GROSS,
Solicitors of Defendant.

EXHIBIT C-1-A.

Perspective picture by G. Jack Ashby.

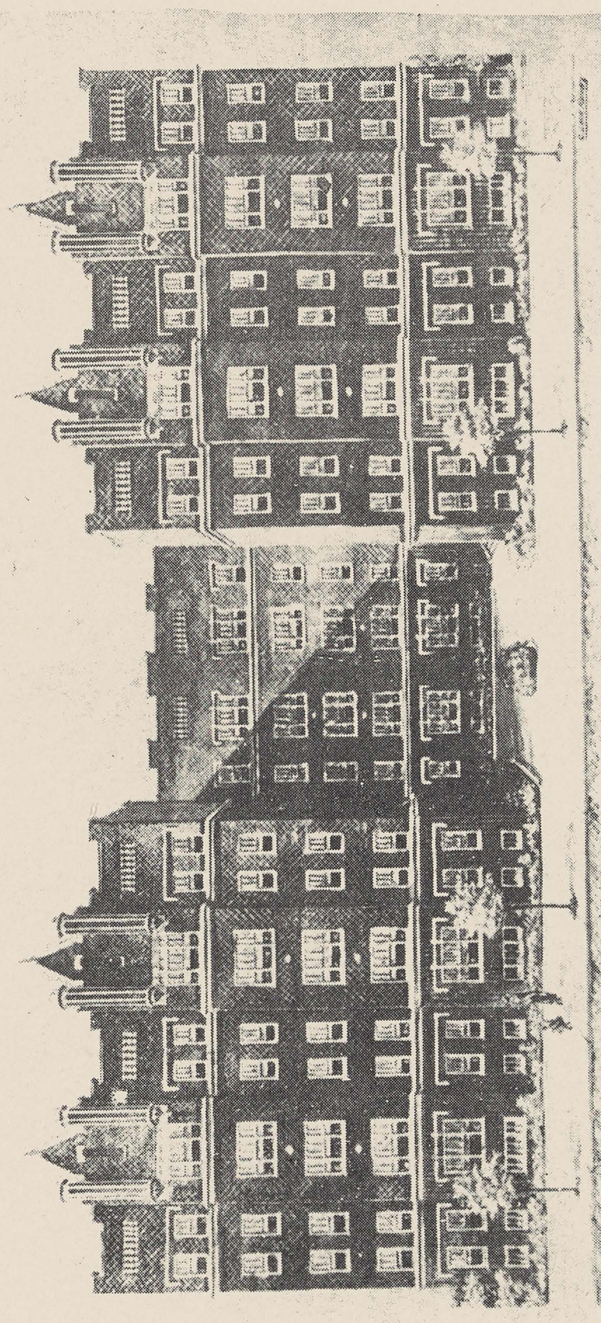

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EXHIBIT C-1-B.

Back of perspective picture of G. Jack Ashby showing signatures.

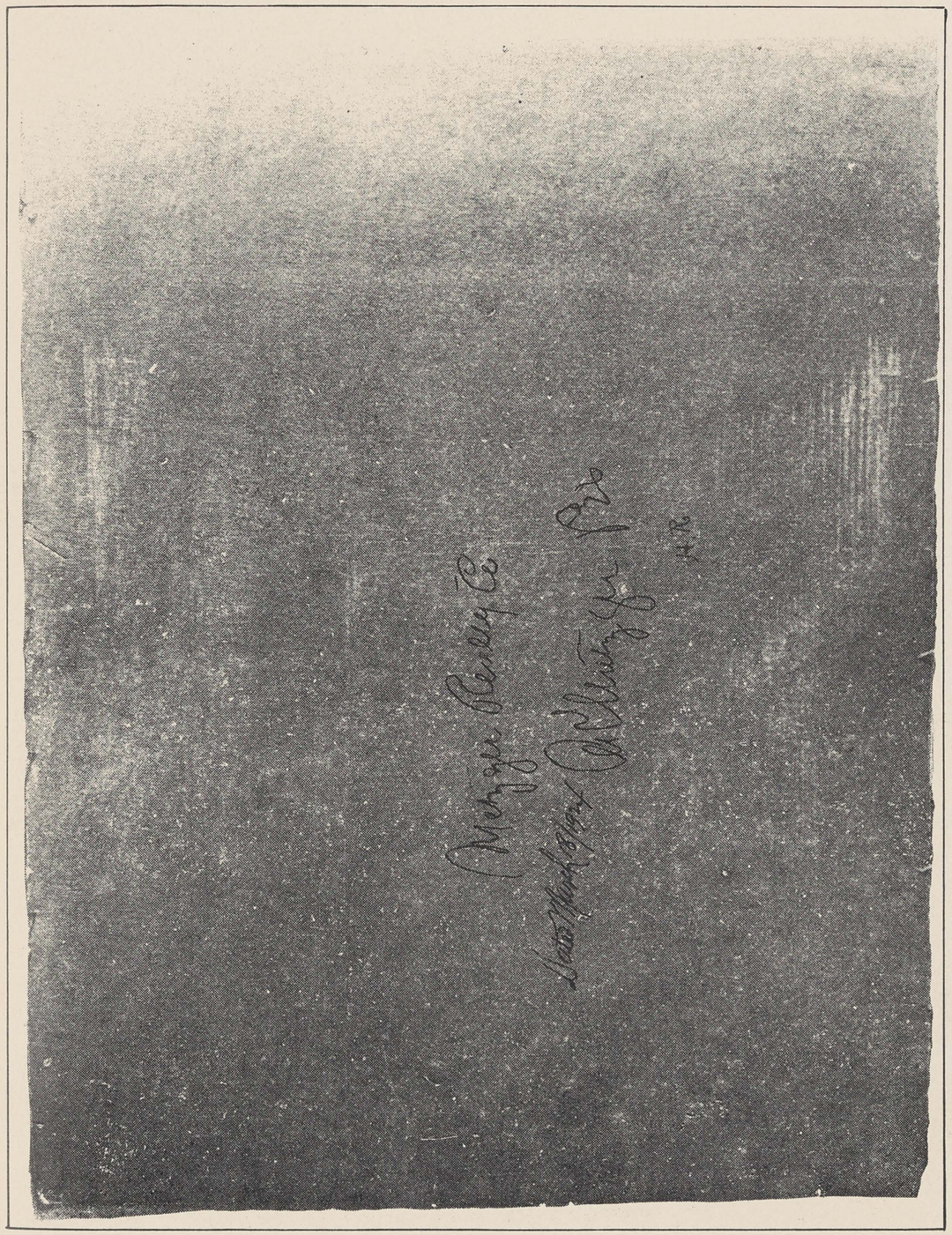

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EXHIBIT C-2.

Photograph made March 26, 1927, showing that Terra Cotta on new building was lower than that on old building.

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EXHIBIT C-3.

Photograph made March 26, 1927, showing that front entrance of new building was lower than old building.

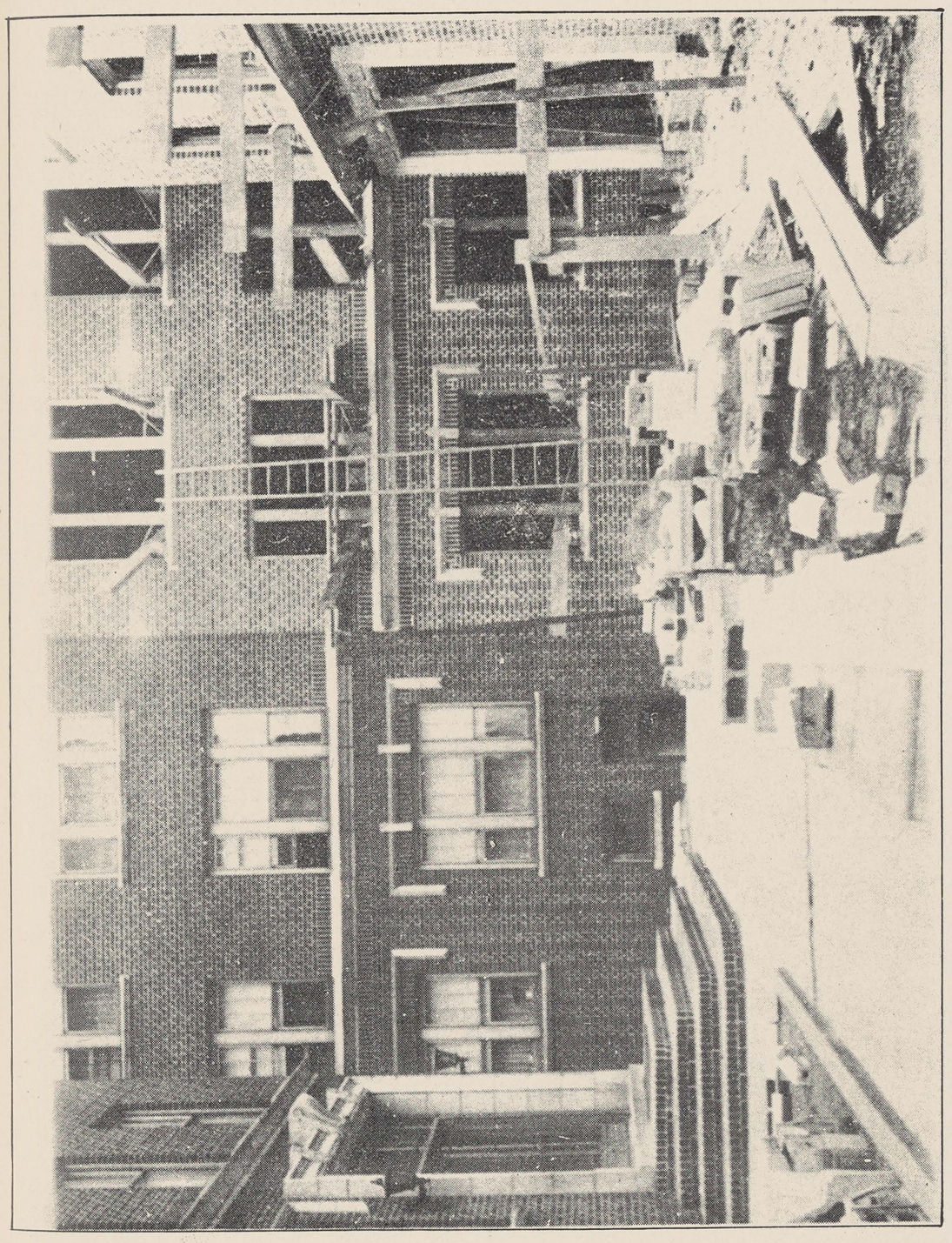

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EXHIBIT C-4.

Photograph made March 26, 1927, showing that floor beams of new building were not being inserted in apertures left in party wall of old building for that purpose.

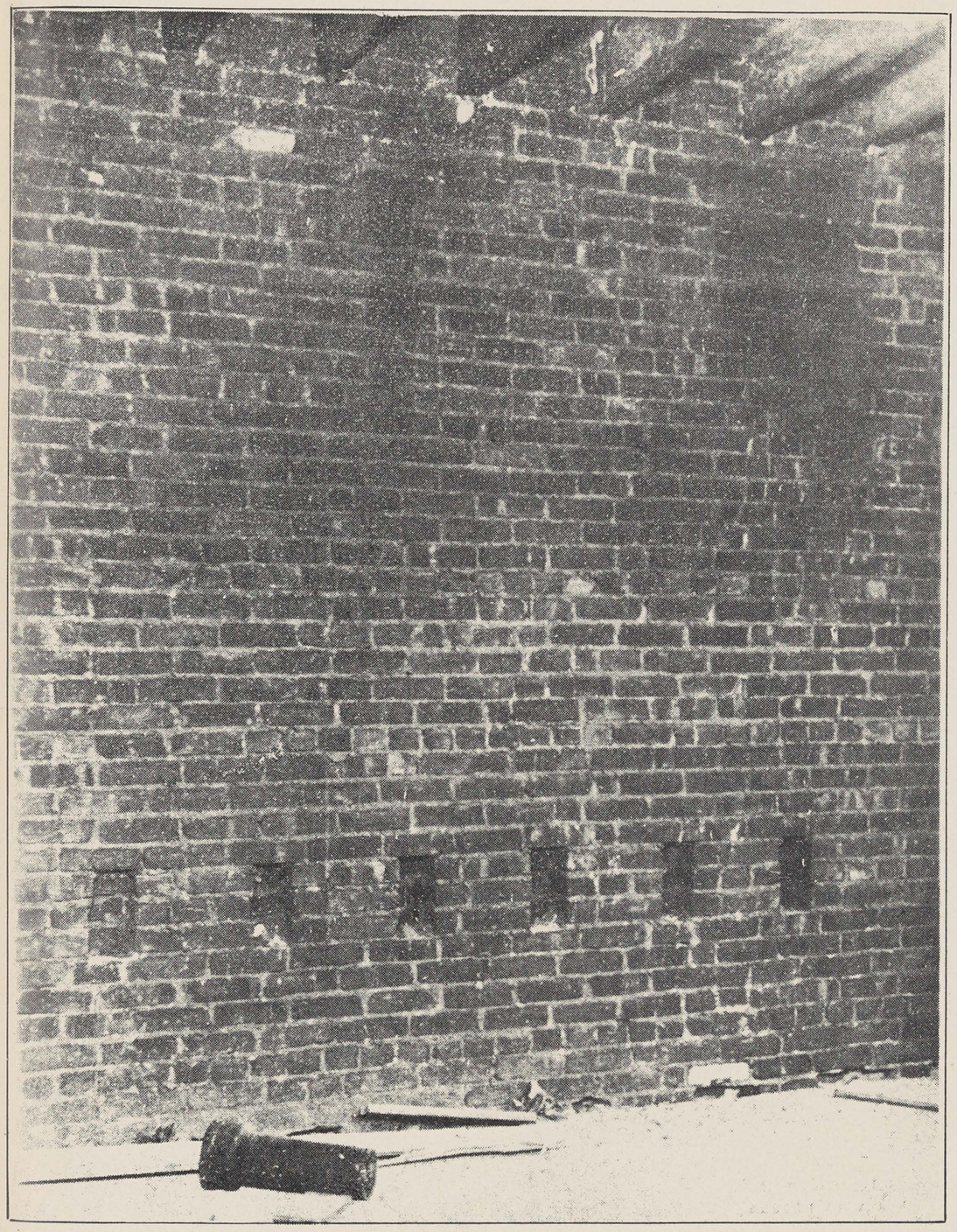

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EXHIBIT D-1.

Photograph made March 31, 1927, showing front part of buildings, and slope and grade in front in a westerly direction.

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EXHIBIT D-2.

Photograph made April 3, 1927, showing front elevation of both buildings from opposite side of street.

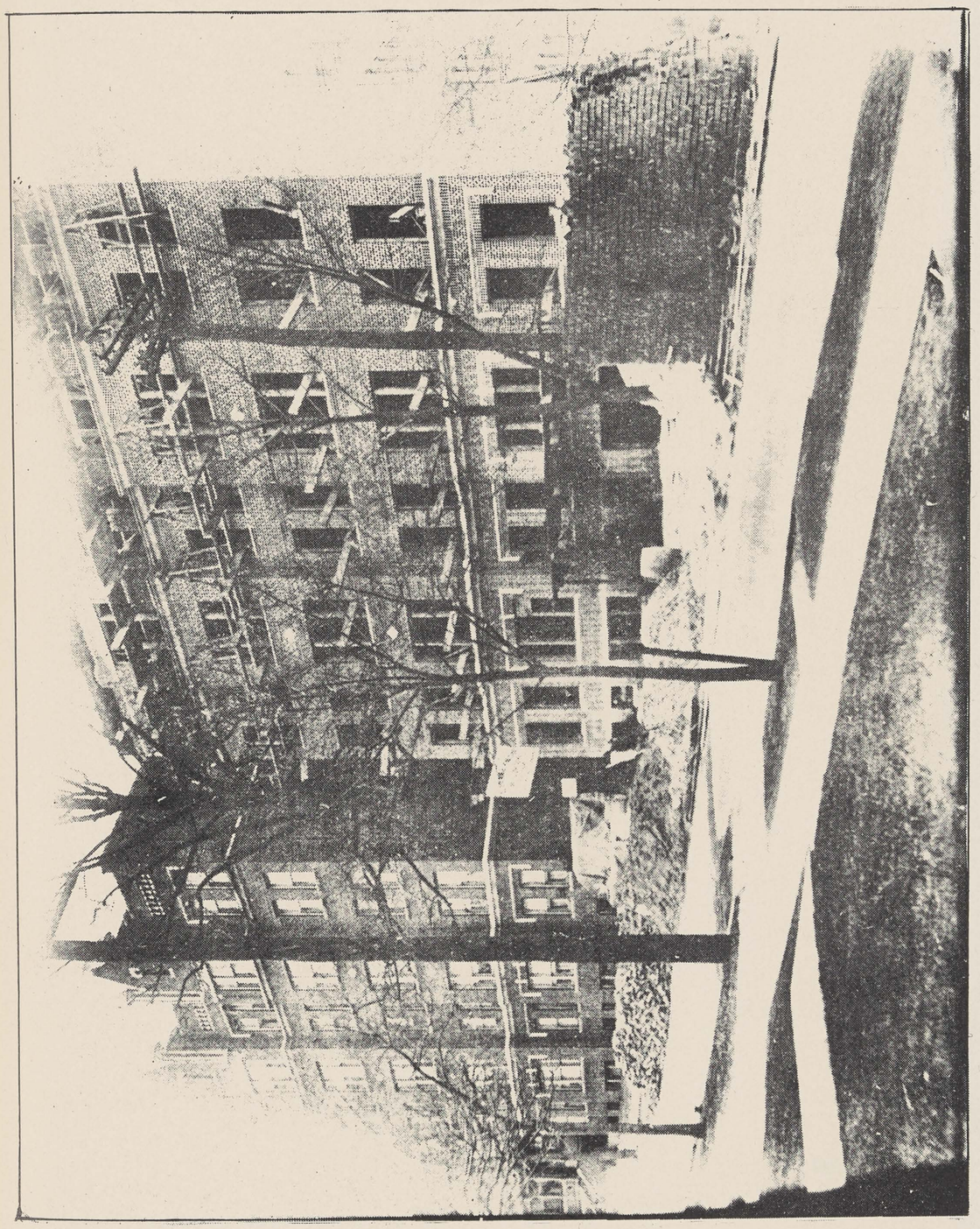

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EXHIBIT D-3.

Photograph made April 24, 1927, showing front elevation of both buildings from same side of street.

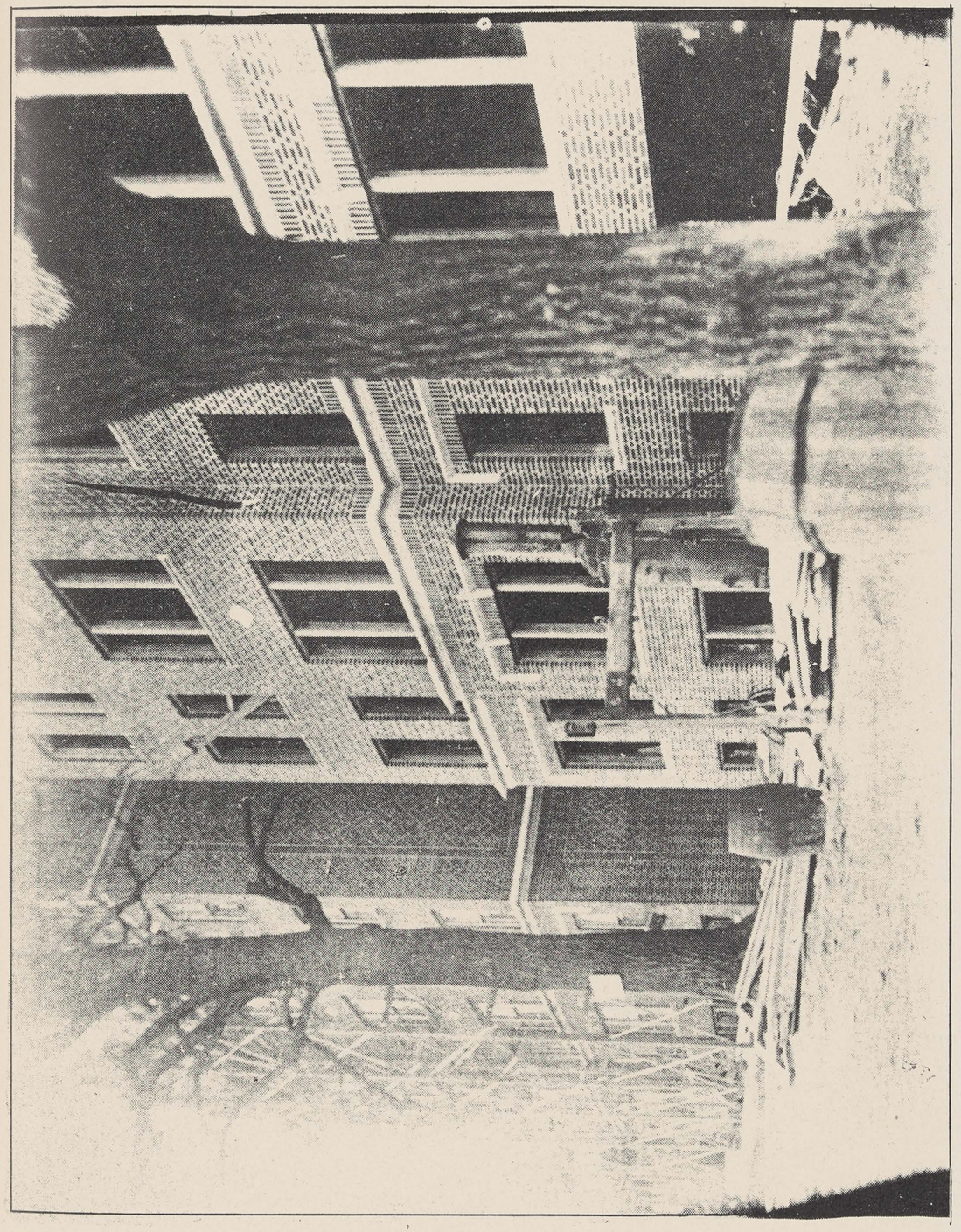

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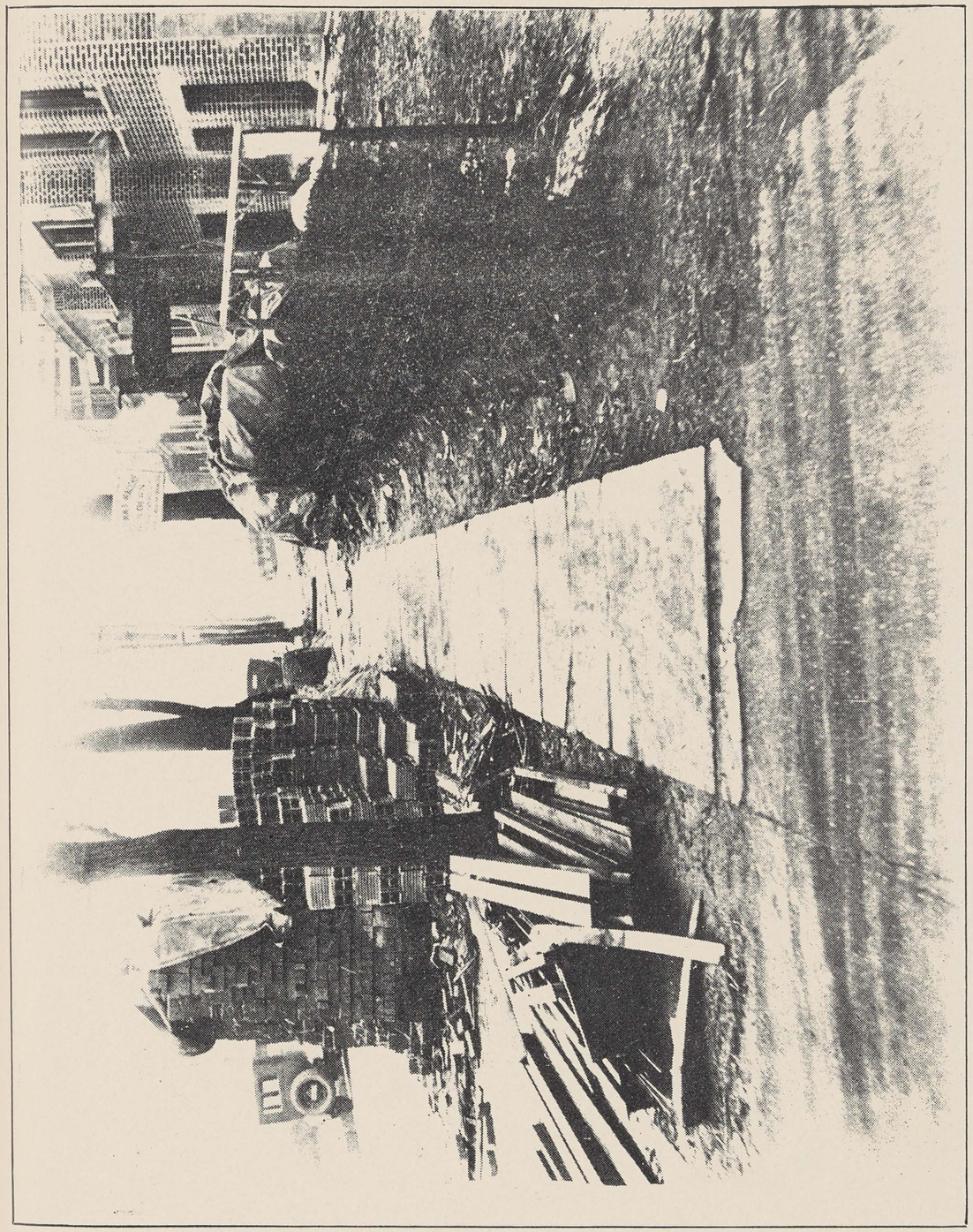
EXHIBIT D-4.

Photograph made March 31, 1927, showing grade of street in front of both buildings looking eastward from westerly line of defendant's property.



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Conclusions.

(Filed February 23, 1928.)

IN CHANCERY OF NEW JERSEY.

63-525.

Between REFORSO KNITTING MILLS, INC., Complainant, *and* M & N CONSTRUCTION COMPANY, Defendant.	On Bill, &c. CONCLUSIONS.

Messrs. HUDSPETH & DEMAREST, for complainant.

Messrs. GROSS & GROSS, for defendant.

FIELDER, V. C.

This cause was submitted on the pleadings, affidavits, exhibits and written stipulation.

The defendant corporation is owned and controlled by Louis Mirner and Joseph Nosenchuk, who, as individuals, acquired title to defendant's land by deed from the Metzger Realty Company, dated December 8, 1925, and thereafter conveyed to the defendant by deed dated November 30, 1926, recorded December 8, 1926. The complainant acquired title to its land early in February, 1927. The deed to defendant contains a covenant that it will not erect anything on its land but a brick apartment house of the same height, depth, width, character, style and color as the apartment house then upon complainant's land, but it contains no reference to a picture or drawing showing complainant's building and a contemplated

building on defendant's land. Of course, defendant's rights in the erection of a building on its land are not to be judged from its deed alone, but also by any building restrictions contained in any previously recorded deeds affecting its title. It appears that the Metzger Company owned both tracts and erected on the easterly tract now owned by complainant a brick apartment house and thereafter conveyed said easterly tract to Henry Richards by a deed which contained a covenant by the grantor to the effect that the Metzger Company, its successors or assigns, would not erect upon the westerly tract retained by the grantor, anything but a brick apartment house of the same height, depth, width, character, style and color as the building on the land conveyed to Richards, so that the building when erected on the westerly tract, would in all respects be like and resemble the twin apartments as shown on a picture or drawing in Richards' possession and so that the new apartment house and the one already erected would constitute the twin apartments shown on the drawing. The covenant further states its intention to be that the lands now owned by defendant should be used for no other purpose than the erection of an apartment house of the height, depth, style and character as shown on said drawing, the color of the brick, stone and other material to be used on the exterior to be identical with that of its neighbor.

Negotiations for the purchase by Mirner and Nosenchuk from the Metzger Company were conducted by Nosenchuk. He was informed of the covenant contained in the deed from the Metzger Company to Richards and he asked the president of the Metzger Company where the drawing therein referred to could be found and he was told there was but one such drawing in existence and that it had been delivered to Richards. He then

went to Richards and stated that he, Nosenchuk, was negotiating for the purchase of the westerly tract and desired to see the drawing before proceeding further. Richards told him that he (Richards) had had it and had made a thorough search for it and could not find it and believed it had been destroyed. On a subsequent occasion Richards made the same statement to Nosenchuk. With this information Mirner and Nosenchuk purchased the westerly tract and subsequently conveyed it to themselves under the style of a corporation. Had Richards continued to own the easterly tract he could not be heard to complain that the apartment house subsequently erected by defendant does not correspond to the drawing, if in all substantial particulars it meets the requirements of the covenant, the covenant being so far as Mirner and Nosenchuk knew, the only evidence in existence showing the building restrictions affecting their property and I am inclined to the opinion that the complainant, as a grantee under Richards, can have no further rights against the defendant than Richards had, unless it had exhibited said drawing to defendant or notified the defendant that complainant and not Richards, had the drawing before the defendant had progressed too far with its building, although defendant had acquired its title in good faith believing that the sole guide as to the kind of building it could construct, was to be found in the recorded covenant.

About the time complainant acquired title to the easterly tract, the defendant commenced excavating its cellar on the westerly tract and of this work complainant's officers were aware. They saw defendant's building go up to the first story windows and they then believed that defendant was not constructing his building according to the drawing, which in some undisclosed way, had come into com-

plainant's possession, but it was not until the defendant had constructed the third floor of its apartment house that complainant exhibited its drawing to defendant and objected to defendant's manner of construction. The defendant had then expended $50,000 in its work and if it could then have met complainant's objection, it would have had to tear down two stories of its building, at an expense of $20,000. I am of the opinion that the complainant's failure to exhibit the drawing to defendant and to assert its claim earlier, is fatal to its prayer for relief.

The defendant's building complies with the limitations placed upon it by the wording of the covenant in the deed to Richards in that it is a brick apartment house of the same height above the street grade, depth, width, character, style and color of brick and with the same ornamental stone work and other exterior materials as complainant's building. Is it a twin building as defined in the covenant and is it in substantial compliance with the drawing? The word "twin" is defined to mean "two; twain; a pair; a couple" and I take "twin buildings" to mean not two buildings so constructed that they appear to be a single building, but two buildings which look like separate buildings, but are similar in exterior construction and appearance. The picture or drawing is, of course, not a photograph or drawing of two buildings in existence at the time it was made; it is an attempt by an artist or architect to depict his mental conception of the appearance two buildings would present to the eye when both were completed, but like many of such concepts, it represents an ideal and not actual conditions. For instance, it shows shapely trees in front of the buildings where there are, in fact, untrimmed and sprawling ones; it pictures flowers and shrubbery

surrounding the front of each building and it further shows the two buildings fronting on a street of a uniform level for the entire width of each building. The fact is that there is an abrupt drop in the street grade and that from the complainant's westerly line to the defendant's westerly line there is a down hill descent of eight feet; yet, according to the drawing, the height of the first story from the street grade to the first story copings in each building is the same, which manifestly cannot be if the top of each building was intended to be on the same level, as the drawings indicate they are. I am of the opinion that the drawing should be interpreted in the light of the ground levels as they were when the drawing was made and as they still are and that the intention of the drawing was to show merely two buildings, twins, of the same height above the street grade, of the same width and of the same exterior appearance. The undisputed evidence is that defendant's building, when completed according to its plans and viewing it from up or down the street, its copings, window sills and other parts will appear to be on the same level as the identical parts of complainant's building, the result of an optical illusion due to the grade of the street.

The complainant comes into court seeking relief on the ground, among others, that if defendant is permitted to complete its building, the complainant will suffer irreparable loss, but no evidence is presented in support of such allegation, while on the other hand it does appear that to enforce the covenant as complainant would have it enforced, would operate oppressively against the defendant and to its great injury.

I do not think that the complainant is entitled to the injunction for which it prays and I shall advise a decree dismissing the bill.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between

REFORSO KNITTING MILLS, Inc.,
Complainant,

and

M & N CONSTRUCTION COMPANY,
Defendant.

On Bill, &c.
FINAL DECREE.

This cause coming on to be heard in the presence of Hudspeth & Demarest, of counsel with the complainant and Gross & Gross, of counsel with the defendant upon the bill and answer, affidavits, exhibits and written stipulation entered into between the parties hereto, and the arguments of the respective counsel having been heard and considered, and the court having duly considered of all matters so submitted to it; and it appearing to the court that the complainant is not entitled to the relief sought and prayed for by it; it is on this 29th day of February, 1928, on motion of Gross & Gross, of counsel with said defendant, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED and DECREED, that the complainant's bill be and the same is hereby dismissed with costs. And it is further

ORDERED, ADJUDGED and DECREED, that the lis pendens or notice of the pendency of this action, filed by the said complainant against the said lands and premises in the Office of the Register

of the County of Hudson, be cancelled and discharged of record. And it is further

ORDERED, ADJUDGED and DECEED, that the sum of $500.00 be allowed and paid to the solicitors of said defendant, and that the same be included in the taxed bill of costs, and collected with the other items of said bill and that execution for said costs issue according to the practice of this court.

E. R. WALKER, C.

Respectfully advised,

JAMES F. FIELDER, V. C.

Petition of Appeal.

(Filed April 18th, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

REFORSO KNITTING MILLS, INC.,
Complainant-Appellant,

and

M & N CONSTRUCTION COMPANY,
Defendant-Respondent.

On Bill, &c. On Appeal from Final Decree. Petition of Appeal.

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

The petition of Reforso Knitting Mills, Inc., the appellant in the above entitled cause, respectfully shows:

1. That your petitioner finds itself aggrieved by the whole of a certain final decree made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, dated February 29th, 1928, wherein the petitioner is complainant and M. & N. Construction Company is defendant.

2. Your petitioner humbly appeals from said final decree of said court on the grounds that the same is in every and all respects erroneous and is not supported by the proofs and pleadings before the Court of Chancery.

Your petitioner therefore prays that the said final decree of the Chancellor may be set aside, reversed and for nothing holden and that your petitioner may have such further relief as to this honorable court shall seem meet.

ELMER W. DEMAREST,
Solicitor and of counsel with
Complainant-Appellant.

Answer to Petition of Appeal.

(Filed April 17, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

REFORSO KNITTING MILLS, INC.,
Complainant-Appellant,

and

M & N CONSTRUCTION COMPANY,
Defendant-Respondent.

On Bill, &c. On Appeal from the Court of Chancery of New Jersey. Answer to Petition of Appeal.

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the 29th day of February, 1928, made and entered in the Court of Chancery, in the cause, for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to equity, and it prays that the same may be affirmed, with costs to be adjudged to this respondent.

GROSS & GROSS,
Solicitors and of counsel with
Defendant-Respondent.

New Jersey Court of Errors and Appeals

Between

REFORSO KNITTING MILLS, INC.,
Complainant-Appellant,

and

M & N CONSTRUCTION COMPANY,
Defendant-Respondent.

ON APPEAL FROM FINAL DECREE.

APPELLANT'S BRIEF.

The appeal in this case is taken by the complainant below, from a final decree of the Court of Chancery (Case, p. 70) dismissing its bill of complaint. The bill was filed to enjoin the defendant below from constructing an apartment house, upon lands adjoining those of the complainant, in violation of a covenant contained in a deed of the Metzger Realty Company (which was then the owner of both the complainant's and defendant's lands) to one Richards, which reads as follows:

> "It is understood and agreed that the two sections for the entire length thereof of the northwesterly wall of the building standing erected upon the lands hereinabove conveyed (which two sections are respectively about ninety-eight (98) and one hundred and forty (140) feet southwesterly from the southwesterly side of Harrison Avenue and immediately adjoining the westerly line of the lands hereby conveyed) shall, as between the parties hereto, their heirs, successors and assigns, be considered as party walls for the purpose of enabling the party of the first part, its suc-

cessors and assigns, to insert beams from the building to be erected by the party of the first part, its successors and assigns, on the lands adjoining the premises hereby conveyed on the west, in order to carry out the plan of the twin apartments hereinafter referred to.

The Metzger Realty Co., the party of the first part hereto, covenants and agrees that it is the owner in fee simple of the tract and parcel of land adjoining the lands and premises hereby conveyed on the west and that the same are of the same dimensions, both as to width and depth, as the lands hereby conveyed. Said Metzger Realty Co., the party of the first part hereto, for itself, its successors and assigns, doth COVENANT AND AGREE to and with the party of the second part, his heirs, executors, administrators or assigns, that it, the said Metzger Realty Co., its successors and assigns, will not build or erect, or cause to be built or erected on the lands immediately adjoining on the west the lands and premises hereby conveyed, and being, as above covenanted, of the same dimensions as the lands hereby conveyed, anything but a brick apartment house of the same height, depth, width, character, style and color as the apartment house now on the lands hereby conveyed, so that when built and erected the new apartment house to be erected by the said party of the first part, its successors and assigns, on the lands adjoining the premises hereby conveyed on the west, shall in all respects be like and resemble the twin apartments shown in a picture drawn by G. Jack Ashby, which said picture is in the possession of the party of the second part herein, signed and initialed by the parties hereto, and represents the present building and the proposed new apartment house to be erected on the lands adjoining those hereby conveyed on the west so that when erected the said new apartment house, and the present building on the lands hereby conveyed, will constitute the twin apartments shown on Ashby's said picture. It being the intention of these presents that the said lands

immediately adjoining the premises hereby conveyed on the west which are owned by the party of the first part and are represented by the party of the first part herein to be of the same dimensions as the lands hereby conveyed, shall be used for no other purpose than the erection and construction of an apartment house of the height, depth, style and character as that shown in the drawing by G. Jack Ashby hereinbefore referred to, the color of the brick and stone and other materials necessary to be used on the exterior of said premises, to be identical with that of the apartment house now on the premises hereby conveyed."

reference to which is made in the later deed of the Metzger Realty Company to Louis Mirner and wife and Jacob Nosenchuk and wife (who later became the M & N Construction Company, the defendant herein) in the following language:

"Together with the right to use the two sections of the northwesterly wall of building standing erected on the lands adjoining the above described premises on the southeast as party walls with the right on the part of the said party of the second part, its successors and assigns, to use the same as such for the insertion of beams for the erection of the building on the lands hereby conveyed and also

Together with the right to use the westerly wall of said building, which is on the line of the westerly portion of the walls upon which the same stands erected and located a distance of about one hundred (100) feet southwesterly from Harrison Avenue and that portion of the wall of the said building which is on the westerly line of said lands and located a distance of about one hundred forty (140) feet southwesterly from Harrison Avenue as a party wall for the new twin apartment house to be erected by the said party of the second party, its successors and

assigns, on the lands hereby conveyed, it being the intention of these presents to convey to the said party of the second part, its successors and assigns, all of the rights reserved by it to the use of said wall upon the conveyance of the lands and premises immediately adjoining the lands hereinabove described to the southwest by deed of Metzger Realty Co. to Henry Richards by deed dated May 15, 1924, recorded in the Register's Office in Book 1529 of Deeds for Hudson County, page 197.

And the said party of the second part does convenant and agree to and with the said parties of the first part that it, the said party of the second part, its successors and assigns will not build or erect or cause to be built or erected on the said lands and premises anything but a brick apartment house of the same height, depth and width, character, style and color as the apartment house now erected on the lands adjacent easterly to the lands hereby conveyed so that when built and erected, the said new apartment house shall in all respects be like and resemble the twin apartments so situated easterly thereof."

Statement of Facts.

In 1924 the Metzger Realty Company was the owner of both the complainant's and defendant's tracts and caused a sketch to be made by one G. Jack Ashby on March 28th, 1924 of twin apartment houses intended to be erected upon said lands (Ex. C. 1 A, Case p. 47). It then constructed the easterly half of said buildings (shown on the left of the exhibit) but postponed the construction of the other half (on the defendant's land) because of the high cost of building. The Metzger Realty Company then conveyed the complainant's lands with the building thereon to one Henry Richards by deed containing the covenant above

recited. By mesne conveyances the complainant's lands were conveyed to it by Henrich Cohen and wife February 1st, 1927, each of which contained the covenant above mentioned and were recorded. Aside from the record, the defendant, who purchased from the Metzger Realty Company November 30th, 1926 (Harkins' Affidavit, p. 13), had actual knowledge of the covenant in the deed to the complainant (Nosenchuk Affidavit, p. 30, Metzger Affidavit, p. 22). After the sale by the Metzger Realty Company to Richards negotiations opened for the sale of the adjoining tract to Mirner and Nosenchuk (Case, p. 30, l. 2; p. 23, l. 13) which "about a year later, after considerable negotiations" were concluded (p. 22, ll. 38-42). Nosenchuk in his affidavit (p. 30) says the negotiations covered eighteen months.

Harrison Avenue, running west from the Hudson County Boulevard, has a grade drop, that would make the grade line 8 feet lower than the east end, or entrance, to the complainant's building. The difference in the grade of the street at the point of entrance of the two buildings (see pp. 47, 53) would apparently be two feet (Neumann Affidavit, p. 16, l. 28) while at the westerly end of the defendant's building it would be 8 feet.

The plans for both buildings were drawn by the same architect, Welitoff (p. 24, l. 32) who had before him "before preparing the plans of the defendant's building a copy of the restrictions" in the deed from the Metzger Company to Richards (p. 25, l. 10). The roof, window sills, windows and copings of the defendant's building are about four feet lower than those of the complainant's building (Defendant's Witness Welitoff, p. 27, l. 20; Photographs C-2, p. 50, C-3, p. 52, D-1, p. 56, D-2, p. 58). The basement windows of the two buildings are also different (Nosenchuk, p. 32, l. 16; Welitoff, pp. 25, 26). The apertures left in

the party wall for the insertion of the floor beams of the defendant's building, distinctly referred to in the covenant in the deed from the Metzger Company to Richards (p. 3, l. 12) were not used by the defendant. Instead of being inserted in, the beams were laid parallel and not at right angles to the party wall (Bill, p. 8, l. 18; Photograph C-4, p. 54). The result is that the roof, windows, window sills, cornices, and entrances of the defendant's building are four feet below those of the complainant's building and that measured from grade, the defendant's building at the easterly end is four feet lower than that of the complainant and at the west end four feet higher. This the complainant contends is a violation of the language of the covenant in the deeds to it and the sketch referred to in the covenant (Ex. C-1, p. 46).

Upon filing the bill a preliminary injunction was applied for and refused, the Court stating his unwillingness to interfere with the construction of a building of this size, but that the denial of the injunction was without prejudice to the rights of the parties. The affidavits of Piscitello (p. 11) and Harkins (p. 12) were submitted by the complainant upon the motion for a temporary injunction. Those of Neumann, Rowland, Metzger, Welitoff, and Nosenchuk were offered by the defendant.

After the denial of the motion, the defendant filed its answer, and the complainant filed the replying affidavit of Ziegler (p. 43). By stipulation (p. 45) the cause was submitted for final hearing without oral proofs upon the bill, answer, affidavits and exhibits already filed.

The complainant's bill and affidavits show that it received the Ashby sketch from its grantors with a deed containing the same restriction as appears in the deed from the Metzger Company to Richards. Upon discovery that the cellar windows were of

different design, the first tier of terra cotta cornice was lower than that of the complainant's building, the entrances not on the same level and that the apertures in the party wall were not being used for the beams of the new building, Roy C. Piscitello, an officer of the complainant, protested to Nosenchuk, Secretary of the defendant (Bill, p. 8; Piscitello, p. 12, Nosenchuk, p. 32) and was told by the latter "he knew what he was doing and was acting upon the advice of his lawyer." The parties then, through their attorneys, entered into negotiations without result, during which time the defendant proceeded with the construction and has since completed its building.

The defendant pleads in its answer:

1.—That the Ashby drawing "is of no force or consequence and not binding upon it" because the picture "failed to take account of natural conditions" (p. 37, l. 27), that while Mirner and Nosenchuk were informed of the existence of the picture (pp. 40, 41) before they purchased (p. 41, l. 28) they made efforts to inspect the picture, inquired of Metzger and Richards and were told the sketch could not be found.

2.—Admits that its deed from the Metzger Realty Company expressly referred to the covenant contained in the deed to Richards which refers to the Ashby drawing (p. 37, l. 1) and sets forth verbatim the defendant's covenant to erect an apartment house which "shall in *all respects* be like and resemble" the complainant's building.

3.—That the defendant had no legal notice or knowledge of the contents of the picture nor were they legally chargeable with notice thereof.

4.—That it was an impossibility for the defendant to construct its building with a roof, window,

cornice and entrance level with the complainant's building. This is a patent absurdity.

5.—While admitting that the defendant's building differs from the complainant's in all respects charged in the bill, it contends that the difference is "insignificant" and that the construction is "in entire compliance with the covenant and in exact accord with the expressed intention" of the deed to Richards.

6.—While admitting that the difference in construction was not discoverable until the defendant "had completed the erection of the first story" (p. 39, l. 33) that the third floor had been completed when the complainant objected and therefore the complainant was guilty of laches. This appears to be the only material difference in the testimony as to the real facts of the case. The bill, verified by the affidavit of Piscitello (p. 8, l. 8) states the protest was made when the lower tier of terra cotta was being laid.

Tersely, the contention of the defendants seems to be that the construction of the defendant's building, both in respect to the covenant and the drawing, is a compliance with the restriction in the complainant's deed and the covenant in the defendant's. The question raised upon this appeal is, therefore, one of fact—viz.: whether the building erected by the defendant, as admitted by the answer and affidavits and shown by the photographs offered on both sides, is a compliance with the language of the covenant.

Before proceeding to the argument it is perhaps well to direct the Court's attention to two erroneous basic conclusions of fact upon which the Vice Chancellor's opinion is reasoned. In referring to the covenant in the defendant's deed, the opinion (p. 65, l. 40 says, "it contains no reference to a picture or drawing showing complain-

ant's building and a contemplated building on defendant's land" yet the affidavit of Harkins (pp. 13, 14) and the defendant's answer (pp. 36, 37) repeat verbatim reference to the deed to Richards in the following language: "deed of Metzger Realty Co. to Richards by deed dated May 15th, 1924 recorded in the Register's Office in Book 1529 of Deeds page 197." As already noted, this deed (p. 4, l. 25) mentions the Ashby drawing. The clause in the defendant's deed moreover refers *exclusively* to the *building* to be constructed by the defendant. Besides, the affidavit of Nosenchuk (p. 30, l. 11) admits actual knowledge of the picture.

Again (at p. 67, l. 37) the opinion says "about the time the complainant acquired title to the easterly tract the defendant commenced excavating its cellar—and of this work complainant's officers were aware. They saw defendant's building go up to the first story windows and they then believed that the defendant was not constructing its building according to the drawing". There is absolutely no proof in the case upon which to base this conclusion. The allegations of the bill (p. 8, l. 5), the affidavit of Piscitello (p. 11, l. 11), and the affidavit of Nosenchuk (p. 32, l. 35), Secretary of the defendant, all disprove this conclusion.

POINT I.

What is the meaning of the covenant in the deed from Metzger Co. to Richards?

The covenant is accurately set out verbatim in the bill (p. 3, *entire,* p. 4, ll. 1-30) and admitted by defendant in its answer (p. 35, l. 23). The first paragraph of the covenant refers to the party wall; the second to the similarity of the buildings.

They are to be read together. The defendant received from the Metzger Company a deed which *expressly* refers to the deed to Richards (p. 37, l. 1) and a further covenant on its part to observe it. The section of the covenant in the deed to Richards referring to the party wall is set out in the answer (p. 36, l. 14). It is entirely overlooked or disregarded in the opinion, and its purport misstated. The opinion reads "the deed to the defendant—contains no reference to a picture or drawing showing the defendant's building and a contemplated building on defendant's land" yet the covenant in the Richards deed refers to "the twin *apartments* shown in a picture drawn by G. Jack Ashby (p. 3, l. 41; p. 4, ll. 1-18). The statement of the terms of the covenant in the opinion (p. 66, ll. 15-33) contains no reference whatever to that part of the covenant relating to the party wall (Bill, p. 3, ll. 1-23; Answer, p. 36, ll. 15-23) and this, as will be later argued, is most important. That the defendant was informed of the existence of the covenant in the Richards deed and the Ashby drawing is found in the opinion (p. 66, ll. 37-43).

The covenant in the Richards deed was intended to be, and is, most carefully drawn. It depends not only upon its own language, but, for still greater certainty, refers to the *Ashby drawing* and the *already constructed party wall.* Its meaning is not to be taken from its language alone but from the references to the drawing and wall as well. Therefore before Mirner and Nosenchuk purchased the land, and before they conveyed to the defendant, they had both record and actual knowledge of the covenant and the Ashby picture, and the party wall to examine. Because the architect, who drew both plans, failed to observe the first plan does not excuse the defendants. The verbiage of the covenant requires no comment. It stands

for itself and is sufficiently succinct. The photograph too is conclusive in its mute portrayal which requires no interpretation.

But here occurs another bit of mute evidence, which, although called to the attention of the Court below, was entirely disregarded by it. It is the party wall, as already constructed and mentioned in the covenant in the deed to Richards. The photograph (Exhibit C-4, p. 54) shows that the apertures left in the party wall for the insertion of the beams of the defendant's building and that for the floor shown in that photograph the beams were laid parallel with the wall. But the next tier of beams above are laid in the opposite direction, *i. e.*: at right angles to the wall and *new holes cut for the insertion of the beams.* Nosenchuk (p. 33, l. 10) says that these apertures were left in the wall for one story only, and gives therefor a reason of which he could have had no knowledge, but Welitoff (p. 26, l. 21) says the openings were left at two stories. We argue that these holes, when their use was considered in conjunction with the language of the covenant showed plainly the intention of the latter and that the cutting of new holes for beams, where others already existed was a direct and culpable violation of the covenant. These apertures were to be considered in conjunction with and are definitive of the intention of the covenant. Defendant contends in its answer, and probably will in its brief, that the provision of the deed respecting the party wall is permissive only. We argue that it both *defines* and *limits* the defendant's rights to the use of the wall. Coupled with the other language of the covenant, the defendant had the right to use the apertures already cut and to cut such others as might be necessary at the same floor levels but not to cut new holes at new levels. Had the defendant done this the provisions of the covenant would have been observed.

The proofs show that there is a difference of eight feet in the street grade in the distance between the east and west end of the defendant's building. The defendant adopted the grade of neither but arbitrarily chose the average of four feet and built its building that distance lower than the complainant's building. If the defendant was unable to understand the meaning of the covenant because of the absence of the picture why was not the approval of Richards (then the owner of the complainant's building) obtained when the building was planned? Again, when the work was begun, why was not the complainant, who then held title, consulted? Complainant's deed was dated February 1st, 1927 (p. 4, l. 35). The defendant's building was not begun until later (p. 7, l. 28; p. 11, l. 37). There appears to have been no attempt by the defendant to observe either the letter or the spirit of the covenant. The entrance is usually the most prominent part of a building. The break of four feet in the roof, window and cornice levels begins midway between the entrances of the two buildings and in the center of the court. It breaks in half the ornamental top embellishment on the roof (Ex. C-1-A). Is this obvious difference in construction a compliance with the covenant?

POINT II.

Was the failure of Richards to find the Ashby picture a waiver of the covenant that is binding upon the complainant?

With knowledge of the existence of the picture (Answer, pp. 40, 41; Nosenchuk, p. 30, l. 11, p. 31, l. 12) the defendant had its plans prepared while Richards was the owner of the complainant's property, and became the owner after the latter

had obtain its title (p. 4, l. 35; p. 7, l. 28; p. 11, l. 37). The defendant seeks to excuse its violation by its inability to see the picture. Yet, as above argued, the location of the apertures for the beams should have made the intended floor level of the two buildings apparent. While the Court below holds that Richards' failure to exhibit the picture is a waiver, binding upon him and his successors to the title, the opinion goes at considerable length into a discussion of whether the defendant's building, as constructed, complies with the picture itself (p. 66, l. 38; p. 67, l. 32; p. 68, l. 31; p. 69, l. 29) and concludes that the picture is meaningless, an impractical "mental conception," "ideal and not actual" and that the construction of the defendant's building is a compliance. Nor does the Court in fixing its facts upon which its conclusions are based confine itself to the proofs. Its conclusions about "untrimmed and sprawling" trees, the absence of "flowers and shrubbery" and the "optical illusion" have no basis in the proofs. The "illusion" does not appear in the defendant's Exhibits (D-2 and D-3) taken from the opposite side of the street. The opinion savors more of a "peep" at the property by the Court than a limitation by the proofs. The Court cannot substitute its artistic conceptions for the expressed intentions of the parties. *The picture is intended to refer exclusively to the buildings* (with the flowers, trees, shrubbery and the weather) (for Exhibit C-1-A shows the sun's shadow) the artist had no concern. Were the reasoning of the opinion followed to a logical conclusion, the figures of the lady and child (shown in Ex. C-1-A) would, in order to be of binding effect, have to be immovable decorative metal hitching posts or Lot's wife and her probable progeny.

The picture (C-1-A) also shows a decline in the street grade, not to the extent of the actual grade

but nevertheless a drop. A measurement of the Exhibit, as printed, which is of much smaller size than the original, shows 1 9/32 inches from the ground level to the bottom of the picture on the complainant's easterly line and 1 5/32 between the same points at the westerly end of the defendant's building. Yet, the roof, windows and copings are in the same alignment. The defendant's own admissions in its answer and affidavits show that it did *not* "believe that the sole guide as to the kind of building it could construct was to be found in the recorded covenant." With full knowledge of the existence of a covenant, Mirner and Nosenchuk bought the lands, agreed in the deed to themselves to observe the same and conveyed to their corporation. The complainant was the innocent party to the transaction. If the defendant and Richards by their act, prior to the complainant taking title, changed the covenant, why was it not in express language changed to conform to the new obligation, whatever that then was?

POINT III.

Evidence of irreparable loss is unnecessary.

It scarcely seems necessary to us to comment upon the finding of the opinion in this respect, but, lest it appear to be ignored, we treat it briefly.

Testimony upon this point would only be that of experts, as to the probable future, and could not measure damages in dollars and cents. For violation of a covenant injunction is always the proper remedy. A grantor may limit the use of property sold by him to some fantastic use, one that will make less and not more valuable. In such case damages could not be proven, yet he

would have the right to his remedy. The recent case of the old Brokaw mansion on Fifth Avenue in New York is directly in point. If an owner erects a statue upon his lands and conveys them subject to a covenant that the statue shall remain he injures the value of the property for the covenant destroys the income but the covenant is enforceable without proof of damage by the erection of an apartment house or office building. The grantee cannot violate the covenant and say "I made money for you."

POINT IV.

Complainant is not guilty of laches.

The defendant makes no point of this defense. It is only casually charged and not stressed in the last paragraph of the answer (p. 42, l. 18); yet the opinion adopts it.

It must be borne in mind that this matter first came before the court upon an application for a preliminary injunction, after the denial of which the defendant proceeded to a completion of the building. The proofs offered upon the motion were considered by counsel sufficient for final hearing, and were supplemented by only the affidavit of Ziegler.

The bill charges (p. 7, l. 29) that the complainant discovered excavating being done by the defendant in February. Later (p. 7, l. 38) the officers of the complainant observed the difference in the cellar windows of the two buildings. When the defendant's building had advanced "to the point where the lower tier of terra cotta was being laid" it protested (p. 8, l. 23). The defendant showed no inclination to comply and Nosenchuk said "he knew what he was doing."

This occured early in March (Piscitello, pp. 11, 12). Upon this point the defendant's answer and affidavits are both most helpful and illuminating. The answer (p. 39, l. 33) admits that the discrepancy was "apparent when it had completed the erection of the first story". Piscitello's affidavit says he remonstrated before that time (pp. 11 and 12). The Ashby picture was then exhibited (Nosenchuk p. 32, l. 36). This is the only material discrepancy in the proofs of the case.

If any laches occurred it was before this protest by the complainant. The answer admits (p. 40, l. 3) that the complainant's solicitors protested to those of the defendant, that three days were consumed in the latter getting into communication with their client. In the meantime, while these protests were pending (p. 40, l. 12) and while complainant threatened to file its bill (p. 8, l. 38) the defendant proceeded with desperate haste to complete its building and has since completed it.

We insist that with knowledge of the covenant, of the existence of the Ashby picture which was shown to Nosenchuk when the complainant made its protest (Answer p. 39, l. 26) and the beam apertures in the party wall there was no obligation on the part of the complainant to object or warn the defendant, yet the answer admits that this was done and that the complainant continued its objection up to the time of argument of the motion for a preliminary injunction during which time the defendant proceeded with the construction. The officers of the complainant did not live in the vicinity of the property and "did not visit it frequently" (p. 11, l. 33). The building of the complainant was purchased as an investment and was not the home of the complainant's officers. Upon discovery of the objectionable construction it immediately protested and continued its objections while the defendant stubbornly continued its construction.

Under these circumstances how could the complainant have "exhibited the drawing to the defendant and assert its claim earlier"? (Opinion p. 68, l. 12). We can conceive of nothing more that the complainant might have done and the opinion suggests nothing that could have been done.

Finally.

We respectfully submit that the opinion savors more of timidity than of equity. As noted in the introduction of the argument, the Court has based its conclusion upon findings of fact not supported by the proofs (in fact disproved by them), and, in its construction of the intention exhibited in the Ashby picture, has drawn conclusions of fact upon subjects upon which there is no proof in the case. The Court seems to have been dazzled by the amount of money invested by the defendant and what it might lose if the covenant were enforced; to have weighed the losses and determined in favor of the party who would suffer most. While it is conceded that if the covenant is enforced the defendant will stand a greater pecuniary loss than will the complainant if the building is permitted to remain as erected, this situation the defendant brought upon itself. Instead of complying with the covenant at a cost of $20,000.00 (p. 40, l. 1, p. 68, l. 12) it chose to take the risk of completing the building and losing a greater sum. For this the complainant is not responsible.

We submit that the decree in the cause should be reversed.

Respectfully submitted,

ELMER W. DEMAREST,
Counsel with Appellant.

New Jersey Court of Errors and Appeals

Between

REFORSO KNITTING MILLS,
Complainant-Appellant,

and

M. & N. CONSTRUCTION COMPANY,
Defendant-Respondent.

On Appeal from the Court of Chancery.

RESPONDENT'S BRIEF.

This appeal is from a final decree of the Chancellor, on the advice of Vice-Chancellor FIELDER, denying to the complainant an injunction mandatory in character, which, if granted, would have required the defendant to pull down a large apartment house which had progressed in construction at the time of the filing of the bill to a point where over three stories of a five-story building had been completed.

The Vice-Chancellor, whose opinion appears on page 65 of the State of the Case, denied the extraordinary relief prayed for upon several grounds recited in the opinion, each of which we shall respectfully maintain was of and in itself a sufficient reason for the Vice-Chancellor's conclusion, and for the making of the decree.

The Facts.

The complainant is the owner of the lands and of a five-story building erected thereon, located on the southerly side of Harrison Avenue, Jersey City, N. J., immediately adjoining easterly the lands now owned by the defendant. The lands of the

complainant have a frontage of about 69 feet on Harrison Avenue and the lands of the defendant are of a similar width.

In 1924 Metzger Realty Company was the owner of both the complainant's and the defendant's lands, but had before that time erected upon the lands now owned by the complainant a fully completed apartment house, which it, in 1924, sold and conveyed to one Henry Richards, and retained title to the remainder of its plot, which is the land now owned by the defendant. In its conveyance to said Richards, Metzger Realty Company inserted a covenant which appears commencing in the middle of page 3 of the State of the Case, in which Metzger Realty Company, the grantor, covenants in substance that it is the owner of lands adjoining to the west of the property so conveyed to Richards, and that the same are of the same dimensions as the lands conveyed; and further, that it will not build or erect on the lands immediately adjoining on the west the lands so conveyed, anything but a brick apartment house of the same height, depth, width, character, style and color as the apartment house then standing on the lands so conveyed to Richards, so that when the new apartment house to be erected on the lands so adjoining to the west is built, it shall in all respects be like and resemble the twin apartments shown in a picture drawn by Ashby, which picture is in the possession of said Richards, the grantee in said conveyance named, signed and initialed by the parties to the conveyance, and represents the then present building so conveyed to Richards, and the proposed new apartment house to be erected on the lands adjoining, so that when completed the new apartment house and the then present building on the then conveyed lands will constitute the twin apartments shown on the Ashby picture.

In this deed of conveyance to Richards there appears to be a reservation to the grantor (Metzger Realty Co.) of a *right* to use the westerly wall of the building so conveyed to Richards, as appears on the first page of the appellant's brief, although nowhere in the case "for the purpose of *enabling* the party of the first part (Metzger Realty Company), its successors and assigns, to insert beams from the building to be erected by the party of the first part (Metzger Realty Company), its successors and assigns, on the lands adjoining the premises hereby conveyed on the west."

Shortly after the acquisition by Richards of the title to the property upon which the completed building then stood, the defendant, through Mirner & Nosenchuk, who compose the defendant corporation, entered into negotiations with Metzger Realty Company for the acquisition of the lands remaining in the ownership of the latter, for the purpose of building thereon. Mr. Nosenchuk conducted the negotiations and was told by Mr. Metzger, president of the Metzger Realty Company, that the use of the lands, for the purchase of which Mr. Nosenchuk was negotiating, was restricted to the erection of a building thereon similar to the building conveyed by it to Richards, and that Mr. Richards was in possession of a picture which he (Nosenchuk) should first examine. Mr. Nosenchuk thereupon went to Mr. Richards, then the owner of the property now owned by complainant, and to use the language of Mr. Nosenchuk's affidavit (p. 30, line 20):

> "Said Mr. Richards was at that time the owner of the said building now owned by complainant and I went to see him, and in fact met him at the property and asked him to let me see the picture, inasmuch as I was negotiating for the purchase of the adjoining property now owned by us and contemplated build-

ing thereon. He stated to me that he had the picture at home and if I would call there the following day, he would show it to me. I went there, pursuant to our appointment, I believe it was some time in the summer of 1924, to see the picture and met Mr. Richards. He told me that he made a thorough search and could not find it, but that he believed that he had thrown it away with some other papers and old photographs which he had. He suggested that I see Mr. Metzger as he believed Mr. Metzger had a duplicate of it. I then went to see Mr. Metzger and advised him of what Mr. Richards had told me, but Mr. Metzger stated to me that he had no copy of the picture and that the only copy thereof had been given to Mr. Richards when he acquired his property. I met Mr. Richards again several days thereafter and asked him whether it was not possible for him to make a more thorough search for the picture and possibly locate it, but he then informed me that he was sure that he did not have it and had thrown it away. I have never seen this picture although I made every effort, as aforesaid, to locate and examine it, and even requested Mr. Gross, my attorney, to ascertain from the records whether it had been lodged for record, but was advised that it had not."

Mr. Metzger's experience in his efforts to obtain this picture from Mr. Richards so that it might be exhibited to the prospective purchaser is set forth in Mr. Metzger's affidavit (p. 22, line 20):

> "We informed Mr. Nosenchuk that Mr. Richards had a drawing or picture conveying the idea of the manner in which the apartment house should be constructed. He thereafter advised me that he had been to see Mr. Richards and had been informed by him that he had been unable to find the drawing or picture and asked me whether I had a duplicate of it. I informed him that there was but one such picture and Mr. Richards had taken possession of it upon our closing title with him. Mr. Nosenchuk thereafter again advised me that he had again seen Mr. Richards and had been told by him that the picture had been thrown away and was not available. I met Mr. Richards myself several weeks thereafter and asked him about the picture and he told me that Mr. Nosenchuk had been to see him about it but that he had thrown it away. I so informed Mr. Nosenchuk."

The defendant being unable, either from the records, from Mr. Richards or from Mr. Metzger, to obtain even a gleaning of this picture, and having thus ascertained that it had been destroyed and was not extant, purchased the property from Metzger Realty Company upon the understanding that it would be required, as far as practicable, having in view the natural conditions existing at the property, to erect a building upon its lot substantially similar in height, design, character, color and appearance as that then standing on the Richards property, which latter has since by mesne conveyances been vested in the complainant.

The defendant had its plans for its new building prepared by Mr. Welitoff, the architect who was familiar with the character of the building on complainant's lands, having prepared the plans for that building as well, and proceeded to erect its building.

It is undisputed that there is a gradual drop in the grade of Harrison Avenue to the westerly wall of complainant's building, but from thence, and upon and in front of defendant's property, the drop in grade is abrupt, so that there is a drop of 8 feet in the grade of defendant's property from its easterly to its westerly boundary.

One of the officers of the complainant, Piscatello (p. 11, line 37), says that he, early in March, noticed that defendant's building was being erected

in such a manner that the cellar front windows were not of the size and design of the complainant's building, and that he then spoke to an officer of the defendant corporation and called his attention to the windows, and asked him why the size of the cellar windows of defendant's building was different from that of the complainant's building, and that they were large enough for a store, and also that the lintels and sills of the basement windows were set and the sides of the windows finished. There is no intimation that he then mentioned anything about the Ashby picture, or exhibited it, or claimed to have it.

In paragraph 6 of the bill of complaint (p. 7) it is alleged (line 29) that complainant's officers observed excavating upon defendant's lands apparently for the purpose of constructing a building thereon, in the month of February, but assumed that the building would be constructed in accordance with the covenant, and that thereafter the officers of the complainant also observed that the cellar windows were not being constructed of the same design as those of the complainant's building, and (according to the Bill of Complaint, p. 8, line 8) that complainant permitted the building to advance to the point where the lower tier of terra cotta was being laid; that the floor beams of defendant's building were not being inserted in the apertures left in the complainant's wall; that complainant remonstrated with an officer of the defendant, and for the first time showed him the Ashby picture. Mr. Nosenchuk swears in his affidavit (p. 32, line 30, etc.) that this conversation and the first exhibition of the picture took place when the building was already up to the third story (see also Answer, p. 39, line 25).

The defendant thereupon offered to do everything reasonably possible within its power and

means, but without prejudice, to satisfy the complainant, by raising the coping on its building to the level of that of the complainant's building (Bill of Complaint, p. 9, line 4), but which the complainant refused to accede to. We shall hereinafter show that defendant's building is not even dissimilar to that shown on this perspective picture.

The answer sets forth, and the proofs on behalf of the defendant are overwhelming to the effect that the defendant's building is in every respect similar to that of the complainant, in height, design, color, size and otherwise (see Affidavit of Neumann, p. 17, line 10; Rowland, p. 20, line 23; Metzger, p. 23, line 14; Welitoff, p. 25, line 25; p. 26, line 11; p. 28, line 8; Nosenchuk, p. 31, line 22; p. 33, line 30; Answer, p. 39, Par. 6).

Upon the filing of the bill of complaint herein an order to show cause was made why a preliminary injunction should not be issued. At the time of the filing of the bill the defendant had already progressed to the point where it had almost completed the fourth story of its building, and upon the return of said order to show cause, after hearing, the Court of Chancery denied the injunction and discharged the order to show cause, not as stated in the appellant's brief "without prejudice," but generally. A copy of the order discharging said order to show cause is printed at the end of this brief.

Keeping in mind the fundamental principles that the burden rests upon the complainant; that covenants restricting the use of property are strictly construed, and that to doubt the complainant's right to enforce such a covenant is to deny it; that upon the hearing of a cause upon bill and answer, the allegations of the answer must be taken as true; that real property is bound only by such conditions as affect its title of record, unless actual notice is shown; and that when it is the duty of a

party to speak, and he refrains from so doing until another may be injured by the assertion of his rights, he will be estopped from so asserting them,—the determination of this cause can be resolved only as did the Vice-Chancellor resolve it in the court below.

This cause was submitted to the learned Vice-Chancellor by stipulation of the parties on bill and answer, and on the affidavits which appear in the State of the Case.

POINT ONE.

The cause having been submitted to the court below on bill and answer, the allegations of the answer must be taken as true.

It is a well established principle that when a cause is heard upon bill and answer, all the allegations of the answer responsive to the bill must be taken as true.

Cammann v. *Traphagen,* 1 N. J. Eq. 28;
Winslow v. *Hudson,* 21 N. J. Eq. 172.

It is respectfully submitted that the allegations of the answer meet all of the charges of the bill and overthrow them.

POINT TWO.

Covenants of doubtful import restricting the use of property and its alienability will not equitably be enforced by injunction.

In the instant case it is alleged in the answer (p. 40, Par. II), and supported by the only two affidavits dealing with the subject—Metzger (p. 22, line 20, etc.) and Nosenchuk (p. 30, line 10, etc.)—that every diligent effort was made by the defendant before it acquired title to its property to secure an inspection of the so-called Ashby picture from the one who was then the owner of the property now owned by the complainant, Mr. Richards, who alone was supposed to be in possession thereof, and in whose deed of conveyance it is recited "which said picture is in the possession of the party of the second part herein, signed and initialed by the parties hereto" (Bill of Complaint, p. 4, line 10).

By the deed to Richards it was thereby made manifest that the only evidence of what this picture indicated, signed and initialed by the parties to the transaction, was in Mr. Richards' possession. After several attempts to locate it, Mr. Richards asserted to the representative of this defendant, and to Mr. Metzger, that the picture had been destroyed. Certainly neither this defendant nor Metzger Realty Company, which was then about to effect a sale of its property to this defendant, was obliged to accept either Richards' or anyone else's oral description of what the picture required, as a perpetual restrictive covenant against the defendant's property. This picture, or a reproduction thereof, might have been lodged for public record, there to remain perpetually for the information of all parties who were or might become interested. It was not so lodged. There was no duplicate of this picture, which had been signed and initialed by the parties extant.

In support of the fact that said Ashby picture, which was a mere visionary perspective of an artist, was not available, there is the mute evidence contained in the deed from Metzger Realty Company to Mirner & Nosenchuk, who in fact compose the defendant corporation, wherein no reference whatever is made of the picture in question, in spite of appellant's contrary statement. The covenant as contained in the defendant's deed

is found on page 36, line 14, etc. The evident reason for the omission of any reference to the picture was because the parties had been authoritatively informed by the only person then in interest, then the owner of the complainant's property, Mr. Richards, that the picture was no more. The statement in appellant's brief, that the covenant in defendant's deed referred to the picture, is not accurate.

Under these circumstances, was the property of Metzger Realty Company, through no fault on its part, to remain perpetually restricted or bound by some covenant reposing in an unrecorded picture, the existence of which was to all intents and purposes beyond the reach of man? If that were so, the property would remain forever inalienable, for certainly no one would purchase property so tied up.

We respectfully submit that it is not necessary to cite authorities for the proposition that our courts do not favor conditions which tend to the inalienability of property.

With this condition confronting the parties, Metzger Realty Company conveyed to the defendant's representatives the lands in question, with a covenant as nearly as practicable conforming with the intention of the covenant contained in its deed to Richards. This covenant (p. 36) grants to this defendant the *right and privilege* of the use of the westerly wall of the Richards building (now owned by complainant). They are not required under this covenant to use the wall at all, but may do so if they so choose. The right so conveyed is precisely in accord with the right reserved by Metzger Realty Company in its deed to Richards. In the deed to Richards Metzger Realty Company reserved the *right and privilege* of using said wall, but was not *required* to use it if it did not choose to do so.

Following earlier authorities to the same effect Vice-Chancellor Lewis in the case of

Muller v. *Cavanaugh,* 94 N. J. Eq. 619

said at page 623:

> "It is a fundamental rule that where a complainant seeks to enforce a restrictive covenant, his right to the relief sought must be clear. If it is doubtful, to doubt is to deny. *Marsh* v. *Marsh,* 90 N. J. Eq. 244."

To the same effect are:

> *Meaney* v. *Stork,* 80 N. J. Eq. 60;
> *Union Investment Co.* v. *Fiske,* 107 Atl. Rep. 65 (not yet officially reported);
> *Jones* v. *Mulligan,* 121 Atl. Rep. 608 (not yet officially reported).

To say that the complainant's right to enforce the restrictive covenant in such a way as to compel the defendant under the circumstances above indicated with respect to the picture to literally comply therewith, *is doubtful,* is to put the case too mildly. The complainant is a successor in title to Mr. Richards, and in privity of estate with him, and has no greater rights than would Mr. Richards have were he the complainant. We respectfully submit that had Richards been the complainant, he would not be heard to insist upon this defendant literally complying with the artist's perspective of how the buildings, when completed, would appear, after his own positive assertion that the picture was destroyed, when he knew and was told that the person inquiring to examine it was about to purchase the lands purporting to be affected thereby, for the purpose of erecting a building thereon in compliance therewith.

Supposing the evidence of the requirements of the covenant were contained in an unrecorded

written agreement between Metzger Realty Co. and Richards instead of in a picture, which agreement was referred to in the conveyance to Richards as being in his possession, and that such agreement could be found nowhere excepting in the possession of Mr. Richards; could it be successfully maintained that Mr. Richards or his successors in title might, after his absolute refusal to show the same to a prospective purchaser of the land purporting to be affected thereby, or upon his destruction of the agreement, forsooth bring it forth from its secret archives and enforce it in a court of equity? Yet that is what is attempted to be done here.

Let us examine what the complainant's case consists of. Its bill of complaint is not verified, but there were subsequently filed on behalf of the complainant the affidavits of Piscitello (p. 11), Harkins (p. 12) and Ziegler (p. 43). In the affidavit of Piscitello, an officer of the complainant, not a word is mentioned about the picture ever having been shown to the defendant or any of its officers, although he recites that he complained to the defendant that some of the windows in the basement of the defendant's building were not of the size of those in the complainant's building. The affidavit of Mr. Harkins, a title searcher, merely recites the covenant contained in the defendant's deed as the same appears of record. The affidavit of Mr. Ziegler as legal evidence is, in our opinion, worthless. He gives his conclusion that the building erected by the defendant is not in accord with the restrictions and covenants, in that it does not resemble the twin apartments shown on the Ashby picture, the latter showing windows, window sills, doors and cornices all to be on the same level, while an examination of the building shows that they are not on the same level. That is the only fault Mr. Ziegler has to find with the manner of the defendant's construction.

There is not a word of proof in all of the complainant's case that it ever exhibited to the defendant, or its officers, the Ashby picture, or insisted upon compliance therewith, although it was in possession thereof, and knew from its chain of title of the recital in the deed to Richards, that in all probability it was the only picture of its kind in existence; for said recital reads:

> "* * * which said picture is in the possession of the party of the second part hereinafter, signed and initialed by the parties hereto."

Complainant and its officers knew that the defendant had not either the possession or access to the said picture since it was in its (the complainant's) possession. Complainant also knew from the very beginning that defendant was erecting a building, and saw the progress thereof (Bill of Complaint, Par. 6, p. 7; Affidavit of Piscitello). Now, too, it may be pointed out that an inspection of the Ashby picture (Exhibit C-1a, p. 46) does not make it certain that brick courses, cornices, window sills are required to be on the same level. These buildings are located on the southerly side of the street. The westerly building or that to the right is defendant's and that to the left is complainant's. This picture takes no account of the natural abrupt grade of the street.

It is respectfully submitted that the complainant's rights under the circumstances, if any, are of such doubtful character as to be unenforceable in a court of equity.

If it were the intention, as claimed by the appellants, that brick courses, window sills, copings, etc. on both buildings were to be on the same level, so as to give the appearance of not "twin buildings" but one building, such intent could readily have been expressed in adequate language in the deed of conveyance, without reference to any picture whatsoever. If such were the intent, the covenant could well have provided, after the requirement that the defendant's building shall be of the same design, color etc., that the brick courses, window sills, copings and all other exterior decorations should be on the same level, so that when completed, the buildings should give the appearance of being but one building; but no such provision anywhere appears.

POINT THREE.

Complainant is estopped from insisting upon the defendant literally complying with the requirements of the Ashby picture.

The facts concerning the assertion by Mr. Richards, the complainant's predecessor in title, that the Ashby picture had been destroyed, and of the non-availability of any duplicate or copy thereof, have been discussed above.

Of course, the burden of proving its case, particularly a case so circumstanced as this, and where serious and irreparable loss may result to the defendant (because the granting of an injunction would have required it to pull down four stories of a five-story building), is upon the complainant. The imposition of burdensome restrictions upon lands, affecting their marketability, and alienability, are not favored in equity, and a complainant's right, in order to be entitled to relief, must be clear.

In this case, in addition to the non-availability of the picture to the defendant, the complainant, knowing that the defendant was in process of constructing a costly building, and knowing that it alone had possession of the picture, made no effort to exhibit the picture until after the defendant had completed the third story of its building, which means that it was proceeding with the fourth story thereof. Complainant is guilty of laches.

Smith v. *Spencer,* 81 N. J. Eq. 389, at page 393.

The complainant, according to paragraph 6 of the bill of complaint, in the month of February, saw the defendant excavating upon its lands for the purpose of constructing a building. An officer of the complainant, Piscitello, swears that early

in March he noticed that the cellar front windows of the defendant's building were not of the size and design of the complainant's building. He said nothing about the picture, nor did he exhibit it, although he then knew, according to his affidavit, that the building as it was being erected was not in conformity with the picture which was then in the complainant's possession.

The uncontradicted affidavit on the part of the defendant (Nosenchuk, p. 32, lines 30, etc.) is to the effect that the complainant's representatives who spoke about the size of the windows in the basement, claimed that that did not make any substantial difference to them, and that he was first shown the picture when the building was up to the third story.

It seems to us quite clear that the complainant knew of the progress of the defendant's building, at all times had possession of the picture, and carefully concealed the same, knowing that the defendant had no access thereto, until the defendant's building had progressed to the completion of the third story, when for the first time did the complainant produce the picture, much to the defendant's surprise. At that stage, were it possible to correct any alleged violation of the covenant, it could have been done only at a cost and loss to the defendant of upwards of $20,000.

If this conduct on the part of the complainant in seeking by this suit to enforce its alleged rights is not unconscionable and inequitable, we must confess that we do not know what is.

The attitude of the complainant may best be illustrated from the allegations of paragraph 7 of its bill of complaint (p. 9), where it is alleged that the defendant expressed its willingness to raise the coping of its building to correspond with that of the complainant's building, but which the complainant refused to agree to, because, as it alleges,

that would not be in accordance with the covenant, inasmuch as it would leave the cellar windows in defendant's building of a different size and design from those of the complainant's building; that the entrances to the building would not be at the same grade and design as shown on said picture, and that the top of the buildings would not be at the same level, and that the brick courses would not be on the same line. There is not a word of proof submitted on the part of the complainant that the cellar windows of the defendant's building will be of different design, or that the entrances are of a different design. The only affidavit on that subject submitted by the complainant is that of Mr. Ziegler, who does not support these allegations of the bill, and every affidavit submitted on the part of the defendant affirmatively shows the contrary. The only difference from the picture which Mr. Ziegler's scrutiny was able to discover was that the windows, window sills, doors and cornices were not on the same level. Complainant does not submit the slightest bit of proof that the condition testified to by Mr. Ziegler will in the slightest degree affect it or its property.

The defendant was willing to do, according to the allegations of the bill above referred to, everything reasonably proper to satisfy the complainant's whims, but it did not wish to avail itself thereof. It insisted, and in its brief in this court persists in its insistence upon its "pound of flesh."

It is respectfully submitted that the complainant was in laches, and that it is equitably estopped from asserting the claim set forth in this suit.

Counsel for the complainant does the learned Vice-Chancellor who determined this case below a grave injustice, when in his brief in this court he says, on page 13:

> "The opinion savors more of a 'peep' at the property by the court than a limitation by the proofs."

Why counsel should go out of his way to make such a misstatement redounding against the learned Vice-Chancellor, is beyond our comprehension. The learned Vice-Chancellor, in finding that because of optical illusion the copings, windows, window sills, etc., appear to be on the same level, undoubtedly based his said finding upon the uncontradicted deposition of Mr. Neumann (Bottom p. 17), where this gentleman, an experienced architect of 25 years' standing, says:

> "A view of the two buildings, either going up or down Harrison Avenue, substantially shows that the two buildings are identical, and in fact the copings, windows, sills and other parts of the buildings appear to be on the same level, because the grade of the street, having been properly taken care of, aids in giving that impression, as it should be. If, in fact, the copings, windows and window sills had been on the same level they would not appear to be so by a view looking up or down the street."

No one contradicts this; not even Ziegler.

The photographs in the record lend no aid whatsoever upon that subject, because upon their examination it will be observed that they were taken from a point almost directly opposite the buildings, which is an entirely different matter. It is matter of common experience that portions of buildings which are located on a steep grade will appear to be at the same level, although in fact not so, when viewed from up or down the street. The buildings in such instances are purposely not constructed with their various exterior trimmings on the same level, because upon such a view from up or down the street, they would not appear to be on the same level. Mr. Neumann swears to this.

Counsel for the complainant-appellant makes much in his brief of the existence of apertures or spaces in the westerly wall of the complainant's building for the insertion of beams. When it is kept in mind that under the covenant contained both in the deed from Metzger Realty Company to Richards, and in its deed to this defendant, the use of the wall by the defendant was merely permissible; that it contained no provision for the use of these apertures; that the defendant, if it so desired, had the right to make new openings anywhere in that wall for the insertion of beams therein, and that it had the right to build an entirely independent wall and not use the old wall at all, the appellant's argument falls flat. But aside from that, the uncontradicted proofs in the case show that these apertures were merely left on one story of the complainant's building and part of the second story. When it was found that because of the difference in the grade of the street and topography of the land, they could not be used, the leaving of further apertures in the wall was abandoned, so that there were about four stories without any apertures at all. (See Affidavit of Welitoff, p. 26, lines 18, etc.; Nosenchuk, p. 33, lines 8, etc.)

POINT FOUR.

Defendant's building complies substantially with the Ashby picture.

The Ashby picture is a mere draftsman's or artist's perspective of what two buildings when completed will look like. Mr. Ashby evidently prepared this picture without examining the *locus in quo,* or did not understand what effect grades have upon building construction. There is an 8 foot drop in grade on the defendant's property from its easterly to its westerly boundary, over a width of 69 feet. No account whatever appears

to have been taken by the draftsman of this picture of this drop in grade. (See grade looking easterly, Exhibit D-4, p. 62.) This condition, for which nature alone was responsible, had to be taken care of by anybody erecting an apartment house upon the defendant's lands, and by virtue of the covenant contained in the deed from Metzger Realty Company to Richards this land now owned by the defendant was not available or usable for any other purpose.

While we are not so certain that an examination of the Ashby picture, appearing as Exhibit C-1a, shows the cornices, window sills, brick courses and other exterior embellishments to be on the same level on the two buildings, a reading of all of the affidavits submitted on behalf of the defendant shows that that would have been practically impossible.

A close examination of the Ashby picture, to our view, does not show the entrances of the buildings to be at the same level. In fact, it does not show the entrances of the buildings at all. The entrance to the complainant's building is to the left of the court shown in the center of the picture, and the entrance to the defendant's building is to the right of that court, where a corner of some steps is about all that is visible on the picture. The brick courses do not even show, and we respectfully maintain that it is very doubtful, from an inspection of that picture, whether the cornices, windows or window sills of both buildings are on the same level.

It is certainly doubtful enough, in our view of it, to question the propriety of the granting by a court of equity of its extraordinary writ of injunction. But aside from that, instead of the picture showing any grade in a westerly direction, which would be to the right of the picture, it shows an up-grade in that direction, which is not in accordance with conditions actually existing.

In order to point out more definitely the fact that even the Ashby picture (p. 46) does not sustain the plaintiff's contention that the copings, window sills, etc., are not thereon shown to be on the same level on both buildings, we made the following measurements thereon: Each of the buildings is 69 feet in width, thus making the width of both buildings 138 feet. In order to ascertain the scale of the picture we measured the width of the buildings thereon and find them to be 6 5/16 inches. Measuring the height of the copings above the first story, from the ground line forming the frame of the picture we find that it is 1 13/16 inches above that line at the left hand, or most easterly end of the complainant's building, and 1 14/16 inches from said line to the bottom of the copings above the first story at the right end or most westerly corner of the defendant's building. There appears to be approximately a difference of 1/16 inch in favor of an elevation to that extent at the most westerly corner of the defendant's building being at the extreme right of the picture, although in truth and in fact the grade of the ground at that point is 8 feet *below* the point of division of the two buildings which is about in the centre of the picture. The scale, as we have figured it out, with respect to the width of the two buildings on this picture, is 1/16 inch to 1.3663+ feet. There is, however, nothing on this picture to indicate that it is drawn to scale or otherwise. However that all may be, we respectfully contend that the complainant's insistment that the defendant was obliged to build its building with its brick courses, coping, terra cotta and window sills precisely in a line with those of complainant's building, based upon this picture alone, is of such doubtful character that the court below was justified in refusing to grant its writ of injunction which here would have resulted in irreparable loss and injury. There is nothing in

the language of the covenant contained either in the Richards deed or in the defendant's deed which in the slightest degree intimates or speaks of the brick courses or cornices or windows or window sills being on the same level with those on the complainant's building, but the language used is that there shall not be built "anything but a *brick apartment house of the same height, depth, width, character, style and color* as the apartment house now on the lands hereby conveyed." All of the affidavits submitted indicate that the defendant's building is built strictly in accordance with the language so used and that the defendant's building is a twin building to that of the complainant. (Neumann, p. 18, line 12, and same page, line 35; Rowland, p. 20, line 23, etc.; Metzger, p. 23, line 15; Welitoff, p. 25, line 24; p. 28, line 8.) Complainant's notion seems to be that the use of the words "twin buildings" is intended to require the buildings to be given the appearance of being but one building, although in separate ownership and subject to independent control and disposition.

We respectfully submit that the words "twin buildings" convey no such significance. Like the word twain, it means two separate, but resembling each other. According to the complainant's proposed definition, "twin beds" would mean but one bed. That the defendant's building in every respect resembles that of the complainant is not disputed by even Mr. Ziegler, who merely finds that the coping, window sills, etc., are not on the same level on both buildings.

The court below has found that the complainant failed to show any injury, and its counsel on this appeal strongly criticizes the court below for such a finding. Practical men say that the difference in the levels of the brick courses, cornices, copings, etc., on the two buildings does not affect the complainant or its property in the slightest degree (Neumann, p. 18, line 30, etc.; Metzger, p. 23, line

20). There is not the slightest proof on the part of the complainant that such difference would affect the saleability, marketability, use or value of its property. Considering that the properties are under separate ownership they could not be sold as one unit. So, considering the doubtful character of the complainant's right, the circumstances surrounding the parties, the inability of the defendant to secure an inspection of the picture after diligent effort, and the failure of the complainant, who knew that the defendant was building or intended to build, to exhibit the picture until after three stories of it were up, the court below very properly, in our judgment, took into consideration the grave and serious injury which might result to the defendant by its strict enforcement of what the complainant claims was its strict right. This very thought seems to us to be expressed by this court in the case of *Morris & Essex Railroad Co.* v. *Pruden,* 20 N. J. Eq. 530, at page 540, where the court says:

> "An injunction ought not to be granted where the benefit secured by it to one party is of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences."

To the same effect are:

Simmons v. *Paterson,* 60 N. J. Eq. 385, at page 393; and
Marvel v. *Jonah,* 81 N. J. Eq. 369.

Appellant insists and persists in its assertion that defendant was chargeable with notice of the Ashby picture because found in its record chain of title. We have no quarrel whatever with the statement thus far, but to carry it further and say

that we are charged with what the picture would show if exhibited to us, in spite of the refusal upon reasonable request to so exhibit, would be inequitable and unconscionable. It is undoubtedly the rule that a person is charged with notice of such facts as upon reasonable and diligent inquiry he might have ascertained. But to say that he is also chargeable with such facts as he was unable, after diligent efforts, to be informed about, we respectfully maintain is not the equitable rule.

After the court below denied the application for preliminary injunction defendant proceeded with and completed its apartment house, which is now tenanted by a great number of families. Mortgage loans were secured thereon in large sums, and were an injunction granted in this matter, it would result in the dispossession of the numerous tenants, the destruction of the mortgage securities and irreparable loss to the defendant without any fault on its part, and without the slightest benefit to the complainant. An unanswerable argument it seems to us to our position that the complainant is not injured is, that were it injured by the failure to have brick courses, copings, etc., of the two buildings on the same level, the defendant would be injured or suffer loss on the same account and it is unreasonable to suppose that practical builders as the defendants are, would have put up a building in such way as to have loss or likelihood thereof staring it in the face, when it might or could have built so or in such manner as to avoid it.

It is respectfully submitted that the decree of the court below should be affirmed, with costs.

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Defendant-Respondent.

ISAAC GROSS,
Of Counsel.

Order Discharging Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between
REFORSO KNITTING MILLS, INC.,
Complainant,
and
M. & N. CONSTRUCTION COMPANY,
Defendant.
On Bill, &c.

This matter coming on to be heard upon an order to show cause made in the above entitled cause on the 22nd day of March, 1927, requiring the defendant M. & N. Construction Company to show cause before this court why an injunction pending the determination of this suit should not be granted to the complainant, pursuant to the prayer of the bill of complaint herein; and the court having read the bill of complaint and affidavits submitted on behalf of the complainant, and the affidavits submitted on behalf of the defendant, and having heard the arguments of Elmer W. Demarest, of counsel with the complainant, and of Isaac Gross, of counsel with the defendant; it is, on this 4th day of April, 1927, on motion of Gross & Gross, of counsel with the defendant:

ORDERED, that the application for said injunction pending the determination of this suit, be and the same is hereby denied, and the said order to show cause discharged with costs, to abide the final disposition of the cause.

Respectfully advised,

E. R. WALKER,
C.

JAMES F. FIELDER,
V.-C.

New Jersey Court of Errors and Appeals

Between
REFORSO KNITTING MILLS,
Complainant-Appellant,
and
M. & N. CONSTRUCTION COMPANY,
Defendant-Respondent.
On Appeal from the Court of Chancery.

RESPONDENT'S BRIEF.

This appeal is from a final decree of the Chancellor, on the advice of Vice-Chancellor FIELDER, denying to the complainant an injunction mandatory in character, which, if granted, would have required the defendant to pull down a large apartment house which had progressed in construction at the time of the filing of the bill to a point where over three stories of a five-story building had been completed.

The Vice-Chancellor, whose opinion appears on page 65 of the State of the Case, denied the extraordinary relief prayed for upon several grounds recited in the opinion, each of which we shall respectfully maintain was of and in itself a sufficient reason for the Vice-Chancellor's conclusion, and for the making of the decree.

The Facts.

The complainant is the owner of the lands and of a five-story building erected thereon, located on the southerly side of Harrison Avenue, Jersey City, N. J., immediately adjoining easterly the lands now owned by the defendant. The lands of the

complainant have a frontage of about 69 feet on Harrison Avenue and the lands of the defendant are of a similar width.

In 1924 Metzger Realty Company was the owner of both the complainant's and the defendant's lands, but had before that time erected upon the lands now owned by the complainant a fully completed apartment house, which it, in 1924, sold and conveyed to one Henry Richards, and retained title to the remainder of its plot, which is the land now owned by the defendant. In its conveyance to said Richards, Metzger Realty Company inserted a covenant which appears commencing in the middle of page 3 of the State of the Case, in which Metzger Realty Company, the grantor, covenants in substance that it is the owner of lands adjoining to the west of the property so conveyed to Richards, and that the same are of the same dimensions as the lands conveyed; and further, that it will not build or erect on the lands immediately adjoining on the west the lands so conveyed, anything but a brick apartment house of the same height, depth, width, character, style and color as the apartment house then standing on the lands so conveyed to Richards, so that when the new apartment house to be erected on the lands so adjoining to the west is built, it shall in all respects be like and resemble the twin apartments shown in a picture drawn by Ashby, which picture is in the possession of said Richards, the grantee in said conveyance named, signed and initialed by the parties to the conveyance, and represents the then present building so conveyed to Richards, and the proposed new apartment house to be erected on the lands adjoining, so that when completed the new apartment house and the then present building on the then conveyed lands will constitute the twin apartments shown on the Ashby picture.

In this deed of conveyance to Richards there appears to be a reservation to the grantor (Metzger Realty Co.) of a *right* to use the westerly wall of the building so conveyed to Richards, as appears on the first page of the appellant's brief, although nowhere in the case "for the purpose of *enabling* the party of the first part (Metzger Realty Company), its successors and assigns, to insert beams from the building to be erected by the party of the first part (Metzger Realty Company), its successors and assigns, on the lands adjoining the premises hereby conveyed on the west."

Shortly after the acquisition by Richards of the title to the property upon which the completed building then stood, the defendant, through Mirner & Nosenchuk, who compose the defendant corporation, entered into negotiations with Metzger Realty Company for the acquisition of the lands remaining in the ownership of the latter, for the purpose of building thereon. Mr. Nosenchuk conducted the negotiations and was told by Mr. Metzger, president of the Metzger Realty Company, that the use of the lands, for the purchase of which Mr. Nosenchuk was negotiating, was restricted to the erection of a building thereon similar to the building conveyed by it to Richards, and that Mr. Richards was in possession of a picture which he (Nosenchuk) should first examine. Mr. Nosenchuk thereupon went to Mr. Richards, then the owner of the property now owned by complainant, and to use the language of Mr. Nosenchuk's affidavit (p. 30, line 20):

> "Said Mr. Richards was at that time the owner of the said building now owned by complainant and I went to see him, and in fact met him at the property and asked him to let me see the picture, inasmuch as I was negotiating for the purchase of the adjoining property now owned by us and contemplated build-

ing thereon. He stated to me that he had the picture at home and if I would call there the following day, he would show it to me. I went there, pursuant to our appointment, I believe it was some time in the summer of 1924, to see the picture and met Mr. Richards. He told me that he made a thorough search and could not find it, but that he believed that he had thrown it away with some other papers and old photographs which he had. He suggested that I see Mr. Metzger as he believed Mr. Metzger had a duplicate of it. I then went to see Mr. Metzger and advised him of what Mr. Richards had told me, but Mr. Metzger stated to me that he had no copy of the picture and that the only copy thereof had been given to Mr. Richards when he acquired his property. I met Mr. Richards again several days thereafter and asked him whether it was not possible for him to make a more thorough search for the picture and possibly locate it, but he then informed me that he was sure that he did not have it and had thrown it away. I have never seen this picture although I made every effort, as aforesaid, to locate and examine it, and even requested Mr. Gross, my attorney, to ascertain from the records whether it had been lodged for record, but was advised that it had not."

Mr. Metzger's experience in his efforts to obtain this picture from Mr. Richards so that it might be exhibited to the prospective purchaser is set forth in Mr. Metzger's affidavit (p. 22, line 20):

> "We informed Mr. Nosenchuk that Mr. Richards had a drawing or picture conveying the idea of the manner in which the apartment house should be constructed. He thereafter advised me that he had been to see Mr. Richards and had been informed by him that he had been unable to find the drawing or picture and asked me whether I had a duplicate of it. I informed him that there was but one such picture and Mr. Richards had taken possession of it upon our closing title with him. Mr. Nosenchuk thereafter again advised me that he had again seen Mr. Richards and had been told by him that the picture had been thrown away and was not available. I met Mr. Richards myself several weeks thereafter and asked him about the picture and he told me that Mr. Nosenchuk had been to see him about it but that he had thrown it away. I so informed Mr. Nosenchuk."

The defendant being unable, either from the records, from Mr. Richards or from Mr. Metzger, to obtain even a gleaning of this picture, and having thus ascertained that it had been destroyed and was not extant, purchased the property from Metzger Realty Company upon the understanding that it would be required, as far as practicable, having in view the natural conditions existing at the property, to erect a building upon its lot substantially similar in height, design, character, color and appearance as that then standing on the Richards property, which latter has since by mesne conveyances been vested in the complainant.

The defendant had its plans for its new building prepared by Mr. Welitoff, the architect who was familiar with the character of the building on complainant's lands, having prepared the plans for that building as well, and proceeded to erect its building.

It is undisputed that there is a gradual drop in the grade of Harrison Avenue to the westerly wall of complainant's building, but from thence, and upon and in front of defendant's property, the drop in grade is abrupt, so that there is a drop of 8 feet in the grade of defendant's property from its easterly to its westerly boundary.

One of the officers of the complainant, Piscatello (p. 11, line 37), says that he, early in March, noticed that defendant's building was being erected

in such a manner that the cellar front windows were not of the size and design of the complainant's building, and that he then spoke to an officer of the defendant corporation and called his attention to the windows, and asked him why the size of the cellar windows of defendant's building was different from that of the complainant's building, and that they were large enough for a store, and also that the lintels and sills of the basement windows were set and the sides of the windows finished. There is no intimation that he then mentioned anything about the Ashby picture, or exhibited it, or claimed to have it.

In paragraph 6 of the bill of complaint (p. 7) it is alleged (line 29) that complainant's officers observed excavating upon defendant's lands apparently for the purpose of constructing a building thereon, in the month of February, but assumed that the building would be constructed in accordance with the covenant, and that thereafter the officers of the complainant also observed that the cellar windows were not being constructed of the same design as those of the complainant's building, and (according to the Bill of Complaint, p. 8, line 8) that complainant permitted the building to advance to the point where the lower tier of terra cotta was being laid; that the floor beams of defendant's building were not being inserted in the apertures left in the complainant's wall; that complainant remonstrated with an officer of the defendant, and for the first time showed him the Ashby picture. Mr. Nosenchuk swears in his affidavit (p. 32, line 30, etc.) that this conversation and the first exhibition of the picture took place when the building was already up to the third story (see also Answer, p. 39, line 25).

The defendant thereupon offered to do everything reasonably possible within its power and

means, but without prejudice, to satisfy the complainant, by raising the coping on its building to the level of that of the complainant's building (Bill of Complaint, p. 9, line 4), but which the complainant refused to accede to. We shall hereinafter show that defendant's building is not even dissimilar to that shown on this perspective picture.

The answer sets forth, and the proofs on behalf of the defendant are overwhelming to the effect that the defendant's building is in every respect similar to that of the complainant, in height, design, color, size and otherwise (see Affidavit of Neumann, p. 17, line 10; Rowland, p. 20, line 23; Metzger, p. 23, line 14; Welitoff, p. 25, line 25; p. 26, line 11; p. 28, line 8; Nosenchuk, p. 31, line 22; p. 33, line 30; Answer, p. 39, Par. 6).

Upon the filing of the bill of complaint herein an order to show cause was made why a preliminary injunction should not be issued. At the time of the filing of the bill the defendant had already progressed to the point where it had almost completed the fourth story of its building, and upon the return of said order to show cause, after hearing, the Court of Chancery denied the injunction and discharged the order to show cause, not as stated in the appellant's brief "without prejudice," but generally. A copy of the order discharging said order to show cause is printed at the end of this brief.

Keeping in mind the fundamental principles that the burden rests upon the complainant; that covenants restricting the use of property are strictly construed, and that to doubt the complainant's right to enforce such a covenant is to deny it; that upon the hearing of a cause upon bill and answer, the allegations of the answer must be taken as true; that real property is bound only by such conditions as affect its title of record, unless actual notice is shown; and that when it is the duty of a

party to speak, and he refrains from so doing until another may be injured by the assertion of his rights, he will be estopped from so asserting them,—the determination of this cause can be resolved only as did the Vice-Chancellor resolve it in the court below.

This cause was submitted to the learned Vice-Chancellor by stipulation of the parties on bill and answer, and on the affidavits which appear in the State of the Case.

POINT ONE.

The cause having been submitted to the court below on bill and answer, the allegations of the answer must be taken as true.

It is a well established principle that when a cause is heard upon bill and answer, all the allegations of the answer responsive to the bill must be taken as true.

Cammann v. *Traphagen,* 1 N. J. Eq. 28;
Winslow v. *Hudson,* 21 N. J. Eq. 172.

It is respectfully submitted that the allegations of the answer meet all of the charges of the bill and overthrow them.

POINT TWO.

Covenants of doubtful import restricting the use of property and its alienability will not equitably be enforced by injunction.

In the instant case it is alleged in the answer (p. 40, Par. II), and supported by the only two affidavits dealing with the subject—Metzger (p. 22, line 20, etc.) and Nosenchuk (p. 30, line 10, etc.)—that every diligent effort was made by the defendant before it acquired title to its property to se-

cure an inspection of the so-called Ashby picture from the one who was then the owner of the property now owned by the complainant, Mr. Richards, who alone was supposed to be in possession thereof, and in whose deed of conveyance it is recited "which said picture is in the possession of the party of the second part herein, signed and initialed by the parties hereto" (Bill of Complaint, p. 4, line 10).

By the deed to Richards it was thereby made manifest that the only evidence of what this picture indicated, signed and initialed by the parties to the transaction, was in Mr. Richards' possession. After several attempts to locate it, Mr. Richards asserted to the representative of this defendant, and to Mr. Metzger, that the picture had been destroyed. Certainly neither this defendant nor Metzger Realty Company, which was then about to effect a sale of its property to this defendant, was obliged to accept either Richards' or anyone else's oral description of what the picture required, as a perpetual restrictive covenant against the defendant's property. This picture, or a reproduction thereof, might have been lodged for public record, there to remain perpetually for the information of all parties who were or might become interested. It was not so lodged. There was no duplicate of this picture, which had been signed and initialed by the parties extant.

In support of the fact that said Ashby picture, which was a mere visionary perspective of an artist, was not available, there is the mute evidence contained in the deed from Metzger Realty Company to Mirner & Nosenchuk, who in fact compose the defendant corporation, wherein no reference whatever is made of the picture in question, in spite of appellant's contrary statement. The covenant as contained in the defendant's deed

is found on page 36, line 14, etc. The evident reason for the omission of any reference to the picture was because the parties had been authoritatively informed by the only person then in interest, then the owner of the complainant's property, Mr. Richards, that the picture was no more. The statement in appellant's brief, that the covenant in defendant's deed referred to the picture, is not accurate.

Under these circumstances, was the property of Metzger Realty Company, through no fault on its part, to remain perpetually restricted or bound by some covenant reposing in an unrecorded picture, the existence of which was to all intents and purposes beyond the reach of man? If that were so, the property would remain forever inalienable, for certainly no one would purchase property so tied up.

We respectfully submit that it is not necessary to cite authorities for the proposition that our courts do not favor conditions which tend to the inalienability of property.

With this condition confronting the parties, Metzger Realty Company conveyed to the defendant's representatives the lands in question, with a covenant as nearly as practicable conforming with the intention of the covenant contained in its deed to Richards. This covenant (p. 36) grants to this defendant the *right and privilege* of the use of the westerly wall of the Richards building (now owned by complainant). They are not required under this covenant to use the wall at all, but may do so if they so choose. The right so conveyed is precisely in accord with the right reserved by Metzger Realty Company in its deed to Richards. In the deed to Richards Metzger Realty Company reserved the *right and privilege* of using said wall, but was not *required* to use it if it did not choose to do so.

Following earlier authorities to the same effect Vice-Chancellor Lewis in the case of

Muller v. *Cavanaugh,* 94 N. J. Eq. 619

said at page 623:

> "It is a fundamental rule that where a complainant seeks to enforce a restrictive covenant, his right to the relief sought must be clear. If it is doubtful, to doubt is to deny. *Marsh* v. *Marsh,* 90 N. J. Eq. 244."

To the same effect are:

> *Meaney* v. *Stork,* 80 N. J. Eq. 60;
> *Union Investment Co.* v. *Fiske,* 107 Atl. Rep. 65 (not yet officially reported);
> *Jones* v. *Mulligan,* 121 Atl. Rep. 608 (not yet officially reported).

To say that the complainant's right to enforce the restrictive covenant in such a way as to compel the defendant under the circumstances above indicated with respect to the picture to literally comply therewith, *is doubtful,* is to put the case too mildly. The complainant is a successor in title to Mr. Richards, and in privity of estate with him, and has no greater rights than would Mr. Richards have were he the complainant. We respectfully submit that had Richards been the complainant, he would not be heard to insist upon this defendant literally complying with the artist's perspective of how the buildings, when completed, would appear, after his own positive assertion that the picture was destroyed, when he knew and was told that the person inquiring to examine it was about to purchase the lands purporting to be affected thereby, for the purpose of erecting a building thereon in compliance therewith.

Supposing the evidence of the requirements of the covenant were contained in an unrecorded

written agreement between Metzger Realty Co. and Richards instead of in a picture, which agreement was referred to in the conveyance to Richards as being in his possession, and that such agreement could be found nowhere excepting in the possession of Mr. Richards; could it be successfully maintained that Mr. Richards or his successors in title might, after his absolute refusal to show the same to a prospective purchaser of the land purporting to be affected thereby, or upon his destruction of the agreement, forsooth bring it forth from its secret archives and enforce it in a court of equity? Yet that is what is attempted to be done here.

Let us examine what the complainant's case consists of. Its bill of complaint is not verified, but there were subsequently filed on behalf of the complainant the affidavits of Piscitello (p. 11), Harkins (p. 12) and Ziegler (p. 43). In the affidavit of Piscitello, an officer of the complainant, not a word is mentioned about the picture ever having been shown to the defendant or any of its officers, although he recites that he complained to the defendant that some of the windows in the basement of the defendant's building were not of the size of those in the complainant's building. The affidavit of Mr. Harkins, a title searcher, merely recites the covenant contained in the defendant's deed as the same appears of record. The affidavit of Mr. Ziegler as legal evidence is, in our opinion, worthless. He gives his conclusion that the building erected by the defendant is not in accord with the restrictions and covenants, in that it does not resemble the twin apartments shown on the Ashby picture, the latter showing windows, window sills, doors and cornices all to be on the same level, while an examination of the building shows that they are not on the same level. That is the only fault Mr. Ziegler has to find with the manner of the defendant's construction.

There is not a word of proof in all of the complainant's case that it ever exhibited to the defendant, or its officers, the Ashby picture, or insisted upon compliance therewith, although it was in possession thereof, and knew from its chain of title of the recital in the deed to Richards, that in all probability it was the only picture of its kind in existence; for said recital reads:

> "* * * which said picture is in the possession of the party of the second part herein, signed and initialed by the parties hereto."

Complainant and its officers knew that the defendant had not either the possession or access to the said picture since it was in its (the complainant's) possession. Complainant also knew from the very beginning that defendant was erecting a building, and saw the progress thereof (Bill of Complaint, Par. 6, p. 7; Affidavit of Piscitello). Now, too, it may be pointed out that an inspection of the Ashby picture (Exhibit C-1a, p. 46) does not make it certain that brick courses, cornices, window sills are required to be on the same level. These buildings are located on the southerly side of the street. The westerly building or that to the right is defendant's and that to the left is complainant's. This picture takes no account of the natural abrupt grade of the street.

It is respectfully submitted that the com-

written agreement between Metzger Realty Co. and Richards instead of in a picture, which agreement was referred to in the conveyance to Richards as being in his possession, and that such agreement could be found nowhere excepting in the possession of Mr. Richards; could it be successfully maintained that Mr. Richards or his successors in title might, after his absolute refusal to show the same to a prospective purchaser of the land purporting to be affected thereby, or upon his destruction of the agreement, forsooth bring it forth from its secret archives and enforce it in a court of equity? Yet that is what is attempted to be done here.

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> "* * * which said picture is in the possession of the party of the second part hereto, signed and initialed by the parties hereto."

Complainant and its officers knew that the defendant had not either the possession or access to the said picture since it was in its (the complainant's) possession. Complainant also knew from the very beginning that defendant was erecting a building, and saw the progress thereof (Bill of Complaint, Par. 6, p. 7; Affidavit of Piscitello). Now, too, it may be pointed out that an inspection of the Ashby picture (Exhibit C-1a, p. 46) does not make it certain that brick courses, cornices, window sills are required to be on the same level. These buildings are located on the southerly side of the street. The westerly building or that to the right is defendant's and that to the left is complainant's. This picture takes no account of the natural abrupt grade of the street.

It is respectfully submitted that the complainant's rights under the circumstances, if any, are of such doubtful character as to be unenforceable in a court of equity.

If it were the intention, as claimed by the appellants, that brick courses, window sills, copings, etc. on both buildings were to be on the same level, so as to give the appearance of not "twin buildings" but one building, such intent could readily have been expressed in adequate language in the deed of conveyance, without reference to any picture whatsoever. If such were the intent, the covenant could well have provided, after the requirement that the defendant's building shall be of the same design, color etc., that the brick courses, window sills, copings and all other exterior decorations should be on the same level, so that when completed, the buildings should give the appearance of being but one building; but no such provision anywhere appears.

POINT THREE.

Complainant is estopped from insisting upon the defendant literally complying with the requirements of the Ashby picture.

The facts concerning the assertion by Mr. Richards, the complainant's predecessor in title, that the Ashby picture had been destroyed, and of the non-availability of any duplicate or copy thereof, have been discussed above.

Of course, the burden of proving its case, particularly a case so circumstanced as this, and where serious and irreparable loss may result to the defendant (because the granting of an injunction would have required it to pull down four stories of a five-story building), is upon the complainant. The imposition of burdensome restrictions upon lands, affecting their marketability, and alienability, are not favored in equity, and a complainant's right, in order to be entitled to relief, must be clear.

In this case, in addition to the non-availability of the picture to the defendant, the complainant, knowing that the defendant was in process of constructing a costly building, and knowing that it alone had possession of the picture, made no effort to exhibit the picture until after the defendant had completed the third story of its building, which means that it was proceeding with the fourth story thereof. Complainant is guilty of laches.

Smith v. *Spencer,* 81 N. J. Eq. 389, at page 393.

The complainant, according to paragraph 6 of the bill of complaint, in the month of February, saw the defendant excavating upon its lands for the purpose of constructing a building. An officer of the complainant, Piscitello, swears that early

in March he noticed that the cellar front windows of the defendant's building were not of the size and design of the complainant's building. He said nothing about the picture, nor did he exhibit it, although he then knew, according to his affidavit, that the building as it was being erected was not in conformity with the picture which was then in the complainant's possession.

The uncontradicted affidavit on the part of the defendant (Nosenchuk, p. 32, lines 30, etc.) is to the effect that the complainant's representatives who spoke about the size of the windows in the basement, claimed that that did not make any substantial difference to them, and that he was first shown the picture when the building was up to the third story.

It seems to us quite clear that the complainant knew of the progress of the defendant's building, at all times had possession of the picture, and carefully concealed the same, knowing that the defendant had no access thereto, until the defendant's building had progressed to the completion of the third story, when for the first time did the complainant produce the picture, much to the defendant's surprise. At that stage, were it possible to correct any alleged violation of the covenant, it could have been done only at a cost and loss to the defendant of upwards of $20,000.

If this conduct on the part of the complainant in seeking by this suit to enforce its alleged rights is not unconscionable and inequitable, we must confess that we do not know what is.

The attitude of the complainant may best be illustrated from the allegations of paragraph 7 of its bill of complaint (p. 9), where it is alleged that the defendant expressed its willingness to raise the coping of its building to correspond with that of the complainant's building, but which the complainant refused to agree to, because, as it alleges,

that would not be in accordance with the covenant, inasmuch as it would leave the cellar windows in defendant's building of a different size and design from those of the complainant's building; that the entrances to the building would not be at the same grade and design as shown on said picture, and that the top of the buildings would not be at the same level, and that the brick courses would not be on the same line. There is not a word of proof submitted on the part of the complainant that the cellar windows of the defendant's building will be of different design, or that the entrances are of a different design. The only affidavit on that subject submitted by the complainant is that of Mr. Ziegler, who does not support these allegations of the bill, and every affidavit submitted on the part of the defendant affirmatively shows the contrary. The only difference from the picture which Mr. Ziegler's scrutiny was able to discover was that the windows, window sills, doors and cornices were not on the same level. Complainant does not submit the slightest bit of proof that the condition testified to by Mr. Ziegler will in the slightest degree affect it or its property.

The defendant was willing to do, according to the allegations of the bill above referred to, everything reasonably proper to satisfy the complainant's whims, but it did not wish to avail itself thereof. It insisted, and in its brief in this court persists in its insistence upon its "pound of flesh."

It is respectfully submitted that the complainant was in laches, and that it is equitably estopped from asserting the claim set forth in this suit.

Counsel for the complainant does the learned Vice-Chancellor who determined this case below a grave injustice, when in his brief in this court he says, on page 13:

> "The opinion savors more of a 'peep' at the property by the court than a limitation by the proofs."

Why counsel should go out of his way to make such a misstatement redounding against the learned Vice-Chancellor, is beyond our comprehension. The learned Vice-Chancellor, in finding that because of optical illusion the copings, windows, window sills, etc., appear to be on the same level, undoubtedly based his said finding upon the uncontradicted deposition of Mr. Neumann (Bottom p. 17), where this gentleman, an experienced architect of 25 years' standing, says:

> "A view of the two buildings, either going up or down Harrison Avenue, substantially shows that the two buildings are identical, and in fact the copings, windows, sills and other parts of the buildings appear to be on the same level, because the grade of the street, having been properly taken care of, aids in giving that impression, as it should be. If, in fact, the copings, windows and window sills had been on the same level they would not appear to be so by a view looking up or down the street."

No one contradicts this; not even Ziegler.

The photographs in the record lend no aid whatsoever upon that subject, because upon their examination it will be observed that they were taken from a point almost directly opposite the buildings, which is an entirely different matter. It is matter of common experience that portions of buildings which are located on a steep grade will appear to be at the same level, although in fact not so, when viewed from up or down the street. The buildings in such instances are purposely not constructed with their various exterior trimmings on the same level, because upon such a view from up or down the street, they would not appear to be on the same level. Mr. Neumann swears to this.

Counsel for the complainant-appellant makes much in his brief of the existence of apertures or spaces in the westerly wall of the complainant's building for the insertion of beams. When it is kept in mind that under the covenant contained both in the deed from Metzger Realty Company to Richards, and in its deed to this defendant, the use of the wall by the defendant was merely permissible; that it contained no provision for the use of these apertures; that the defendant, if it so desired, had the right to make new openings anywhere in that wall for the insertion of beams therein, and that it had the right to build an entirely independent wall and not use the old wall at all, the appellant's argument falls flat. But aside from that, the uncontradicted proofs in the case show that these apertures were merely left on one story of the complainant's building and part of the second story. When it was found that because of the difference in the grade of the street and topography of the land, they could not be used, the leaving of further apertures in the wall was abandoned, so that there were about four stories without any apertures at all. (See Affidavit of Welitoff, p. 26, lines 18, etc.; Nosenchuk, p. 33, lines 8, etc.)

POINT FOUR.

Defendant's building complies substantially with the Ashby picture.

The Ashby picture is a mere draftsman's or artist's perspective of what two buildings when completed will look like. Mr. Ashby evidently prepared this picture without examining the *locus in quo,* or did not understand what effect grades have upon building construction. There is an 8 foot drop in grade on the defendant's property from its easterly to its westerly boundary, over a width of 69 feet. No account whatever appears

to have been taken by the draftsman of this picture of this drop in grade. (See grade looking easterly, Exhibit D-4, p. 62.) This condition, for which nature alone was responsible, had to be taken care of by anybody erecting an apartment house upon the defendant's lands, and by virtue of the covenant contained in the deed from Metzger Realty Company to Richards this land now owned by the defendant was not available or usable for any other purpose.

While we are not so certain that an examination of the Ashby picture, appearing as Exhibit C-1a, shows the cornices, window sills, brick courses and other exterior embellishments to be on the same level on the two buildings, a reading of all of the affidavits submitted on behalf of the defendant shows that that would have been practically impossible.

A close examination of the Ashby picture, to our view, does not show the entrances of the buildings to be at the same level. In fact, it does not show the entrances of the buildings at all. The entrance to the complainant's building is to the left of the court shown in the center of the picture, and the entrance to the defendant's building is to the right of that court, where a corner of some steps is about all that is visible on the picture. The brick courses do not even show, and we respectfully maintain that it is very doubtful, from an inspection of that picture, whether the cornices, windows or window sills of both buildings are on the same level.

It is certainly doubtful enough, in our view of it, to question the propriety of the granting by a court of equity of its extraordinary writ of injunction. But aside from that, instead of the picture showing any grade in a westerly direction, which would be to the right of the picture, it shows an up-grade in that direction, which is not in accordance with conditions actually existing.

In order to point out more definitely the fact that even the Ashby picture (p. 46) does not sustain the plaintiff's contention that the copings, window sills, etc., are not thereon shown to be on the same level on both buildings, we made the following measurements thereon: Each of the buildings is 69 feet in width, thus making the width of both buildings 138 feet. In order to ascertain the scale of the picture we measured the width of the buildings thereon and find them to be 6 5/16 inches. Measuring the height of the copings above the first story, from the ground line forming the frame of the picture we find that it is 1 13/16 inches above that line at the left hand, or most easterly end of the complainant's building, and 1 14/16 inches from said line to the bottom of the copings above the first story at the right end or most westerly corner of the defendant's building. There appears to be approximately a difference of 1/16 inch in favor of an elevation to that extent at the most westerly corner of the defendant's building being at the extreme right of the picture, although in truth and in fact the grade of the ground at that point is 8 feet *below* the point of division of the two buildings which is about in the centre of the picture. The scale, as we have figured it out, with respect to the width of the two buildings on this picture, is 1/16 inch to 1.3663+ feet. There is, however, nothing on this picture to indicate that it is drawn to scale or otherwise. However that all may be, we respectfully contend that the complainant's insistment that the defendant was obliged to build its building with its brick courses, coping, terra cotta and window sills precisely in a line with those of complainant's building, based upon this picture alone, is of such doubtful character that the court below was justified in refusing to grant its writ of injunction which here would have resulted in irreparable loss and injury. There is nothing in

the language of the covenant contained either in the Richards deed or in the defendant's deed which in the slightest degree intimates or speaks of the brick courses or cornices or windows or window sills being on the same level with those on the complainant's building, but the language used is that there shall not be built "anything but a *brick apartment house of the same height, depth, width, character, style and color* as the apartment house now on the lands hereby conveyed." All of the affidavits submitted indicate that the defendant's building is built strictly in accordance with the language so used and that the defendant's building is a twin building to that of the complainant. (Neumann, p. 18, line 12, and same page, line 35; Rowland, p. 20, line 23, etc.; Metzger, p. 23, line 15; Welitoff, p. 25, line 24; p. 28, line 8.) Complainant's notion seems to be that the use of the words "twin buildings" is intended to require the buildings to be given the appearance of being but one building, although in separate ownership and subject to independent control and disposition.

We respectfully submit that the words "twin buildings" convey no such significance. Like the word twain, it means two separate, but resembling each other. According to the complainant's proposed definition, "twin beds" would mean but one bed. That the defendant's building in every respect resembles that of the complainant is not disputed by even Mr. Ziegler, who merely finds that the coping, window sills, etc., are not on the same level on both buildings.

The court below has found that the complainant failed to show any injury, and its counsel on this appeal strongly criticizes the court below for such a finding. Practical men say that the difference in the levels of the brick courses, cornices, copings, etc., on the two buildings does not affect the complainant or its property in the slightest degree (Neumann, p. 18, line 30, etc.; Metzger, p. 23, line

20). There is not the slightest proof on the part of the complainant that such difference would affect the saleability, marketability, use or value of its property. Considering that the properties are under separate ownership they could not be sold as one unit. So, considering the doubtful character of the complainant's right, the circumstances surrounding the parties, the inability of the defendant to secure an inspection of the picture after diligent effort, and the failure of the complainant, who knew that the defendant was building or intended to build, to exhibit the picture until after three stories of it were up, the court below very properly, in our judgment, took into consideration the grave and serious injury which might result to the defendant by its strict enforcement of what the complainant claims was its strict right. This very thought seems to us to be expressed by this court in the case of *Morris & Essex Railroad Co.* v. *Pruden,* 20 N. J. Eq. 530, at page 540, where the court says:

> "An injunction ought not to be granted where the benefit secured by it to one party is of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences."

To the same effect are:

Simmons v. *Paterson,* 60 N. J. Eq. 385, at page 393; and
Marvel v. *Jonah,* 81 N. J. Eq. 369.

Appellant insists and persists in its assertion that defendant was chargeable with notice of the Ashby picture because found in its record chain of title. We have no quarrel whatever with the statement thus far, but to carry it further and say

that we are charged with what the picture would show if exhibited to us, in spite of the refusal upon reasonable request to so exhibit, would be inequitable and unconscionable. It is undoubtedly the rule that a person is charged with notice of such facts as upon reasonable and diligent inquiry he might have ascertained. But to say that he is also chargeable with such facts as he was unable, after diligent efforts, to be informed about, we respectfully maintain is not the equitable rule.

After the court below denied the application for preliminary injunction defendant proceeded with and completed its apartment house, which is now tenanted by a great number of families. Mortgage loans were secured thereon in large sums, and were an injunction granted in this matter, it would result in the dispossession of the numerous tenants, the destruction of the mortgage securities and irreparable loss to the defendant without any fault on its part, and without the slightest benefit to the complainant. An unanswerable argument it seems to us to our position that the complainant is not injured is, that were it injured by the failure to have brick courses, copings, etc., of the two buildings on the same level, the defendant would be injured or suffer loss on the same account and it is unreasonable to suppose that practical builders as the defendants are, would have put up a building in such way as to have loss or likelihood thereof staring it in the face, when it might or could have built so or in such manner as to avoid it.

It is respectfully submitted that the decree of the court below should be affirmed, with costs.

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Defendant-Respondent.

ISAAC GROSS,
Of Counsel.

Order Discharging Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between

REFORSO KNITTING MILLS, INC.,
Complainant,

and

M. & N. CONSTRUCTION COMPANY,
Defendant.

On Bill, &c.

This matter coming on to be heard upon an order to show cause made in the above entitled cause on the 22nd day of March, 1927, requiring the defendant M. & N. Construction Company to show cause before this court why an injunction pending the determination of this suit should not be granted to the complainant, pursuant to the prayer of the bill of complaint herein; and the court having read the bill of complaint and affidavits submitted on behalf of the complainant, and the affidavits submitted on behalf of the defendant, and having heard the arguments of Elmer W. Demarest, of counsel with the complainant, and of Isaac Gross, of counsel with the defendant; it is, on this 4th day of April, 1927, on motion of Gross & Gross, of counsel with the defendant:

ORDERED, that the application for said injunction pending the determination of this suit, be and the same is hereby denied, and the said order to show cause discharged with costs, to abide the final disposition of the cause.

Respectfully advised,

E. R. WALKER,
C.

JAMES F. FIELDER,
V.-C.