INDEX

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

HELEN E. MARSH,
Complainant-Respondent

and

JOSEPH A. MARSH,
Defendant-Appellant

On Appeal from Chancery

CASE

CHARLES JONES,
For Appellant.

EDWIN B. AND PHILIP GOODELL,
For Respondent.

BILL OF COMPLAINT
Filed November 13, 1917.

IN CHANCERY OF NEW JERSEY

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

The Complainant, Helen E. Marsh, of Montclair, Essex County, New Jersey, respectfully shows that:

1. On February 17, 1911, one Ralph Stout conveyed to the complainant by his deed dated on said day and recorded in the Office of the Register of the County of Essex in Book M-48 of Deeds beginning at page 483 premises in the Town of Montclair described as follows:

BEGINNING at a point in the Northerly line of Sunset Park North, which point is distant South 73 deg. 23 min. East 75 ft. from the corner formed by the intersection of the Easterly line of Norwood Avenue and the northerly line of Sunset Park North and which point is at the southeast corner of the lot of land conveyed by the party of the first part to Edward S. Ellis; running thence North at right angles to the Northerly line of Sunset Park North on a course North 16 deg. 37 min. East along the Easterly line of said lot of land conveyed to said Edward S. Ellis 190 ft.; thence South 73 deg. 23 min. E. 129.68 ft. to the Westerly line of land now or late of the Estate of Erwin J. Crane, dec'd; thence South 16 deg. 37 min. West along the Westerly line of land of said Estate of Erwin J. Crane, dec'd, 190 ft. to the Northerly line of Sunset Park North; thence North 73 deg. 23 min. West along the Northerly line of Sunset Park North 129.68 ft. to the point or place of Beginning. Together with all the right, title and interest of the party of the first part of, in and to so much of the land included within Sunset Park North as lies in front of and adjacent to the premises above described.

2. Complainant's said premises were part of a

larger tract of land conveyed to the said Ralph Stout by Edwin B. Goodell and Benjamin V. Harrison, as Executors of the Last Will and Testament of Erwin J. Crane, deceased, by their deed of conveyance bearing date the 26th day of May, 1909, and recorded in the Office of the Register of the County of Essex in Book G-45 of Deeds beginning at page 500, which larger tract is described in said deed as follows:

BEGINNING at the Northeasterly corner of Norwood Avenue and Sunset Park North as the same is now laid out and running thence along the Northerly line of Sunset Park North on a course South 73 deg. 23 min. East 204.68 ft.; thence at right angles to Sunset Park North on a course North 16 deg. 37 min. East 250 ft. to an angle; thence North 73 deg. 23 min. West and parallel with Sunset Park North 211.53 ft., more or less, to the Easterly side line of Norwood Avenue; thence along the said Easterly side of Norwood Avenue as the same is laid out along its various curves and distances about 260 ft. to the point and place of Beginning.

3. Said deed from Crane's Executors to Ralph Stout contained, among other things, the following restrictive covenant:

"That no building shall be erected on said lot unless the front foundation wall of the said building is at least 75 feet from the front of the above described tract and the party of the first part do for themselves, their heirs, executors, administrators, successors and assigns, covenant and agree that they will sell no other lots facing on Sunset Park North except subject to the same restrictions."

4. The same restriction was incorporated by the said Stout in complainant's said deed and the complainant thereupon erected a house upon her said premises costing approximately $14,000 in which she now resides; in building her said house the said restric-

tive covenant was carefully observed and kept in all respects by her.

5. On October 1, 1910, and before the complainant purchased her said lot the said Ralph Stout conveyed to one Edward S. Ellis, by his deed of conveyance dated on said day and recorded in the Office of the Register of the County of Essex in Book C-48 of Deeds beginning at page 69, premises lying to the west of complainant's said lot, being on the northeasterly corner of Norwood Avenue and Sunset Park North and extending 75 feet on Sunset Park North (called in said deed "Sunset Parkway North") and 195 feet on Norwood Avenue, which conveyance to Ellis contained the restriction, "that no building shall be erected on said lot unless front foundation wall of said building is at least 75 feet from front of above premises on Sunset Parkway North."

6. The said Stout had erected upon the premises so conveyed by him a private residence with its front wall situated as required by the said restrictive covenant, and said Ellis occupied the said premises until his death, which occurred some time prior to the conveyance next hereinafter stated.

7. On August 27, 1917, Lillian D. Taylor and Miriam I. Hillman, as Executrices and Trustees under the Last Will and Testament of Edward S. Ellis, deceased, conveyed to Joseph A. Marsh, the defendant, the same premises theretofore conveyed to the said Edward S. Ellis by Ralph Stout, by their deed of conveyance bearing date on said day, which conveyance is recorded in the Office of the Register of the County of Essex in Book — of Deeds beginning at page —.

8. The said conveyance to Joseph A. Marsh contained the same restrictive covenant contained in the deed to said Ellis and also other restrictive covenants.

9. On or about the 8th day of October, 1917, the

said Joseph A. Marsh, intending to erect certain additions to the house so purchased by him, filed in the office of the Inspector of Buildings of the Town of Montclair an application for a permit accompanied by a plan or drawing of the westerly elevation of the said house designated on said plan as the "front elevation," showing the original house with two proposed additions, one upon the rear or northern end of the house and one upon the front or southern end of the house. The latter extension is shown upon the said elevation to extend 14 feet from the front wall of the house towards Sunset Park North, to be two stories in height with solid walls except for windows and with a hip roof above the second story with a dormer window facing south. The said application filed by said Joseph A. Marsh specifies that the said extension is to be placed upon a concrete foundation and the said plan shows that a wall called a "new trench wall" is to extend from the present front wall of the house for a distance of about 13 feet 9 inches towards the south, all of which new wall and of which new addition to the building, except that part of the roof which extends back of the present front wall of the house, is within 75 feet from the northerly line of Sunset Park North and the addition, if erected, will be in violation of said restricting covenant and will greatly damage the complainant.

10. As soon as complainant learned of this application by the said Joseph A. Marsh she caused a notice to be sent to him that the addition of the southerly side of his house proposed to be erected by him would be in violation of the restrictions, and that should he proceed in his intention, application would be made to the Court of Chancery for an adjudication of the matter.

11. Subsequently to receiving such notice the said Joseph A. Marsh modified his application for a permit made on the 8th day of October by amending the same in such a way as to show his purpose to erect

the southerly addition of the same size and construction as shown by his former plan and application, with the exception that instead of the hip roof shown on the original plan a flat roof is to be substituted above the second story structure and that, as a foundation for the said structure, "piers" would be constructed in lieu of a "wall," but what will be the size, shape or location of the piers the complainant is ignorant.

12. Complainant insists that the structure proposed and threatened to be erected by the said Joseph A. Marsh upon the southerly end of his premises situated on the above described lot by extending the foundation of the house and the southerly wall of the same 14 feet nearer Sunset Park North than the distance fixed by his conveyance, is in violation of the spirit and letter of the said covenant and will accordingly injure the property of the complainant both by obstructing and cutting off her view towards the west and also by breaking up and destroying the regularity of the building line upon said Sunset Park North, as established by the executors of the said Erwin J. Crane and shown by the restrictive covenants entered into by them in the deed to Ralph Stout above mentioned.

13. While the said Erwin J. Crane was still alive he caused the said premises and other premises then owned by him to be laid out for building and improvement according to the following plan:

Owning a tract of land extending from Park Street on the east of the property to Norwood Avenue on the west, he caused a street to be constructed running westerly from Park Street for a distance of about 250 feet, at which point he divided the said street into two arms or branches which arms or branches were continued to Norwood Avenue, thus giving the street the form of a two tined fork. The northerly branch of this fork he called Sunset Park North and the southerly branch he called Sunset Park South. The space be-

tween the two tines of the fork is covered with trees of substantial size, and the street so laid out and the space between the two tines of the fork he dedicated by his deed bearing date July 19, 1905, and recorded in the Office of the Register of Essex County in Book H-39 of Deeds beginning at page 94, to the Town of Montclair, the said street as a public street or highway and the space between the two tines of the fork as a public park. The said streets and park were accepted by the municipal authorities of the said Town and the said park has since remained free of buildings and open to the public as a park. In harmony with the scheme for development thus conceived by him and adhered to by him during his lifetime, he notified his brokers that in selling lots upon Sunset Park North and South the front line of the houses should be 75 feet back from the street in each case and in laying out the plot into building lots he made each lot 100 feet in width. The entire tract with the exception of the southerly side thereof was covered with a growth of timber of considerable size, and was approximately level and of such grade as readily to lend itself to such development as was thus planned.

14. Since the conveyance to Ralph Stout as recited in Paragraph 2 a further conveyance has been made of a lot 100 feet front and extending back to the rear of the property immediately east of complainant's premises, upon which has been erected a residence in all respects suitable to the neighborhood and which strictly conforms to the building line established as aforesaid. But one lot remains upon said Sunset Park North, unbuilt upon and that is still owned as complainant is informed, by the estate of the said Erwin J. Crane and subject to the restrictive covenant contained in the deed to Ralph Stout.

15. The structure described and indicated in and by the plans filed by the said Joseph A. Marsh, as modified, violates the ordinance regulating and con-

trolling the inspection, construction, alteration and repair of buildings in the Town of Montclair in that the present piers upon which the piazza now rests are not constructed in accordance with the first section of Paragraph VI, which says that all piers "shall be built of solid stone, cement of good hard burnt brick laid in cement mortar, and capped with hard stone four inches thick, or iron plates full size of pier"; and also in violation of the said building ordinance in that it is a wooden dwelling house or substantial portion of a wooden dwelling house built without a foundation of brick, stone or concrete as required by an unnumbered section of Chapter VIII of the said ordinance which states, "No frame or wooden dwelling house hereafter erected shall be built without a foundation of brick, stone or concrete." And, furthermore, the said Joseph A. Marsh is erecting or attempting to erect said building without a permit lawfully issued for that purpose as required by Sections 2 and 3 of Chapter II of said ordinance, reference to which is hereby made and which provide, among other things, that before the issuing of a permit for such erection or a preliminary permit for the erection of any part thereof there shall be filed with the Inspector of Buildings plans and specifications describing the entire work to be erected or describing the portion thereof which is embraced within the terms of a temporary permit, whereas no specifications for the work to be done in accordance with said plans have been filed.

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

1. That Joseph A. Marsh who is the defendant in this suit may answer this bill of complaint and each statement therein made:

2. That a writ of injunction may issue enjoining the defendant, his servants and agents, from erecting the addition upon the southerly side of the house de-

scribed in the bill of complaint described and set forth in his application to the Inspector of Buildings of the Town of Montclair or any addition to the said house or structure in connection therewith having its front wall within 75 feet from the front of his said premises on Sunset Park North.

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

EDWIN B. AND PHILIP GOODELL,
Solicitors and Counsel with Complainant.

ANSWER.
Filed December 6, 1917

IN CHANCERY OF NEW JERSEY

Between HELEN E. MARSH, Complainant, and JOSEPH A. MARSH, Defendant,		On Bill, Etc. Answer.

Joseph A. Marsh, the defendant, of the Town of Montclair, Essex County, N. J., to the bill of complaint of Helen E. Marsh, says.

FIRST DEFENSE.

1. He has no knowledge of paragraph one of the complaint.

2. He admits paragraph two.

3. He admits paragraph three.

4. He has no knowledge of paragraph four, and leaves complainant to her proof.

5. He admits paragraph five.

6. He admits paragraph six.

7. He admits paragraph seven.

8. He admits paragraph eight.

9. He admits that certain plans were filed by him as stated in paragraph nine of the complaint, and that the dimensions stated in said paragraph are approximately correct, but states that the description of the alterations or additions therein set forth is untrue and misleading, in this: The defendant's house fronts on Norwood Avenue and not on Sunset Park, North; that

ever since defendant's house was erected there has extended beyond the southerly foundation of the house a substantial enclosed porch, erected on three brick piers, each pier two feet long, two inches wide and 12 feet deep, which porch had a hip roof. The proposed addition originally contemplated when these plans were filed, merely adds a sleeping porch and dormer on top of said porch, coextensive therewith, and as originally planned, a trench wall was to be built between the piers of the piazza, purely for the sake of warmth.

10. He admits that a notice of the purport stated in paragraph ten was received by him shortly after October 20th.

11. He admits that after receiving said notice, he modified his plans by omitting the trench wall between the piers and omitting the dormer, and making a flat roof instead of a hip roof on the sleeping porch; that there is no change whatever contemplated or planned as to the support for the porch; the piers mentioned in complainant's bill are the same piers that have supported the porch since it was built, almost seven years ago.

12. He denies paragraph twelve, and especially denies that any change is to be made in the foundation of foundation wall.

13. He has no knowledge of paragraph thirteen.

14. He has no knowledge of paragraph fourteen.

15. He denies all the allegations of paragraph fifteen.

SECOND DEFENSE.

Defendant contends as a matter of law and equity, that the relief sought must be denied, because of acquiescence and laches.

CHARLES JONES,
Solicitor of Defendant.

January 22, 1918.

Between

HELEN E. MARSH, Complainant,

and

JOSEPH A. MARSH, Defendant.

Transcript of shorthand notes of testimony taken in the above entitled cause at Chancery Chambers, Newark, New Jersey, on January 22, 1918, before Hon. Merritt Lane, Vice Chancellor.

APPEARANCES:

Philip Goodell, of Edwin B. and Philip Goodell, for the complainant.

Charles Jones (of Jones & Gleeson) for the defendant.

Mr. Goodell: I offer in evidence deed to the complainant.

Marked Exhibit C 1.

CHAUNCEY H. MARSH Sworn.

Direct Examination by Mr. Goodell:

Q. Mr. Marsh, are you the husband of Helen Marsh, the complainant here? A. I am.

Q. And you were married at the time she purchased your property on Sunset Parkway shown by the deed? A. I was.

Q. Have you built on that property that you purchased of Stout as shown in that deed? A. I have.

Q. What sort of a house did you and Mrs. Marsh build, that is, how much did it cost? A. About $14,000.

Q. Whereabouts on your lot does it stand with reference to its distance from Sunset Avenue, Sunset Parkway? A. Distance of just seventy-five feet from the sidewalk or the city street line.

Q. Now when you bought your lot was there any house on the lot to the west of you now belonging to the defendant? A. There was.

Q. Will you explain where that stood in reference to the seventy-five foot line? A. The chimney line on the southerly end is just seventy-five feet from the street line.

Q. That chimney line is the furthest extension to the south of the main building? A. It is not.

Q. What is? A. There was a porch extending further south.

Q. Just a porch? A. Yes.

Q. Will you describe that porch as nearly as you can?

The Court: Isn't the best way to describe the porch to put in the photograph? I think you have some photographs.

Mr. Goodell: I am trying to describe the old porch, and Mr. Jones said he had one; we have none.

Mr. Jones: He can put it in as of now if he wishes; it won't be here for a few minutes.

Mr. Goodell: I won't attempt to describe it; the photograph will describe it accurately, and the same way with the new porch.

Q. Now, then, has the defendant recently attempted any alteration to his house? A. He has.

Q. Will you describe those alterations very briefly, just their general nature? A. He has built on the easterly side an extension running up into the third story, which extension I have not measured; he has built on the northerly end an extension running up three stories; he has built on the southerly end an extension running up two stories.

Q. Now is it that extension on the southerly end that is in controversy in this suit, if your honor please. Is that extension within the line of seventy-five feet from the street? A. It is.

Q. (By the Court.) It is above what was formerly the porch, isn't it? A. Yes.

Q. Is the old porch built onto it so as to form a part of this extension? A. It is.

Q. And is the old porch changed from the way it was? A. It has been.

Q. Have you a picture of that, photograph of that? A. Why, I have them, I guess.

Q. I show you a picture; does that represent the extension? A. It does.

Q. As it is now? A. It does.

Offered in evidence and marked Exhibit C 2.

Q. Do you know how far distant that front wall is now from the front wall of that addition?

The Court: It is admitted, isn't is, that it is within the restricted limits?

Mr. Jones: Yes.

The Court: Then why go into it? The only question is whether or not this structure or this addition to the structure, whatever you may call it, comes within the language of the restriction, isn't it?

Mr. Goodell: Exactly.

Q. Will you describe as nearly as you can the character of that addition?

The Court: Why go into that when we have got photograph of it, that I can see exactly what it is?

Mr. Goodell: I was thinking of the things you could not see from the photograph.

Q. (By the Court.) Is this building frame or not? A. It is a frame building, yes, sir.

Mr. Goodell: I want to show the character of the windows; I want to show the character of the finish inside, as to whether it is heated or not, and a number of those things you couldn't tell from the photograph there.

The Court: You can do that; go ahead.

Q. What is the character of the windows that are set in that porch, that addition, what sort are they, permanent? A. So far as one can tell they will be permanent windows, on hinges; there are no specifications of the Building Department showing just how they are to be fixed.

Q. (By the Court.) Are the windows in now set? A. Yes.

Q. (By the Court.) Are they any different from the windows in the rest of the house? A. I should say they were to be dormer windows.

Q. What do you mean by dormer windows? A. With hinges swinging in, divided in two pieces, they are in two pieces.

Q. How are they now fastened together? A. I believe they are nailed.

Q. They are windows that will be hinged you believe to swing? A. Yes.

Q. You mean dormer windows? A. Dormer windows.

Q. I thought dormer windows were windows that projected out under a hood? A. Not necessarily; I should say either way. I should have said casement windows, not dormer windows.

Q. Are the windows on the second story of the addition the same as on the ground story? A. So far as I can see, with the exception of the easterly side.

Q. Of the second story? A. Of the second story.

Q. Those windows are finished windows, that is permanent windows to set there all the year around, are they not? A. It would look so.

Q. And even though they are not the sort of windoys that may be in the house are they not the sort of windows that are sometimes used in houses? A. Yes.

Q. How about the finish outside, how is it finished outside? A. Shingled.

Q. How is it finished inside? A. There is no finish

shown; at the present time the ceiling, the old ceiling of the lower porch is removed, the beams showing, and there is no finish on the second floor.

Q. It is evidently going to be finished, or is it completed now? A. It is going to be finished.

Q. Could it be finished with lath and plaster as it stands now? A. It could.

Q. How about the heating apparatus, is there any heat provided, do you know? A. There is a radiator on the porch, lower porch, at present disconnected.

Q. But the radiator is there? A. The radiator is still there.

Q. Is the steam riser there? A. It is.

Q. Now, the second story part of the addition do you know whether that is heated or not? A. I do not.

Q. Have you measured these windows and window openings? A. I have.

Q. About what proportion of the total area seems to be window and what proportion seems to be solid construction? A. Less than twenty per cent., approximately eighteen.

Q. You refer to the amount of glass in? A. Actually in glass.

Q. (By the Court.) Twenty per cent. is actually in glass? A. Less than twenty, about eighteen, your honor; that is on the lower porch.

Q. Now, including the wooden part of the windows, that is the frame in which the glass is set, about what is the percentage of window openings? A. About fifty per cent.

Q. Taking the south end, can you give your actual figures, what is the total area of the south end of the ground floor? A. 246½ square feet.

Q. Now, what is the open area? A. Area of the frame 82 1/6 square feet.

Q. Is that as high as fifty per cent?

The Court: Never mind. I can figure that.

A. About 33 and 1/3 per cent.

Q. Now, how about the east end; what are the figures there? Is that about the same percentage? A. The total area is 150 and 5/7; and the frame area you ask for?

Q. Yes, the frame? A. 53 and ½; about thirty per cent. I should have said.

Q. Now is there any entrance from the outside to these rooms? A. None whatever.

Mr. Goodell: Now the question of laches.

The Court: That is defense. Make your own case first. Don't go into something you don't have to on your own case.

Q. Was there an entrance to the porch that was there before? A. There was.

Q. By steps? A. By steps.

Q. The porch that was there when you bought your house, how was that finished inside? A. The ceiling was ceiled with wood and the posts were or the supports were shingled both outside and in.

Q. What kind of a floor did they have, painted or hard wood floor? A. Painted; well, it was all wooden floor, I believe stained or painted.

Q. Now was that a room or piazza?

Mr. Jones: I object to that as a conclusion.

Question withdrawn.

Q. What about the floor of the new extension, as nearly as you can judge now? A. The same floor.

Q. Do you know about the second floor? A. I do not.

Q. Did the old piazza have screens? A. It did.

Q. Did it have glass, have sash? A. It was enclosed in the winter, whether with screen or sash I am not sure.

Q. Mr. Marsh, I show you a photograph; does that represent approximately from the angle from which it is taken, the situation of the porch before these alterations were begun? A. It does.

Mr. Goodell: I would like to offer this in evidence.

Marked Exhibit C 3.

Q. Will you point out, that the Vice Chancellor may get the situation here, the features of that photograph? What is the name of this street? A. Norwood Avenue.

Q. And where is Sunset Parkway? A. Running at right angles to Norwood, on the right of the picture.

Q. This is east; this is the south end of the house; where is your house? A. Right here, the next house on Sunset Avenue.

The Court: What the witness indicated as Norwood Avenue is on the bottom of the picture, would be on the bottom of the view, or the photograph, rather.

Q. How about the other houses in this neighborhood; who owns the house to the east of you? A. Mrs. Ida E. Vernon.

Q. Do you know how far back her house is?

The Court: Why go into that?

Mr. Goodell: To show the neighborhood.

The Court: I don't care anything about the character of the neighborhood, unless they show it has been changed.

Cross-Examination by Mr. Jones:

Q. You say that your wife bought the property in February 1911? A. About that date, yes.

Q. And that the house which is the subject of complaint was already there, that is the corner house was there when you bought? A. That house was built; yes.

Q. How soon after your wife bought the property did you commence building? A. Something over a year.

Q. So that approximately a year after you bought you went to live in your house? A. Approximately two years.

Q. And you and your wife have lived there ever since? A. Ever since.

Q. Who has lived in the corner house? A. Mr. and Mrs. Edwin S. Ellis.

Q. They bought immediately from Stout, did they? A. They had bought.

Q. They bought shortly before you bought from Stout? A. So far as the record shows, yes.

Q. Now, living as a next door neighbor did you visit back and forth with the Ellis's? A. Very occasionally, seldom oftener.

Q. While you were living there did you have occasion to go in their living room on this porch? A. I have; yes.

Q. Very often? A. Not very often.

Q. In the winter time? A. Not to my knowledge.

Q. You have never been there in the winter time? A. I have been in the house, but not on the porch to sit, no.

Q. Wasn't there a radiator there while the Ellis's were there? A. There was.

Q. Now, while Ellis lived there, referring to Exhibit C 3, when the Ellis's occupied that house in the winter those places where screens are now shown in that picture there were frames of glass were there not? A. That I can't say.

Q. You lived next door, didn't you?

The Court: He says he can't say.

Q. You don't remember that? A. The Ellis's used that as a porch.

Q. That was not the question. A. I don't recall whether there was glass for those openings or not; they were always enclosed.

Q. Now do you recall whether they had an electric light out there? A. I believe there was, but I can't say positively.

Q. Was it furnished out there? A. It was.

Q. About the same as the living room, wasn't it? A. No.

Q. It was furnished? A. What do you call furnished?

Q. It was furnished, wasn't it? A. To some extent.

Q. Had a table, reading lamps? A. I believe there was a table in the summer time; there was a lamp.

The Court: What is the use of asking this witness's recollection when you can prove by your own witnesses exactly what was there?

Q. Have you seen the floor of it, what was there? A. Yes.

Q. That floor the same as the living room? A. I can't say positively.

Q. Do you know whether there was a door leading from the living room onto this porch? A. There is.

Q. Now, from the south side was there any approach to this porch, from the south side of the house? A. Do you mean steps?

Q. No, I mean approach in the yard itself? A. You mean walk?

Q. Yes? A. No.

Q. There is a terrace there on the south side, isn't there? A, It was on all sides except on the east and north there is no terrace.

Q. Any break in the terrace leading from this side of the house to Sunset Avenue? A. There was none as long as they lived there; there is now a driveway.

Q. You don't know the character of the upstairs of this porch as it is now built, do you, from your own knowledge? A. I haven't been in the porch, not upstairs, I haven't been in the house; from the outside you can see that the ceiling beams are open; they are not now covered, there is no ceiling.

Q. You don't want to swear of your own knowledge whether these windows are removable or not, do you? A. I do not.

Q. So far as you can say the lower porch is in the

same condition as it has always been since Ellis was there? A. Without the ceiling and without the steps.

Q. What do mean without the ceiling? A. There is no ceiling now on it; there was.

Q. There was no ceiling when Ellis was there, was there? A. Yes.

Q. Just boarded up like a porch, isn't it? A. What is a ceiling?

Q. What was there that took the place of a ceiling when Ellis was there? A. I should say ceiling boards.

Q. You purchased from whom? A. Mr. Ralph Stout.

Q. How far is your porch, that is how far is your house westerly, south side of your house from this porch? A. The westerly end of my house is forty-nine feet from my line.

Q. And how far is this porch from your line? A. That I can't tell you.

Q. Roughly, twenty, forty, thirty? A. About sixty feet.

Q. (By Mr. Goodell.) That is from your line? A. From the line you said?

Q. Yes, from the westerly line? A. No, I should say about sixteen feet, fifteen or sixteen feet.

Q. Now from this house in question to your house the land gradually rises, does it not? A. Yes.

Q. Have you a porch on your westerly side? A. Yes.

Q. Did this porch as it was occupied and existed under the Ellis's did that interfere with your views of the west? A. My porch?

Q. Yes, from your lower porch? A. We could see over it without much trouble.

Q. See over the top of it? A. At an angle, yes.

Q. What could you see over the top of it? A. Mountains.

Q. You could see some of the landscape over the top? A. Yes.

Q. (By the Court.) Can you now from your porch? A. No, sir.

Q. Did you raise any objection while the porch was there while the Ellis's occupied it?

Mr. Goodell: I object to that.

The Court: What difference does that make? I will assume that he had not, of course. What difference does it make? He is not complaining about the porch as it was; he is complaining about the porch as it is. You didn't raise any objection; you raised no objection to the existence of the porch as it was?

A. No, sir.

Q. How far back is your porch from the street line? A. Seventy-seven feet.

Mr. Goodell: I offer photograph.

Marked Exhibit C 4.

Re-Direct Examination by Mr. Goodell.

Q. Mr. Marsh, while the Ellis's owned and occupied the house can you say whether or not the glass, if they had any glass, was there permanently, or was it just for the winter? A. It was just winter.

Q. It was not there in the summer, you are sure? A. I am sure.

Q. During that time those openings were open? A. Absolutely.

The Court: If there wasn't any glass there it would have to be.

A. There was mosquito netting, but that was open.

Q. Now as to that furniture, did they use the porch as a living room or as a porch? A. I should say as a porch.

Q. I show you two photographs, one apparently of the interior of the porch, did you take that picture? A. I did.

Q. Can you tell where it was taken from? A. That is looking in the window on the southerly side.

Q. Which floor? A. The first floor.

Q. What is this door? A. Leading into the living room.

The Court: "This door" means the door to the right.

Photograph offered in evidence and marked Exhibit C 5. (Omitted by agreement.)

Q. And this picture, is this the work in progress? A. Yes.

Q. Taken from where? A. Taken from my property.

Q. This is the addition to which objection is made? A. It is.

Q. The left hand of the picture? A. Yes.

Photograph offered in evidence and marked Exhibit C 6. (Omitted by agreement; similar view to C 2.)

Mr. Goodell: I offer in evidence certified copy of Montclair Building Code simply on account of one definition on page 28, "Meaning of term Foundation." The word 'foundation' shall be construed to include all walls and piers built below the sidewalk or ground level, or the nearest tier of beams thereto which serve as supports for walls, piers, columns, girders, posts or beams."

Book not marked, but quotation to go as the exhibit.

A further definition on page 12, "External Wall," means every outer wall or vertical inclosure of any building not being a party wall.

Calling your honor's attention to the fact that it is stated in the bill and admitted in the answer—just to recall to your mind—the original plan showed a foundation trench wall, so-called, under this, and then on our first objection that was stricken out, and the building department wanted the third story taken off. Those facts being ad-

mitted in the answer, and some small changes made in the character of the sash, to set sliding sash on the original plans, and they changed them to movable sash. I think we rest.

WILLIE WIKSTROM Sworn.

Direct Examination by Mr. Jones.

Q. What is your business? A. Building contractor.

Q. And how long have you been building contractor? A. About sixteen years.

Q. Do you know this property in question that is the subject matter of this bill? A. Yes, I do.

Q. Who built that house? A. I built it.

Q. Who did you build it for? A. Mr. Ralph Stout.

Q. And when did you build it? A. I built it, commenced building in 1909, and it was completed in the spring of 1910.

Q. And was that completed before the Marshs, the complainants, residence was started? A. Yes, it was.

Q. And what did Stout do with the house after it was built? A. He sold it to Mr. Ellis.

Q. And what became of Ellis? A. Ellis lived there for a few years and he died there a couple of years ago.

The defendant offers in evidence deed from Merriam I. Hilliard to Lillie D. Taylor, executor of the last will of Edward S. Ellis, to Joseph A. Marsh, recorded in K59 of Deeds for Essex county, page 328. Also deed from Clara S. Ellis, widow, to Joseph A. Marsh, recorded in K 59, 331, on September 19, 1917, the latter being for dower right, and both these deeds cover the premises in question.

Marked Exhibits D 1 and D 2.

Q. Which way did that house which you built front? A. Fronts Norwood Avenue west.

Q. What was the street which the complainant's house fronts? A. Sunset Parkway.

Q. How far is the main foundation of the southerly side of the house from Sunset Parkway?

Mr. Goodell: I object unless he measured it.

A. Seventy-five feet six inches.

Q. Have you measured it? A. Yes.

Q. That is to what point? A. To the chimney foundation.

Q. Now beyond that foundation this porch comes? A. There is fourteen foot porch.

Q. And that porch was built by Stout? A. That porch was built for Stout by him at the time the building was built.

Q. Now when Mr. Ellis lived there did you visit him? A. I did.

Q. Frequently? A. Very often.

Q. How was that porch used? A. That porch was used as a living porch.

Q. Was there a door running from the porch into the main living room? A. Yes, door opening into the living room, casement door.

Q. I am showing you Exhibit C 5 and ask you whether the door, the glass door going from the porch into the living room on the right of that picture was there in the original structure? A. Yes, it was.

Q. Was the porch lighted? A. Yes, it was.

Q. What kind of a floor was on the porch? A. Hard wood floors.

Q. Varnished or painted? A. Painted, filled and varnished.

Q. How was the porch used in winter? A. It was used as a living porch.

Q. I notice in the large picture there, Exhibit C 3, there are screens in it? A. Yes.

Q. What took the place of those screens in winter? A. Sash took the place of the screens in winter.

Q. And the sash was in there when you visited it? A. Yes.

Q. How did that sash compare with the sash that is

in it at present? A. The only difference is before there was three single sash, and they were very big and hard to handle, so Mrs. Marsh decided to make it in three casement, said it would be easier to take out and put in, more easily to remove.

Q. About the same amount? A. About the same amount.

Q. How was that furnished? A. It was furnished with rug, porch furniture.

Q. And the ceiling—— A. She had rugs there and she had wicker chairs; she had rug on the floor, and she had plants in there, kept them there all winter.

Q. Was the porch heated? A. The porch was heated.

Q. And how long did the Ellis's live there using that in that way? A. Approximately six years.

Q. How was that porch which was built supported? A. Supported by three piers, one in each corner and one in the center.

Q. And how large were those piers? A. The corner pier is two feet each way, angle of forty-five, and center pier is two feet.

Q. So that on the two corners, two outer corners of this porch were two of these piers you described, and then in the center? A. Yes, and in the center is another pier.

Q. And that is all that supports that? A. That is all.

Q. Now has there been any change whatever to this porch here that has existed all these years? A. The lower construction has not been changed at all except the steps on the east side removed.

Q. Has there been any change whatsoever in the foundation or the southerly side or any part of this porch? A. No, not the lower part.

Q. What practical change has been made? A. The difference is that this is indicated three single sash and I have three casement, so it is six sash instead of three.

Q. Are those sash which are put in removable? A. Yes.

Q. What takes their place when they are removed? A. Screens.

Q. And you have those? A. Yes.

Q. Is there any change in the ceiling at the present time? A. Have removed the ceiling; the ceiling is going to be the same boards as it was before; I am going to replace the ceiling with ceiling boards.

Q. So the change you are making on the southerly side of the house consists of what? A. The sleeping porch over this porch is the principal changes.

Q. And what goes on top of the sleeping porch? A. Just flat tin roof; the sleeping porch goes up one story.

Q. And is that tin roof a part of the main roof of the house or not? A. It is not; the main roof got a shingle roof on it.

Q. I notice from these photographs it appears as though it is part of the main part of the roof. A. It is not; there is flat tin roof on the porch.

Q. Now I show you three photographs of the house which were taken during the course of construction; the right hand side of the picture is what side of the house? A. That is facing Sunset Parkway.

Q. That is southerly part of it? A. Yes.

Photograph offered in evidence and marked Exhibit D 3.

Q. I am showing you another photograph which shows it during the course of construction? A. That is also facing Sunset Parkway.

Q. The right hand side? A. The right hand side faces Sunset Parkway.

Photograph offered in evidence and marked Exhibit D 4. (Exactly same as D 5.)

Q. And the third picture, which is made—— A. Is the same; that is copy of the one just had.

Q. Is that copy of it? A. It looks like to me the same.

Q. The third the right hand side of the picture is the southerly side of the house? A. Yes.

Photograph offered in evidence and marked Exhibit D 5.

The Court: Is this new work at the northerly end of the house too?

Mr. Jones: Yes, sir.

Q. On those pictures I have just put in the roof looks as though it is co-extensive with the house; that you say is not true? A. Except the cornice part going in the main part.

Q. Now on the southerly side, what is the general situation of the premises on the southerly side of the house, is there any approach to this porch? A. No, not at all, not from the sidewalk any, but there is step from the porch down to the ground.

Q. That lead right down to the line? A. Yes.

Q. No sidewalk leading up to those steps? A. No; it was never used in winter, because the door leading up to the steps in the winter was fastened, it wasn't used.

Q. And where was the furniture? A. There was table and furniture against the door.

Q. What I mean was there any approach from the Sunset north to the porch? A. No, there wasn't.

Q. This land is high terrace all around? A. Yes.

Q. Is there any terrace on the southerly side? A. No, there is not.

Q. What did you do when Mr. Marsh bought this property, where did you figure in, I mean when the defendant Marsh bought the property? A. Mr. Marsh authorized me to have plans prepared to build the sleeping porch and also carry third story room over it.

Q. What is the condition of Mr. Marsh, the defendant's health? A. He is in very bad health at the present time.

Q. Suffering from a stroke of some sort, isn't he? A. Yes.

Q. So who did all the practical part of the business? A. I have done all the business for him.

Q. In carrying out that business what did you do? A. I prepared the plans, got estimates, filed the plans with the Building Department.

Q. When you filed plans with the Building Department did you get permit to go ahead? A. Yes, I got permit to go ahead.

Q. And then what happened? A. A week or so after the plans had been filed with the building department I got a letter from Mr. Marsh or his attorney that there was some action by the neighbors on account of this addition which he proposed to build, and he asked me to kindly go and see their attorney and change the plans to suit the wishes so he would be able to build the addition.

Q. Then did you change those plans? A. I went up to see the attorney and told him what I was going to do.

Q. (By Mr. Goodell.) Who was that again? A. Mr. Goodell. Leave off the third floor and leave off the concrete wall in between the piers of the present porch; and I also went back to the building department and made changes and had them approved by the building inspector. I was trying to do everything as Mr. Marsh wished me to do to try to prevent the law suit or any inconvenience to the neighbors.

Mr. Goodell: I move that be stricken out.

The Court: It may be stricken out.

Q. You say these windows you placed in are removable? A. Removable, yes.

Q. Has this work been done? A. The outside is all completed, but the inside is not as yet completed.

Q. Which way does this house face? A. Faces Norwood Avenue.

Q. (By Mr. Goodell.) You mean the front of the

house? A. The front of the house faces Norwood Avenue.

Q. All approaches from the house are from what side, I mean all approaches from the side of this house? A. The approaches are from Norwood Avenue, but now we got driveway in from Sunset Parkway.

Q. That has just been recently put in? A. Yes, recently put in.

Q. Where does that go to? A. That goes to the garage in the rear.

Q. (By the Court.) Is there any way by which you could get to the front door through this right of way?

A. Yes, the hallway in the main house was all the way through; it has rear entrance in the rear facing east.

Cross-Examination by Mr. Goodell:

Q. What do you mean when you say the windows are removable? A. It means they were put in, what I call portable.

Q. How are you going to hang them? A. Can put them either with screws or brass buttons.

Q. Not going to be on hinges? A. No.

Q. Won't be any way to ventilate that porch in winter? A. Yes, will be.

Q. How? A. You can hinge one small light in the glass for ventilation.

Q. Now you state that after objection was made you changed those plans as Mr. Marsh's agent? A. I did.

Q. What did you leave out? A. I left out the concrete wall between the piers and left the third floor off.

Q. Why did you leave them out? A. Because I thought I would satisfy the complainant.

Q. What about the third story, did you think that would satisfy the complainant?

Mr. Jones: I object.

The Court: I will permit it.

A. Well, I felt personally that carrying the third story over would make part of the main building, and

when I left that out with flat tin roof it would not come under the heading of the main building, that it would become a porch as it is now.

Q. What did you think about leaving this foundation wall that you showed on the original plans out? A. I found we didn't need to have it; I consulted the building inspector, and it was not needed.

Q. Then when you said a minute ago you left it out because you thought it would suit the objecting neighbors what did you mean?

Mr. Jones: He didn't say that.

A. I meant doing as little work to it as possible, not to make it solid structure, as they claim it is.

Q. Haven't you made it a solid structure right down to the ground? A. No, we have not.

Q. Wasn't there one there? A. What was there, what was there before is there now.

Q. And it goes right down to the ground, don't it? A. Yes.

Q. Is the foundation wall going to make any difference in the solidity of the structure to the eye? A. No, not to the eye it would not.

Q. Did you know about these restrictions when you decided to lift out the foundation wall? A. I knew there was restriction.

Q. And you knew what they said, didn't you? A. You told me about it.

Q. Now you say you are not doing anything inside this ground floor, not changing it at all except the character of the sash? A. Just simply changing the sash, and we will change the side walls, panel them instead of rough shingles.

Q. To correspond with what? A. With the living porch, to make it more livable.

Q. You mean panel the way this room is paneled? A. No, it is not; it is only paneled with white wood for painting, paint it the same as outside of the building.

Q. Have you any specifications for this change? A. The only specification is on the plans; whatever is marked on the plans is the only specifications I have got.

Q. Have you got the plans here? A. I believe it is here.

Q. Do the building inspector's plans show it? A. Yes.

Q. (By the Court.) Where is the entrance to this second story? A. From the bed room on the second floor on the south.

Q. How are you going to finish the second story porch, as you call it? A. The second story living porch is intended to plaster.

Q. Whereabouts on these plans does it show that— A. That would seem to indicate you can either shingle or panel, whichever you want.

Q. Where is it indicated? A. Take thickness of the wall, sixteen inch wall.

Q. Couldn't you plaster it? A. It could be plastered; it wouldn't look like a porch if it was plastered; the idea is to have distinction between the living room and porch.

Plans and specifications offered in evidence and marked Exhibit C 6½.

Re-Direct Examination by Mr. Jones.

Original and amended plans of this house offered in evidence and marked Exhibit D 6.

Q. What is this? A. Original plan of the house that was built in 1909.

Q. Did you draw those? A. My draughtsman did it.

Q. Under your supervision? A. Yes.

Q. The house was built according to these, was it? A. Yes, built according to these.

Q. And what is the second sheet here? A. That is floor plan of the same house.

Q. And the porch plan as well? A. Yes, and steps is included in there, too.

Q. And what is this third sheet? A. That is foundation for it.

Q. So Exhibit D 6 consists of three sheets, does it not? A. Yes.

Q. That is attached to the answering affidavit? A. Yes.

Q. What is this other sheet? A. That is the way we propose to complete it now.

Mr. Jones: I would like to offer that in evidence. This is perspective of the house as proposed to complete.

Mr. Goodell: Is this the way you built it, the kind of sash you got in there? A. Yes; the sash may be split in the center, easy to remove, which I testified before, made smaller, to be easier to handle.

Q. What does this show, if anything at all, this picture you have in front of you? A. Just shows the house the way I am building it now, except there may be another sash bar in the center.

Q. How long since you looked at this? A. About a month ago, six weeks.

Q. Since it has been filed here you haven't looked at it? A. No.

Q. When was it drawn, drawn after the case was started? A. It was drawn after the case was started.

Q. You filed it here two or three days later and haven't seen it since? A. No, it was filed here at the first hearing when the case came up.

Re-Cross-Examination by Mr. Goodell:

Q. You have the blue prints from that? A. Yes.

Q. This print? A. Yes, I got blue prints from it.

Q. Now then what is the finish of the living room inside this? A. That is plaster.

Q. How is the trim painted? A. Stained dark.

Q. Inside? A. Inside.

Q. How are you going to paint the living porch

outside? A. Going to paint it light cream, what you call ivory white.

Q. That is not an outdoor room, is it? A. It will be treated the same as an outdoor room.

Q. I note that you are going to put down by the plans a new oak floor; what is the matter with the other floor? A. Well, at the time I prepared the plans I didn't think it was hard floor, didn't think of it at the time; now we find there is hardwood floor there at present.

Q. How thick is it? A. 7/8.

Q. Floor under it? A. It is nailed to the floor timber.

Q. Single nails right in the timber, nothing between that and the ground? A. No.

Q. Now what are you putting down, putting floor on top of the old one? A. No.

Q. Not going to put in the floor as shown in the plans? A. No, because it is not needed.

Q. Did you ever sit out there with Mr. Ellis in the winter? A. Yes, I did, very often.

Q. What time in the year? A. In the evening, and some time at noon, any time.

Q. What time of year? A. There wasn't a month in the winter without I was up there, because Mr. Ellis was a personal friend of mine; there wasn't a single thing done to that house without it was done through me; I often went up and had tea with Mrs. Ellis and him both on that porch in the winter.

Q. Did you wear your overcoat while you had tea? A. Didn't have to, because it was very comfortable in there.

Q. And you saw plants growing in there in winter weather? A. Yes, I did, not one, but a dozen.

Q. I show you a picture. You say you are doing no work on the ground floor to finish it except remove the shingles and panel? A. Not inside.

Q. I show you this picture which is in evidence, C 5, showing considerable material lying there; what is

that material for? A. We used that in another part of the house; we used that in the construction; the porch is there, the best place to keep the lumber.

Q. You were working all over the house, weren't you? A. Yes, certainly.

Q. Were you at the Ellis's every winter that they lived there? Every winter I was there, never missed one.

Q. Didn't they go away some time? A. They went away some time in the winter, yes, but in the fall of the winter they put sash in and generally stayed there two or three weeks or a month in cold weather before they left, but the porch was left every winter Mr. Ellis was living.

Q. What is this that shows up here on this plan? A. It is simply a wood railing you would call it.

Q. This parapet shows on the roof; how high is that parapet? A. You mean from where?

Q. From the shingles? A. About sixteen inches approximated.

Q. Did you build a shingle roof when you built the roof finally? A. There is no shingle roof.

Q. This shows shingle roof, don't it? A. No; tin roof right up here, it shows plainly metal roof.

Q. Are you adding any lights more than were there before under this new plan? A. We intended to put some lamps in, but they have not been installed yet.

Q. And you intend to panel it to the ceiling? A. No, just the same kind of ceiling board that was there before.

Q. The paneling will cover the whole wall? A. Yes.

Q. And upstairs you intend to plaster it? A. Yes.

Q. Putting heat in upstairs? A. No heat in, no.

Q. Is there going to be? A. I intend to put heat there.

Q. The steam rises there now, don't it? A. No.

Q. On the house the heating plant to the main plant

has been remodeled, hasn't it? A. The heating plant was wiped out entirely.

Q. Increased in capacity, a new heating plant is going to be installed? A. It is not installed yet.

Q. It is going to be connected with both these porches? A. Yes.

Q. Which of those lights are you going to hinge for ventilation? You say you can hinge some of the lights with sash? A. That will be up to Mrs. Marsh to decide what she wants.

Q. How big are those little lights of glass, do you know? A. Well, approximately I should say they are about 6 x 12, something like that.

Q. Aren't the sash now nailed in there susceptible of being hung with hinges? A. They could be.

Q. Isn't there a bearing for every sash so hinges could be screwed in? A. Hinges could be put in if you wanted to.

Q. Aren't they the kind that is usually used with casement windows? A. Yes, board or casement.

Q. They are not the type shown on the plans, are they? A. The only difference that they are split up in the center to make them smaller.

Q. The edge of those doors are fitted so as to make water tight joints, aren't they, open one way from the other? A. Just to make them tight.

Q. They are not tongued and grooved together the way they would be if they were simply going to be taken out as a whole? A. I make all the sash that way, making it movable and stationary.

Q. They can be hung either way? A. They can be hung or left stationary.

Q. They are the same sort of sash you put in the dining room if a man specified casement window, aren't they? A. If he specified that is the kind of sash it would be, yes.

Q. I mean that would be proper? A. They could be used.

Re-Direct Examination.

Q. The radiator has always been connected on the lower floor, hasn't it? A. That has been there when the house was built; I installed it there when the house was built.

Q. These windows are actually going to be hooked on, put on the hooks? A. Screwed in or fastened with some kind of buttons.

Re-Cross-Examination.

Q. Wasn't that radiator box in? A. There was box made to put over it in the summer when the screens were made; the box was there to prevent the rain from beating through the screen, from rusting the radiator in summer when the sash was not there.

Q. (By the Court.) What kind of a sill is there between the rooms of the main house and this? A. There is two inch sills.

Q. An ordinary sill that you can find between two rooms? A. No, it is more of a door sill, door sill between two rooms is only half inch and this is only about two inch, there is two inch drop, the porch floor it two inches lower than the living room porch floor.

Q. (By the Court.) Is that so too with the extension on the north? A. No, that is dining room, going to be on the same level as the dining room; there is addition to the dining room extension on the north.

Q. (By the Court.) That extension on the north is not a porch? A. No, that is room.

Q. (By the Court.) That is extension to the house? A. Yes, sir.

Q. Where does it differ from the extension to this house in construction? How are you going to fix the walls of the dining room? A. Going to be plastered.

Mr. Jones: How is this going to help us on this?

Q. How are you going to fix the ceiling? A. Plaster it.

Mr. Jones: That is objected to.

The Court: I will permit it.

Q. Did you ever plan to plaster this room? A. No, not this room, living porch; never been intended to make room out of it, what you call living room, always intended to treat it as a porch.

Q. Why did you change the character of the sash as you indicated you changed it? A. I found that with the big sash we would have difficulty to separate the sash because it got to be separate up in the third floor.

Q. You show here on this original plan the same sash as you show on the second story; then you changed it to removable sash; now were they fixed before that? A. No, they are sliding.

Q. Why did you change the character of it? A. Well, they were changed to be left the way they were on the original porch.

Q. Did you change that after conversation with the Building Inspector? A. Well, that was changed to certain extent that the sash would be removable.

Q. So as to comply with the code? A. No, not to comply with the code.

Q. Did you have to comply with the code to build the building without a foundation? A. The principal part was to try to comply with the way the porch was before.

Q. I asked you if you did not have to comply with the code so as to get a permit to build without a foundation? A. The code required that there should be movable sash.

Q. (By Mr. Jones.) Is this your permit? A. That is the permit, yes.

Mr. Jones: I offer this permit in evidence.

Marked Ex. D 7.

OWEN FEENEY Sworn.

Direct Examination by Mr. Jones.

Q. What is your business? A. Mason and builder.

Q. And how long have you been a mason? A. About fifty years in Montclair.

Q. You know this house in question, don't you? A. I do.

Q. Who did the mason work on it? A. I did.

Q. When it was originally built? A. When it was originally built.

Q. Who did you do it for at that time? A. I did it for Mr. Stout.

Q. And you are doing some work on this house now, aren't you? A. Yes.

Q. Are you acquainted with the foundation, or rather the foundation under this house?

Mr. Goodell: Your Honor please, the pleadings admit the exact character of the foundation of the part in question.

Q. Have you seen all these foundations lately? A. I have seen them lately, not since I finished the line of the foundation of the new part.

Q. How lately have you seen the foundations of that house? A. Not since; I haven't gone up that way since the first snow.

Q. You have seen them within a month? A. Yes, I have seen them within a month.

Q. Since the time you built that house what has covered up the piers that are on the three corners, I mean on the two corners and the center? A. It was shingles.

Q. Shingles have gone down to the ground? A. Yes.

Q. Ever since the house was originally built? A. Yes.

Q. Has there been in this recent construction any change whatsoever in the character of those piers?

Mr. Goodell: I object. He doesn't know.

Q. (By the Court.) Do you know? Did you do the work? A. I done the work there, yes; there has been no change, nothing whatsoever.

Q. Has there been any change in this lower part of

the structure so far as it might be called the support or the foundation is concerned? A. Nothing.

No Cross-Examination.

HELEN E. MARSH Sworn.

Direct Examination by Mr. Goodell.

Q. What can you say about the use Mr. and Mrs. Ellis made of that porch as it existed as shown in this photograph in the winter time; was it habitable as a room? A. I have never been on this porch in the winter time, because when I went in to see Mrs. Ellis in the winter the doors into the living room were always closed because it was cold if they were left open on to the porch; all I know is she went away several winters, and on one occasion in asking me to look after her plants she asked that under no conditions would I leave them where they would freeze in the winter, as she was unable to keep them on her own porch in very cold weather because they would be killed by the cold.

Mr. Jones: I ask that that conversation be stricken out.

The Court: I will let it stand.

Q. Did they sit out there in the winter except perhaps in the mildest days? A. I never knew them to sit out there in the winter time.

Cross-Examination by Mr. Jones.

Q. You saw the radiator there, didn't you? A. I didn't see the radiator, because whenever I was on the porch the radiator was boxed in.

Q. You were only there in the summer? A. I said I was not on the porch in the winter time because it was too cold.

The Court: Isn't the erection of this room over the porch a deliberate attempt to evade this covenant?

Mr. Jones: No.

TESTIMONY CLOSED.

IN CHANCERY OF NEW JERSEY

Between HELEN E. MARSH, Complainant, and JOSEPH A. MARSH, Defendant.	On Bill, etc. Additional Testimony

Testimony taken this 28th day of May, 1918, at No. 491 Bloomfield Avenue, Montclair, New Jersey, in the presence of Philip Goodell, solicitor for the complainant, and Charles Jones, solicitor for the defendant.

It is stipulated between the solicitors of the respective parties that the testimony here taken shall have the same force and effect as though taken before the Vice-Chancellor at the hearing, reserving, however, all legal objections.

PHILIP GOODELL,
Solicitor for the Complainant,

CHARLES JONES,
Solicitor of Defendant.

EDWIN B. GOODELL, a witness on behalf of the complainant, testifies as follows:

Examination by Mr. Philip Goodell.

Q. Did you know Erwin J. Crane, who originally owned the lot belonging to complainant and the land of defendant in this cause? A. Yes, I was well acquainted with him and acted as his counsel for many years before his death and was one of the executors of his will.

Q. Did you ever discuss with him, by correspondence or otherwise, a general plan or lay-out for the land bordering on the streets known as Sunset Park North

and Sunset Park South? A. I don't remember whether he discussed the lay-out of the ground with me or not, but he had a map made of it and laid it out and made contracts for the building of the roads and arranged the lots for sale according to his own ideas of what he wanted done.

Q. Did he arrange with you or instruct you to restrict the lots? A. He instructed me that all lots which were to be sold on Sunset Park South or Sunset Park North were to be so restricted that the building line would be seventy-five feet back of the street.

Q. Was this before any lots were sold? A. This was before any lots were sold.

Q. Did he sell any lots in his lifetime? A. No.

Q. Have you and your co-executor made any deeds since Mr. Crane's death? A. We made one deed.

Q. To whom? A. To Ralph Stout. After the conveyance to Ralph Stout the widow of Mr. Crane, one of the beneficiaries under the will, bought out the interest of Mr. Crane's daughter, the other beneficiary, and whatever deeds have been made since that have been made by Mr. Crane's widow.

Q. Do you know of your own knowledge whether the deeds she has made contain similar restrictions? A. So far as I know they do. I know of two deeds which she made to a Mr. Cooper on Sunset Park South, both of which are subject to this restriction, and one deed which she has made on Sunset Park North next east of complainant's, which was also subject to the same restriction. These, so far as I know, are all the deeds she has made.

Q. How many house lots are there on Sunset Park North? A. One lot left, making in all, as originally designed, four house lots.

Q. On the South? A. The same number.

Mr. Jones: No cross-examination.

PHILIP GOODELL,
Solicitor for Complainant.

IN CHANCERY OF NEW JERSEY

Between
HELEN E. MARSH, Complainant,
and
JOSEPH A. MARSH, Defendant.

Conclusions.

Messrs. Edwin B. & Philip Goodell for Complainant.

Mr. Charles Jones for Defendant.

LANE, V. C.

The bill is filed to enforce the provisions of a restrictive covenant. Both complainant and defendant derive title from a common grantor, the executors of Erwin J. Crane. Crane owned a considerable tract of land along a street in Montclair known as Sunset Park North. There is no doubt but that there was a plan of development adopted by which it was contemplated that no house should be built upon any of the property, the main structure of which should be within seventy-five feet of Sunset Park North. In the deeds which were made, including that to defendant, there was this restrictive covenant: "That no building shall be erected on said lot unless the front foundation wall of the said building is at least 75 feet from the front of the above premises on Sunset Parkway North." The house of defendant is on the corner of Norwood Avenue and Sunset Park North and faces Norwood Avenue. The front foundation wall is parallel to Norwood Avenue. Prior to the purchase by defendant of the premises in

question and prior to October 1910, a dwelling house had been erected. There was attached to it a porch, resting upon piers, facing Sunset Parkway North, extending for a distance of approximately fourteen feet, within the seventy-five foot distance referred to. No objection was made to this structure, nor do I think there could have been an objection made to it. Some time in 1917 defendant proceeded to make alterations which are now complained of. He filed plans with the Building Department of Montclair. These plans indicated that a foundation wall was to be placed under, and that a second story was to be erected over, the porch. After objection by the complainant, the plans were altered so that the foundation wall was omitted. Substantially, however, so far as outward appearances are concerned, the structure is to be as the plans originally contemplated.

There are three questions to be decided: (1) What is the meaning of the restrictive covenant? (2) Does the proposed structure come within its inhibition? (3) Is the complainant estopped or guilty of laches?

First: I have no difficulty in construing the covenant. It reads: "That no building shall be erected on said lot unless the front foundation wall of said building is at least 75 feet from front of above premises on Sunset Park North." Construing it strictly, it seems to me that if any part of the front foundation wall is within seventy-five feet of Sunset Park North there is a violation of the covenant. If defendant chose to build his building so that his front foundation wall fronts Norwood Avenue rather than Sunset Park North he must build it so that no part of it is nearer to Sunset Park North than seventy-five feet.

It seems to me that the reasoning of the Court of Errors and Appeals in the case of Howland vs. Andrus, 11 Buch. 175, does not apply. In that case, while it is true that the physical location of the properties was similar to the location of the properties under consideration in this case, the covenant was substantially

different. The deed under which the complainant obtained title to the property fronting on Wildwood Avenue contained a restriction that any building should be "so located that the front line thereof shall not be nearer than sixty feet to the street line measured at right angles thereto." It contained a further provision that no other lots should be sold except by deed containing the same restriction. The deed to the defendants of a corner lot on the corner of Wildwood Avenue and Park Street contained this restriction: "The said houses to face on Park Street on lots having a frontage of not less than one hundred feet, the front foundation of said dwelling to be at least fifty feet from the westerly side of Park Street." A map filed prior to the making of the deeds showed the corner lots facing Park Street. Of this map the complainant at the time of his purchase had knowledge. Upon the defendants proceeding to erect a building fronting Park Street the side line of which facing Wildwood Avenue would be within sixty feet of the street line, complainant filed a bill for injunction. The Court of Chancery granted the injunction holding "that for the purpose of the covenant the line of the dwelling 'fronting' toward the street from which the measurements are to be taken is to be considered as the 'front line' intended by the covenant, although this line might be in fact the side line of the dwelling."

The Court of Errors and Appeals reversing intimated that this construction did violence to the language used. It based its determination, however, upon the fact that at most the complainant's right to relief was doubtful, and that being so, equity ought not to intervene. The covenant now under discussion is substantially different. It forbids the erection of any building unless the front foundation of such building is at least seventy-five feet from front of said premises on Sunset Park North. In the Andrus case the street from which the measurements were to be made is not indicated by name, but the covenants clearly refer to

the street upon which the building fronts. In the case at bar the street from which the measurements are to be taken is named, to wit, Sunset Park North. Although the Court of Errors and Appeals said in the Andrus case that while the word "side" might be used in a generic sense to include "front," the word "front" as applied to a house is always specific, yet it seems to me that it may appear from the context that the user of the word may not have used it in the specific sense indicated by the Court of Appeals. Again referring to the covenant the grantor says that the front foundation wall of the building must be at least seventy-five feet "from front of said premises on Sunset Park North." The grantor here clearly indicates that he is referring by the word "front" to that portion of the lot adjacent to Sunset Park North.

The clear purpose of the grantor as expressed in the covenant was to prevent the erection of a structure with foundation walls nearer to Sunset Park North than seventy-five feet.

Second: Does the proposed structure violate the restrictive covenant?

I think it does. It may be that from a technical architectural standpoint, what is being erected is an upper porch. It is a fact that there are no "foundation walls" (in the technical sense) under the lower porch. I have examined photographs of the structure in question and it appears that defendant has in reality, so far as outward appearance is concerned, added two wings to his house. It is not contended that if the structure which is built on the other side of the house had been built on the side fronting Sunset Park North there would not be a violation of the covenant. So far as outward appearance there is no distinction between that portion of the structure which faces Sunset Park North and that portion of the structure built on the other side of the house. Yet defendant insists that, because it has induced the Building Department of Montclair to permit the erection of the structure facing

Sunset Park North without a foundation wall (speaking technically), although it looks the same as the other, it is not within the terms of the restrictive covenant. I think that the language "front foundation wall" does not necessarily imply a solid wall (Cornell vs. Bickley, 52 N. W. 192, 85 Iowa 219), but includes anything which takes the place and serves the purpose of a foundation wall, and I think that the piers which support the double decked structure are within the meaning of the restrictive covenant a part of the front foundation wall of the building and being within a distance of seventy-five feet from Sunset Park North there is a violation of the restrictive covenant.

I have considered the cases of Walker vs. Renner, 60 N. J. E. 493, Atlantic City vs. Young Amusement Company, 63 N. J. E. 831, Fortesque vs. Carrroll, 76 N. J. E. 583. The rules to be applied in the determination of cases such as this as gathered from these cases seem to be clear. The language of the covenant is to be strictly construed. If it has a plain meaning it is to be enforced in that sense. If it has no meaning it cannot be enforced. If it may mean either one of two things, it will be construed to mean that which is most favorable to the owner of the property. If complainant's right to relief be doubtful equity ought not to intervene. But none of the rules laid down deprive the court of the power to construe the language used in the light of all the circumstances, this very thing was done in Walker vs. Renner, supra. Nor is the court obliged in a case where to attribute a strict technical meaning to each word used would result in defeating the perfectly clear intent of the user of the language to apply such strict technical meaning. The test is whether the construction put upon the language by the court is so clear as that by the acceptance of the deed containing the restriction the acceptor may reasonably be deemed to have understood and acceded to the terms of the restriction as so construed. Fortesque vs. Carroll, supra.

The clear purpose of a restrictive covenant such as

now under consideration is to prevent the erection of something which can be sensed by one of the senses. When the grantor used the language "foundation wall" he had primarily in mind not the masonry forming the foundation, but the structure superimposed, or a structure ordinarily superimposed upon a foundation wall which would appeal to the sense of sight of a neighbor. To hold that a person under the terms of such a covenant may erect a main structure which would ordinarily rest upon a foundation wall and be within the terms of the covenant, without a foundation wall technically speaking, and be without the terms of the covenant, would render the language of the restrictive covenant meaningless.

Third. Defendant insists that because of the acquiescence of complainant and her predecessors in title in the existence of the lower porch so called that she is charged with laches, or is estopped from questioning the building of the proposed structure. There can be no claim that there was any laches after complainant ascertained that defendant intended to build the structure now being erected. The answer to the contention of defendant is that prior to the proposed changes the structure existing was in fact but a porch. The change proposes not only the erection of a second story but an alteration of the lower porch. As I have before pointed out, as originally proposed there were to be foundation walls under the first porch. These walls were abandoned upon objection being made by complainant, and with the consent of the Montclair building authorities. While it is true that the roof of the structure as proposed is not a continuation of the roof of the main structure, yet it is so connected with the roof of the main structure, and the nature of the construction of the second story addition is such as that to the eye the entire structure appears to be one main building. I do not think the complainant could have objected to the existence of the porch as it was prior to

the alteration. I think the alteration has changed its nature so that the complainant may now object.

Decree for complainant.

Settle decree on five days' notice.

DECREE

Filed June 13, 1918

IN CHANCERY OF NEW JERSEY

Between HELEN E. MARSH, Complainant, and JOSEPH A. MARSH, Defendant.	On Bill, etc. Final Decree.

This cause coming on to be heard before the Chancellor, upon, answer, replication and briefs, in the presence of Edwin B. and Philip Goodell, of counsel with the complainant, and of Charles Jones, of counsel with the defendant, and the pleadings and briefs having been read and the arguments of counsel heard and considered, and the Chancellor being of the opinion that the complainant is entitled to the relief prayed for in the bill of complaint,

It is, thereupon, on this 11th day of June, 1918, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, "that a writ of injunction do issue out of this court, restraining and enjoining the defendant, Joseph A. Marsh, his servants and agents, his heirs, devisees, grantees and assigns, from erecting or causing to be erected upon his premises upon the northeasterly corner of Norwood Avenue and Sunset Park North or Sunset Parkway North, whichever way the said street may be properly designated, in the Town of Montclair

and County of Essex, as described in the bill of complaint in this cause, any part of the building or structure specified in his application to the Building Department of the Town of Montclair, filed in the office of the Inspector of Buildings of said town on or about the eighth day of October, 1917, which constitutes an addition to or superstructure upon the piazza theretofore and then existing upon the southerly side of the said house towards said Sunset Park North, or Sunset Parkway North, and being within the distance of seventy-five feet, measured from the northerly line of said Sunset Park North, or Sunset Parkway North, and from erecting any addition to the said house, or any structure in connection therewith, which shall have its front wall within seventy-five feet of the said northerly line, measured at right angles thereto."

And it is further ordered, adjudged and decreed "that the said defendant be therein and thereby specifically enjoined and commanded to forthwith remove from the said premises any erection or structure thereupon which has been built or constructed since the said eighth day of October, 1917, contrary to and in violation of the said writ. And that he do pay to the complainant or to her solicitor her costs to be taxed, and also the sum of One Hundred and Fifty Dollars as a counsel fee." The allowance of counsel fee is without prejudice to solicitors of complainant, making reasonable charges against their clients.

Respectfully advised,
MERRITT LANE, V. C.

PETITION OF APPEAL

Filed June —, 1918.

NEW JERSEY COURT OF ERRORS AND APPEALS

To the Honorable, The Court of Errors and Appeals, in the last resort of causes.

The petition of Joseph A. Marsh, the Appellant in this cause, respectfully shows that your petitioner finds himself aggrieved by the final decree made in the Court of Chancery, by his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, bearing date the Eleventh day of June, Nineteen Hundred and Eighteen, wherein, Helen E. Marsh was complainant, and Joseph A. Marsh was defendant, in this respect, to wit, that the said decree adjudges, "That a writ of injunction do issue out of this court, restraining and enjoining the defendant, Joseph A. Marsh, his servants and agents, his heirs, devisees, grantees and assigns, from erecting or causing to be erected upon his premises upon the northeasterly corner of Norwood Avenue and Sunset Park North, or Sunset Parkway North, whichever way the said street may be properly designated, in the Town of Montclair and County of Essex, as described in the bill of complaint in this cause, any part of the building or structure specified in his application to the Building Department of the Town of Montclair, filed in the office of the Inspector of Buildings of said Town on or about the eighth day of October, 1917, which constitutes an addition to or superstructure upon the piazza theretofore and then existing upon the southerly side of the said house towards said Sunset Park North, or Sunset

Parkway, North, and being within the distance of seventy-five feet, measured from the northerly line of said Sunset Park North, or Sunset Parkway North, and from erecting any addition to the said house, or any structure in connection therewith, which shall have its front wall within seventy-five feet of the said northerly line, measured at right angles thereto."

And further adjudges, "that the said defendant be therein and thereby specifically enjoined and commanded to forthwith remove from the said premises any erection or structure thereupon which has been built or constructed since the said eighth day of October, 1917, contrary to and in violation of the said writ. And that he do pay to the complainant or to her solicitor her costs to be taxed and also the sum of One Hundred and Fifty Dollars as counsel fee."

And your petitioner humbly appeals from the entire decree of the Chancellor, upon the ground that the same is erroneous in that the facts of the case do not show any violation of the restrictive covenant at all; and further that the language in which complainant's restriction was framed does not entitle complainant to an injunction on the facts developed in the case; and further that the restriction in this case does not apply as the house does not front Norwood Avenue, and does not constitute a violation of the restriction. And further that said decree was erroneous in that, assuming it was a violation, the complainant was bound by her acquiescence and laches. And further in this, that there was no privity between complainant and defendant, and that complainant was therefore in no position to complain. And further that, if there was any general scheme of development it was abandoned or broken at the very inception.

Your petitioner therefore prays, that the said decree of the Chancellor may in the particulars as aforesaid, be reversed, set aside, and for nothing holden. And

that your petitioner may have such relief in the premises as to this Honorable Court should seem meet.

CHARLES JONES,
Solicitor for and of counsel with Appellant.

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

CHARLES JONES,
Of Counsel.

Service of the within petition is hereby acknowledged this 19th day of June, 1918.

EDWIN B. & PHILIP GOODELL,
Solicitors for Complainant-Appellee.

ANSWER TO PETITION OF APPEAL

Filed Oct. 17, 1918.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between HELEN E. MARSH, Complainant, Respondent and JOSEPH A. MARSH, Defendant, Appellant.	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 eleventh day of June last past, 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 she prays that the same may be affirmed, with costs to be adjudged to this respondent.

EDWIN B. & PHILIP GOODELL,
Solicitor for and Counsel with Respondent.

It is hereby consented that the within answer to the petition of appeal be filed as of time.

CHARLES JONES,
Solicitor of Appellant.

EXHIBIT C1 OF COMPLAINANT

(Abridged by agreement.)

RALPH STOUT, Unmarried, to HELEN ESTHER MARSH.	Warranty Deed Dated Feb. 17, 1911. Ack. Feb. 18, 1911. Rec. Feb. 18, 1911. Book M148-483.

Conveys land in Montclair owned by complainant adjoining defendant's lands on the East. It contains following covenant:

Subject, however, to the restrictions that no building shall be erected on said lot unless the front foundation wall of said building is at least seventy-five (75) feet from the front of the above described premises on Sunset Park North; and that no building shall be erected on said premises except a single family dwelling house to cost not less than six thousand dollars ($6,000) when erected.

EXHIBIT C2 FOR COMPLAINANT

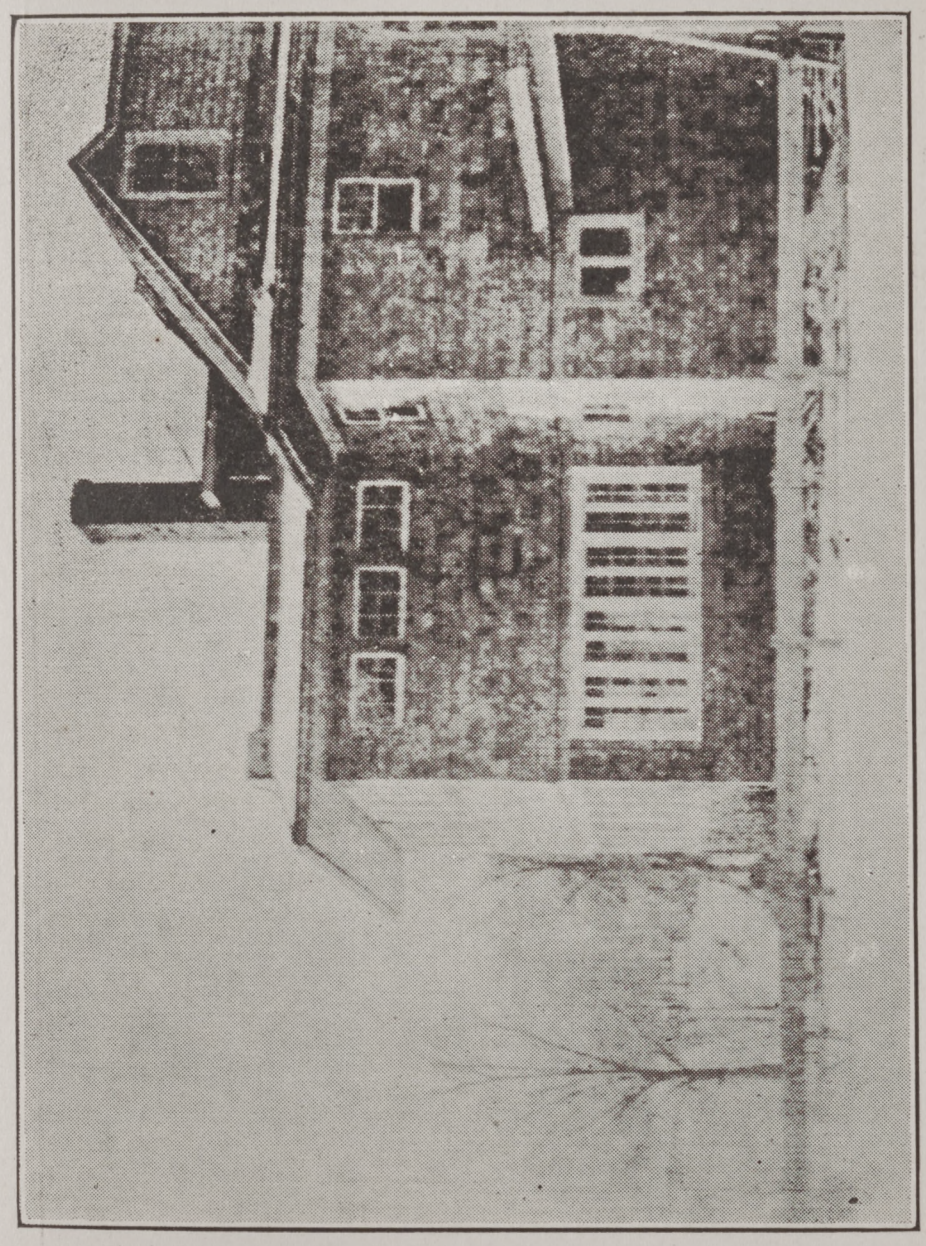

EXHIBIT C3 FOR COMPLAINANT

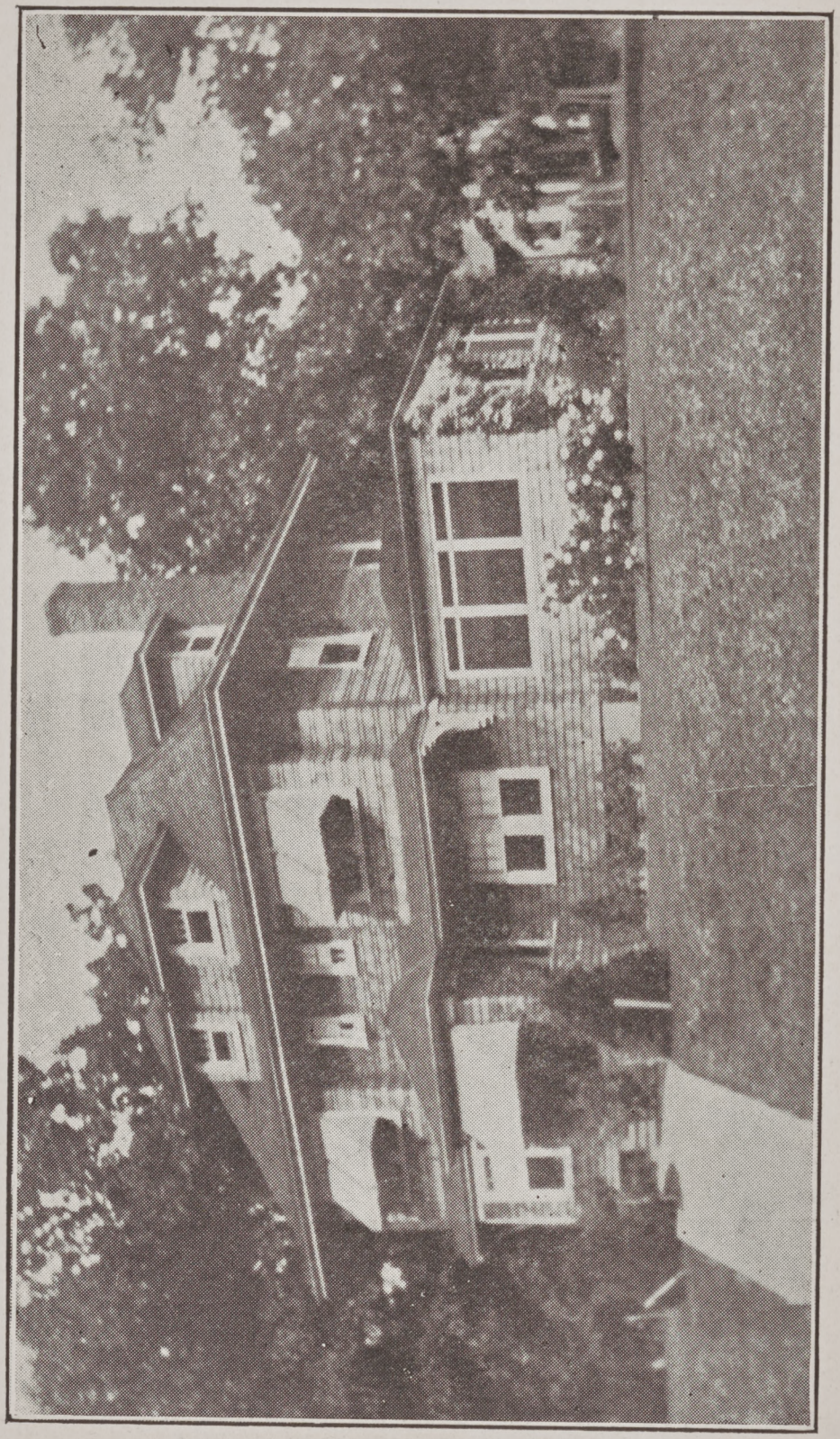

EXHIBIT C4 FOR COMPLAINANT

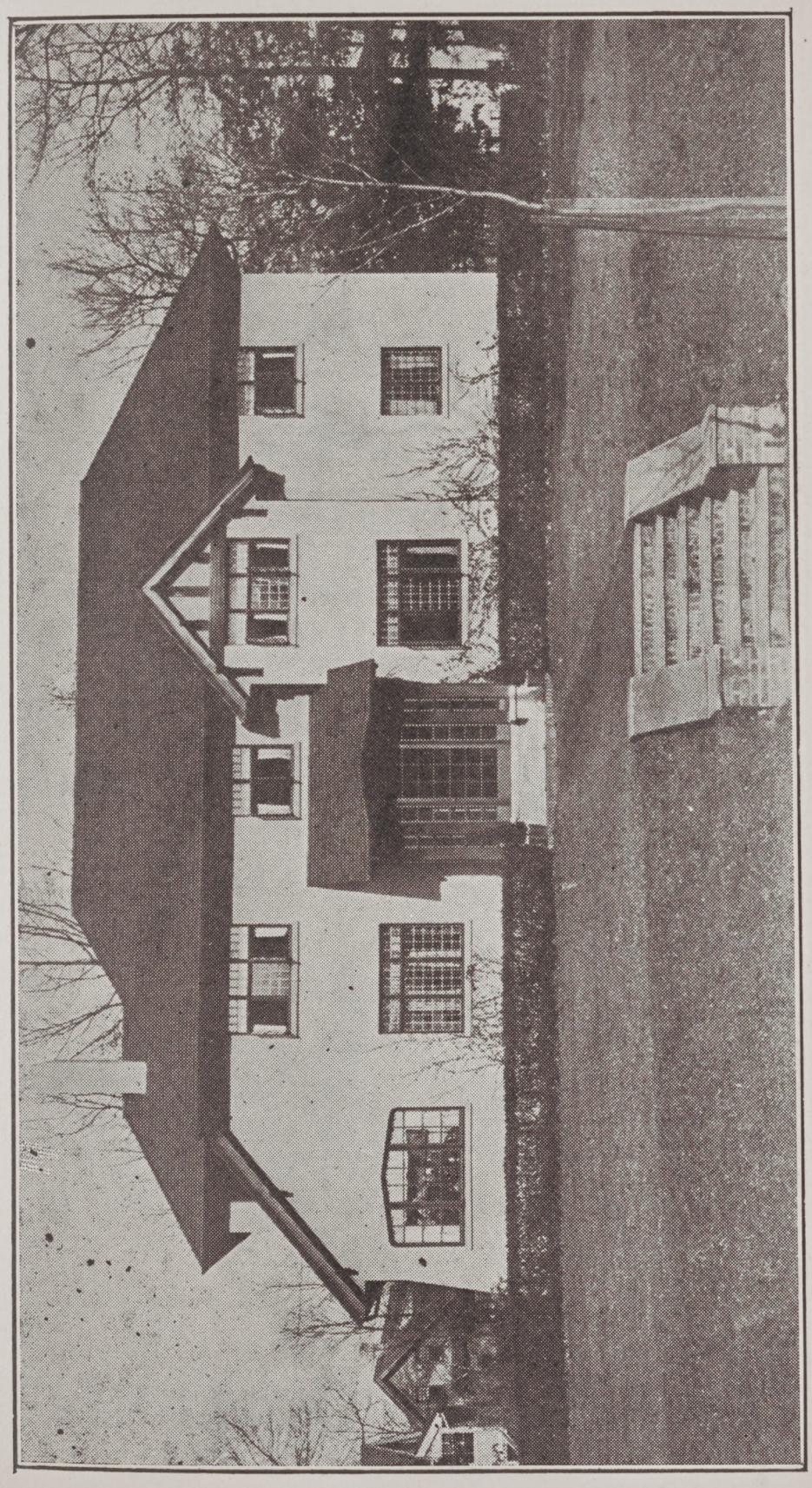

EXHIBIT D1 OF DEFENDANT

(Abridged by Agreement.)

MIRIAM I. HILLMAN and LILLIAN D. TAYLOR, as executrices under the last will and testament of Edward E. Ellis, deceased, to JOSEPH A. MARSH.	Warranty Deed Dated Aug. 27, 1917. Ack. Aug. 27, 1917. Rec. Sept. 19, 1917. Book K50-328. Cons. $13,250.

Conveys premises in Montclair, on which defendant's house is erected, as described in bill of complaint. Contains this restriction:

"Subject also to the restriction that no building shall be erected on said lot unless the front foundation wall of said building is at least seventy-five (75) feet from the front of the above described premises on Sunset Parkway North.

Subject to a mortgage of $6,500 now a lien on said premises.

EXHIBIT D2 FOR DEFENDANT

(Abridged by Agreement.)

CLARA S. ELLIS, Widow, to JOSEPH A. MARSH.	Quitclaim Deed. Ack. Sept. 6, 1917. Dated Sept. 6, 1917. Rec. Sept. 19, 1917. Book K59-331.

Conveys dower right of widow of Edward S. Ellis to defendant in property on which defendant's house is erected and described in bill.

Contains following restriction:

"Subject also to the restriction that no building shall be erected on said lot unless the front foundation wall of said building is at least seventy-five (75) feet from the front of the above described premises on Sunset Parkway North."

EXHIBIT D3 OF DEFENDANT

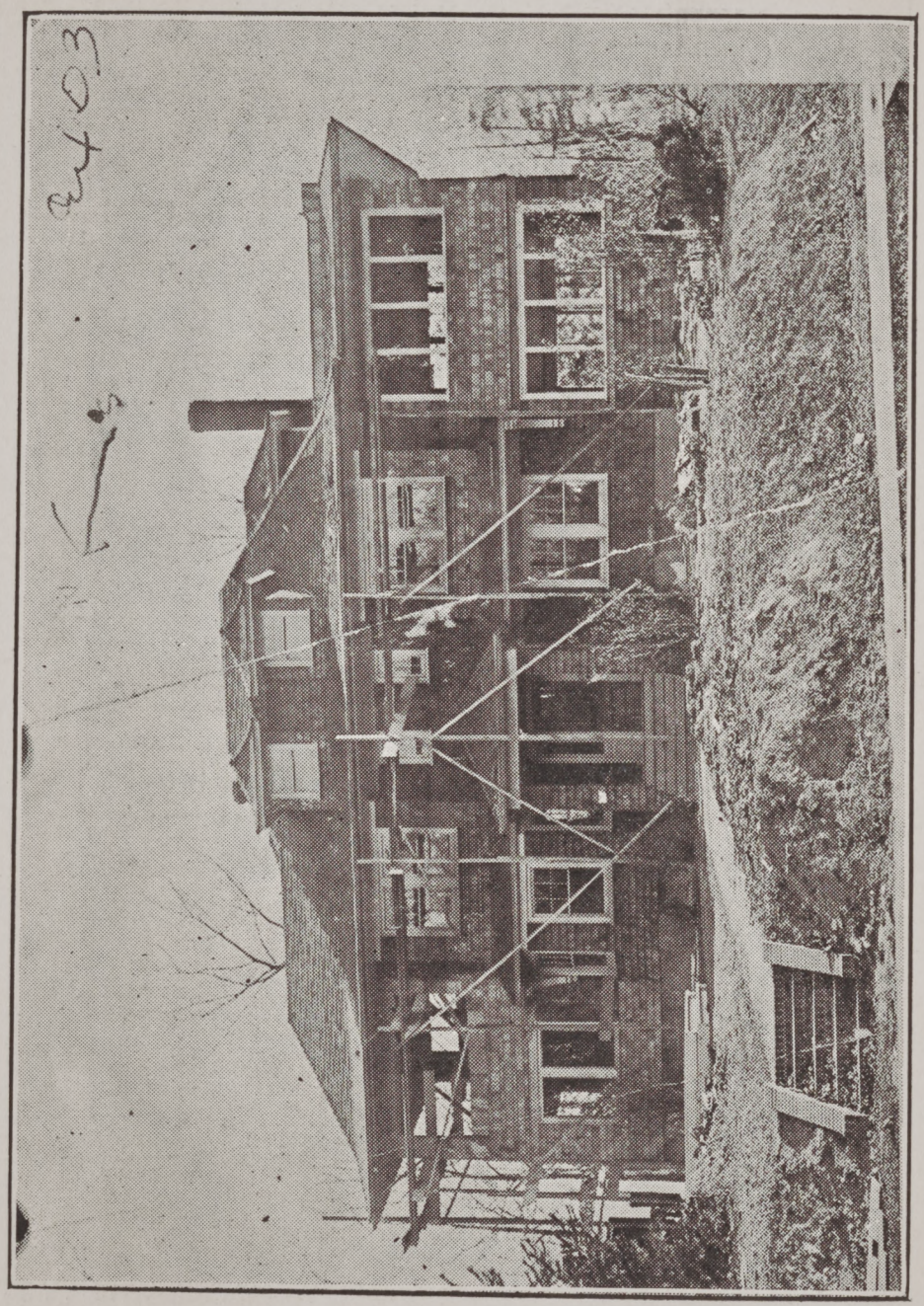

EXHIBIT D5 OF DEFENDANT

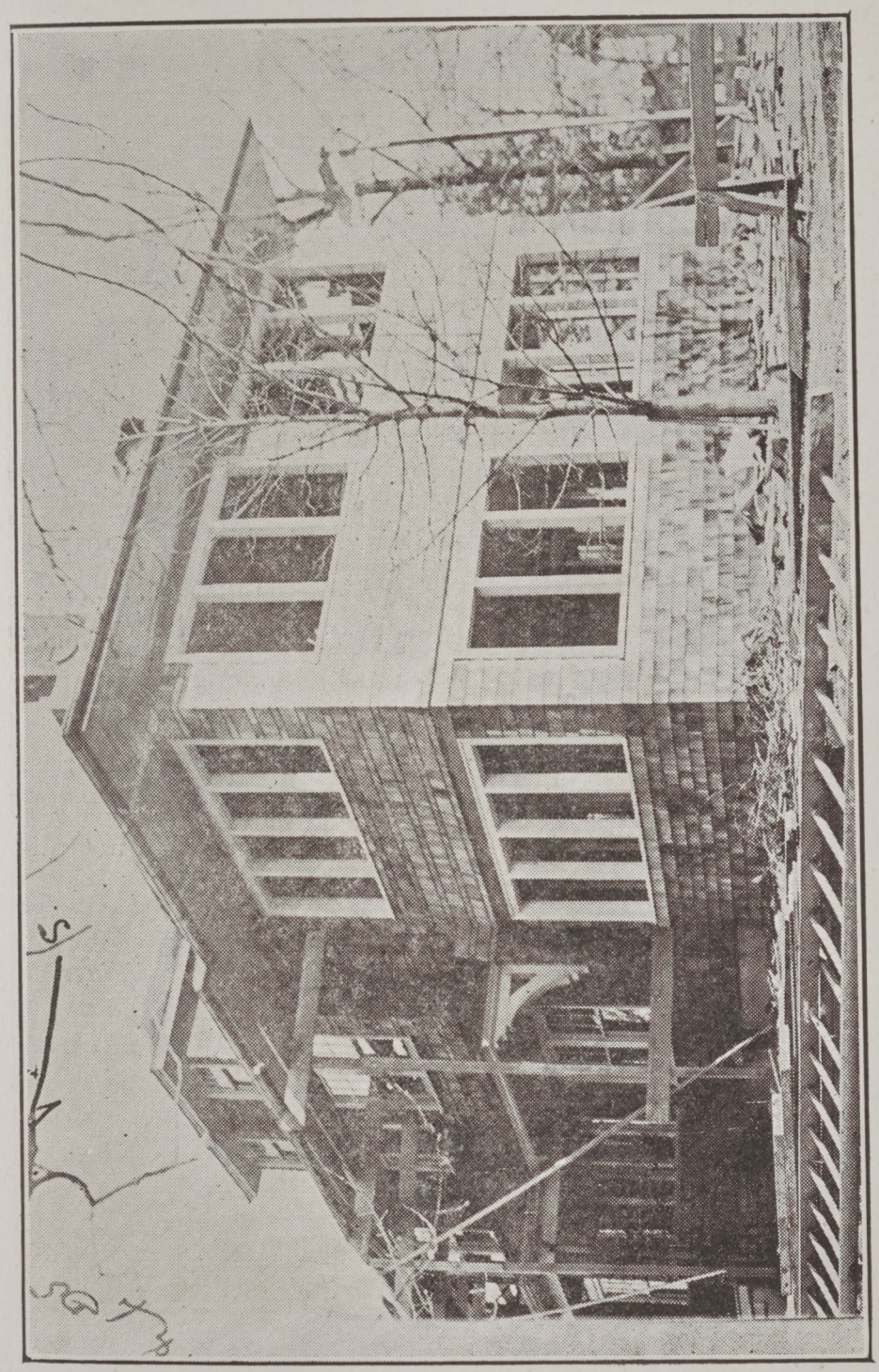

EXHIBIT D7 OF DEFENDANT

No. 312 Ward 1

DEPARTMENT OF BUILDINGS
MUNICIPAL BUILDING

Montclair, N. J., Oct. 15th, 1917.

Block No..... Lot No.....

This permit is granted to Mr. Jos. A. Marsh to make alterations to building located Norwood and Sunset Parkway. Width, 12 ft. 6 in. by 7 ft. 6 in.; depth, 14 ft. 0 in. by 15 ft. 0 in.; height, 30 ft.; number of stories, two; proposed use, dwelling; estimated cost, $7,500.

This permit is subject to all existing Town Ordinances.

WM. H. SENIOR,
Inspector of Buildings.

Fees, $7.00.

New Jersey Court of Errors and Appeals

Between
HELEN E. MARSH,
Complainant-Respondent,
and
JOSEPH A. MARSH,
Defendant-Appellant.

On Appeal From Chancery.

POINTS OF RESPONDENT

This is an appeal from a decree enjoining the appellant from violating a restrictive building covenant and ordering him to take down certain structures found to be in violation thereof. The parties are next door neighbors on a street called Sunset Parkway North, in the Town of Montclair. The appellant's house is on the northeast corner of said street and a street called Norwood Avenue, and the respondent's property adjoins the appellant's property on the east.

The two properties came from a common grantor, one Ralph Stout (see testimony of C. H. Marsh, p. 19, in connection with Exhibit C-1, p. 56 and Exhibit D-1, p. 60). The house on the appellant's place had been built prior to 1911 (Test. p. 18, ll. 30-34). Appellant bought his place in 1917 (Exhibit D-1, p. 60), under the restriction

> "that no building shall be erected on said lot unless the front foundation wall of said building is at least seventy-five (75) feet from the front of the above described premises on Sunset Parkway North."

Respondent bought her place in 1911, under the restriction

> "That no building shall be erected on said lot unless the front foundation wall of said building is at least seventy-five (75) feet from the front of the above described premises on Sunset Park North,"

and also another restriction as to cost. It will be noticed that the restrictions as to location are expressed in identical words in the two deeds.

It is alleged in Paragraph 5 of the complaint (p. 4), that the deed from Stout to Ellis was made in October, 1910, and contained the same restriction, in exactly the same words, and in Paragraphs 3 and 4 on page 3, that the deed to Stout, which covered the premises of both parties to this controversy, not only contained the same restrictions, but that the grantor, who owned the remaining land on Sunset Parkway, covenanted not to convey his remaining land on Sunset Parkway except by deeds containing the same covenant. Both these allegations of the complaint are expressly admitted by the answer.

At the time the appellant bought, the main wall of the house on his property on the Sunset Parkway side was at least seventy-five feet back from the line of that street and there was a porch or piazza, one story high, erected on that side of the house and projecting fourteen feet beyond this main front wall (Test. p. 13, ll. 1-13, Exhibit C-3, p. 58). The wall of the main house, exclusive of

the piazza, on the Norwood Avenue side did not extend within seventy-five feet from Sunset Parkway. Before the appellant bought the respondent had erected a house on her lot, having its front wall seventy-five feet from Sunset Parkway North (Test. p. 12).

After appellant bought he planned various enlargements to his house and filed his plans in the office of the Montclair Building Inspector, as required by the local ordinance. These plans involved, among other things, a large superstructure on the top of the one-story piazza or porch on the side of the house towards Sunset Parkway. The respondent's husband, after inspecting these plans, objected in writing that they would be violative of the covenant, and the appellant thereafter somewhat modified the same (Pars. 9 and 10 of the Complaint, pp. 4 and 5 and Pars. 9 and 10 of the Answer, pp. 10 and 11).

The changes made by the appellant in consequence of this notice are significant. They are stated by the builder, Wikstrom, in his testimony at page 29. He says:

> "I went up to see the attorney and told him what I was going to do. * * * Leave off the third floor and leave off the concrete wall in between the piers of the present porch. And I also went back to the building department and made changes and had them approved by the building inspector."

The significance of leaving off "the concrete wall in between the piers" will appear hereafter. It was manifestly not done to make the addition less prominent or less extensive.

Considerable evidence was introduced bearing on the use to which the appellant proposes to put

this extension, but it is undisputed that the lower floor of this extension was to be used as a sort of outside sitting room and the second story was used for sleeping. They call it a "sleeping porch." (Test. of Wikstrom, p. 28, l. 37). We do not conceive that the use to which this extension was put or was to be put, is at all material, and we will not take the time of the Court in discussing the evidence on that point. We do claim that, by his changes, he has materially altered the appearance even of the lower part and made its walls more like the main walls of the house, and that, by adding the superstructure, he has changed what was a "piazza" into a substantial extension or "ell" to the house. For proof of this we refer to the photographs, which will show the character of the extension as now erected, as well as the piazza which was there before. Photographs which were put in evidence are reproduced on pages 57 and 58 of the book.

Exhibit C-3 on page 58, shows the front porch extension as it was when respondent bought her property, which adjoins the appellant's property on the east and is just visible at the right of the photograph (see Test., p. 17 at the bottom and p. 18 at the top). In this picture we are looking at the appellant's house from the west and are, consequently, facing the east.

Exhibit C-2 on page 57, shows the extension as it was at the time of the hearing (Test., p. 14). In this picture we are looking at appellant's house from the east. Upon this state of facts the Court below decided that the appellant's operations were violative of the restrictions, and that the respondent, having made prompt objection and applied as soon as possible for a preliminary injunction which was denied, with the warning that the

appellant would proceed at his peril, was entitled to relief and the appellant was enjoined from constructing any "addition to or superstructure upon the piazza" existing October 8th, 1917, and was commanded to remove any such structure built since said date and which violated the terms of the injunction.

Law

The appellant makes the following points:

(1) That the restriction has no application to a house "fronting on Norwood Avenue";

(2) That there is doubt and ambiguity in the language of the covenant, and that strictly construed, appellant has not violated it;

(3) Acquiescence and laches;

(4) That respondent is in no position to complain because the covenant had been violated before she bought, and if there was a "general scheme" it included only four lots and was disregarded on the first house built; and

(5) The relief granted was beyond the prayer of the bill, which did not ask for a mandatory injunction.

We will endeavor to meet the points in the order in which they appear.

FIRST

The restriction applies with equal force to a house fronting on Norwood Avenue or to a house fronting Sunset Parkway.

The case relied on by appellant's counsel (*Howland vs. Andrus,* 81 N. J. Eq., 175), is not applicable. There is no attempt here to make the "side" of the house do duty as a "front" in order to make the covenant apply to a street which was not named or indicated. The evidence in that case showed that all parties knew when the covenant was made that the house would front Park Street and the covenant was naturally understood to apply to Park Street. Here the street to which it applies *is* named, and that makes all the difference.

When Crane's executors made their covenant, before appellant's house was built, they did not name the street. They evidently assumed that the house would front Sunset Parkway, as the lots were so arranged. And they conveyed to Stout two one-hundred-foot lots. Stout built the house with its entrance on the avenue, probably so as to use his land more economically by getting another house on the Avenue. But *he* knew what the covenant meant and when he conveyed to Ellis, *with the house facing as it is now*, he named the street, as honesty and good faith required, and Ellis' executors did the same when they conveyed to appellant. If Andrus, in the case cited, had agreed that the "front" of his house should be sixty feet from Wildwood Avenue, he could not plead any uncertainty in meaning, much less could he have escaped keeping his contract by "fronting" his house some other way than towards Wild-

wood Avenue. He would have been obliged to build so that *no part* of its front line would have been within the prescribed area; and even if, to dodge the covenant, he had put his front door on the side away from Wildwood Avenue, so as to "front" neither on Park Street nor Wildwood Avenue, it is not thinkable that the Court would have let such a trick succeed.

The question here is not, which way does the house "front," but, was a "building" put up which does not have the "front foundation wall of said building" *and all of it,* at least seventy-five feet from Sunset Parkway North.

SECOND

The covenant in question is not doubtful in its meaning and it requires, by necessary implication, that no part of the front line of the house shall be within seventy-five feet of Sunset Parkway North.

And by the "front line of the house" we mean what everybody means by that collocation of words, not the line of a light balcony, or the line of the eaves, if they project, but the line of the *house,* for that is the "building" which the parties clearly had in mind.

Here is no question of the construction of the covenant. The only question as we contend, is: Where is their front line located, as the appellant has now constructed the building. The appellant's counsel seeks to avoid the covenant altogether by dwelling on the words "front foundation wall" and overlooking their context. It says, "No building shall be erected" unless the "front foundation wall *of said building*" is so and so. "But," he

seems to argue, "you can put your *building* where you like, so long as there is no 'foundation wall' nearer the street than seventy-five feet."

Acting in this sense, the appellant, after respondent's objections were brought to his attention, changed his plans, and among other things, decided "to leave off the concrete wall between the piers of the present porch" (Test. of Wikstrom, above cited). He evidently feared that the concrete between the piers would make it a "wall," whereas piers, as a foundation, no matter how large or how numerous, would not be a "wall," though they might be a "foundation," and so, by leaving out the filling, he would be able to break the covenant, in its clear and well understood meaning, and yet escape the consequences. He puts the whole essence of the covenant into the word "wall." The question here is whether this is an honest argument, *i. e.*, one that the clear force of the words would suggest to a candid and unprejudiced mind; for any "doubt," to be available for defense, must be an honest one—not one that might be raised by the subtlety of an astute mind, looking for an avenue of escape from its bargain.

We admit, of course, that restrictions must not be of doubtful meaning, and that they will not be enforced beyond their clear import. The appellant must, in each case, know from the language of the covenant what he can do and what he cannot. That is but reasonable. But the question here is different. It is this: When the defendant *does* know from the language what he can do and what he cannot, will he be allowed to escape from this meaning and annul his covenant by applying a technical definition to a word used in its ordinary sense? However, appellant's counsel omits,

in this argument, the force of the words "of said building." Appellant agreed *not* to erect,

> "any building on said lot *unless* the front foundation wall *of said building* is at least seventy-five feet from the front of the above described premises on Sunset Parkway North."

If any building is erected, therefore, it is not the absence of a "wall" within seventy-five feet, but the presence of a wall, and the whole of it, back of that limit, which is required. Every "building" erected on the lot, therefore, *must have* a front foundation wall, because "no building shall be erected" unless its "wall" is located as required. This is not straining the meaning of the language, but giving it its natural construction. It is quite immaterial where the wall is located if the *building* is not attached to it; and a building on piers will damage the neighborhood, if it encroaches over the building line, as much as would a building on a "wall" which encroached. If the appellant chooses to put up a building on "piers" the respondent is not damaged, provided the building is back of the line—though there be a technical violation; but if he puts up a "building" in front of the line on "piers," we have the right to say:

> "The covenant plainly implies that you should build a wall; but if you choose to use piers, we do not care, provided you locate your 'piers' where the covenant requires you to locate the 'wall.' "

Thus, the technical definition of "wall" is not involved.

Respondent may use anything he likes in the place of a wall, provided that that something else

is recognized to be in the place of, and to be governed by, the restriction which applies to a "wall." The evident purpose for which the covenant was made was to prevent a "building" within the building line. And the framer of the language of the covenant, by the above language, first tied the building to be erected and its foundation wall together, and then located the foundation wall. The force and meaning of his language are unmistakable, and the appellant could not help understanding it.

We rest confidently upon the purport of the rule established by this Court in similar cases. We concede at once that such covenants are construed in favor of the freedom of the owner of the property; but that does not mean that the Court will aid the owner to avoid a contract, which is unmistakable in its language and purpose, by a device which is more subtle than honest. The question has always been whether the *meaning* and *purpose* were clear and unmistakable.

Thus, in *Fortesque vs. Carroll* (6 Buch., 385), the question was whether one two-family house was more than one "building." That was the only question, and this Court simply said that it was not, or at least, not obviously and unmistakably so.

So in *Atlantic City vs. Young Amusement Company,* 53 N. J. Eq., 831, an attempt was made to apply a covenant *expressly* confined to a pier which the defendant should build in the future, to one already built when the covenant was made. This Court held that the language could not be extended by some supposed purpose not expressed.

And in *Walker vs. Renner,* 60 N. J. Eq., 493, the covenant was printed in the blank deed, which blank was intended to be used whether one lot or

more than one was to be conveyed. The printed matter, however, contained the word "is" in the sentence, "the lot hereby conveyed 'is' not to be subdivided," etc. The deed in question was for two lots, and the letter "s" was inserted after "lot," but the word "is" was left unchanged. This Court considered these circumstances, and construed the covenant according to its evident purpose, namely, to prevent the subdivision for building purposes of the single lots, and resolved the doubt accordingly.

Atlantic City vs. New Auditorium Pier Company, 1 Rob., 610, was simply a decision that the *defendant* had had no notice, constructive or otherwise, of the restriction, when he bought his land.

In the light of all the cases, the general rule is easily discernible. The language must be such as clearly indicates what may not be done, and if it does not clearly mean something, it cannot be enforced at all. And if its meaning is ambiguous, that construction shall be taken which most favors the freedom of use.

There is no question raised here as to the meaning. The appellant says the building he has erected *has no foundation wall*—hence he can locate it where he pleases, although he personally agreed, when he bought, that he would not erect a building, *unless the foundation wall of that very building* should be located in a certain place. He thus seeks to reduce his agreement to a nullity by taking advantage of a technical definition of one of the terms used, and utterly ignoring the plain and necessary implications of the language.

THIRD

The willingness of the respondent to accept the situation as she found it when she bought does not stop her from objecting to a subsequent violation, or aggravation of a prior violation, which increases the injury.

Appellant's counsel does not seem to charge any laches. He says:

> "It is not contended that there was any delay in applying for relief when this work was commenced on the upper porch."

He relies wholly on what he calls "acquiescence." We do not admit that the covenant was violated when respondent bought. Being only a piazza it seems not to have been a violation of its spirit. We do contend that it is immaterial whether the porch that existed when these parties bought their respective properties, was a "building" within the meaning of the covenant or not. We do not think respondent could or ought to ask that the structure which was there when she bought should be removed. She is not asking it. If she were, then she would be within the two cases: *Trout vs. Lucas* (54 N. J. Eq., 361), and *Smith vs. Spencer* (81 N. J. Eq., 389), cited by appellant's counsel. But as she is trying to restrain a substantial alteration and enlargement of the original structure, she is not within these cases, and counsel cites no others.

But, upon principle, why should an acquiescence in the existence of a one-story piazza, for which she was in no way responsible, prevent her from objecting to the erec-

tion of an addition to the building over the piazza? Even if the covenant was broken by the original structure, *appellant covenanted anew* when he bought, that *he* would not further break it. Counsel, in arguing this point, returns to the "foundation wall' argument. But it seems immaterial whether he has altered a foundation already existing or not, so long as he has clearly and manifestly erected a "building" on the restricted land. If, as we have tried to show, he has agreed on his own account, that he would not erect any building on the lots unless "the foundation wall of *such building* is at least," etc., then we say that he has violated that agreement. If there is no "foundation wall" then certainly it is not located as the covenant says; and if there is a "foundation wall," then whether we consider the one on the south side or the west side of the "building," it is not seventy-five feet back from Sunset Parkway.

And the respondent comes with clean hands and with all possible speed and asks the Court to protect her.

FOURTH

The standing of respondent as complainant is not impaired by any violation of the covenant which originated before she bought and which she could do nothing to prevent.

The history of the transactions, briefly recapitulated, is this: Stout bought two lots (Appellant's and Respondent's), from Crane's executors, who made a restrictive covenant and agreed to extend it to all the remaining lots. He then built appel-

lant's house and sold it with the lot to Ellis, keeping respondent's lot, and making with Ellis a new covenant, which included the one *he* had made with Crane's executors and added to it by naming Sunset Parkway. He then sold respondent's lot to her, the same being already protected by his covenant with Ellis, and in the deed to her he repeated their covenant, and, to protect Ellis, added a new one as to the cost of the house on respondent's lot. Now, counsel says respondent has no right to enforce this covenant which Stout made with Ellis and which Ellis made with appellant, for the benefit of his remaining lot (now respondent's), because Stout had violated *this* covenant before he made it. But how could he violate it before he made it? Even if the "general scheme" had been broken into by Stout's operation (which may or may not be the case), still the "general scheme" for a uniform building line still remained, and if it was a little marred, respondent was not to blame for it. She took it for what it was, and valued it. But, suppose the "general scheme," as such, had failed, she still had the new covenant, which forbade *further* impairments of her view and of the line, and it is these future impairments which she is endeavoring to prevent.

If appellant prevails in this suit, not only the "general scheme," but all her rights under the covenant will have disappeared; for, if counsel is right, his client could build a twenty-story flat up to the very line of Sunset Parkway by the simple device of fronting it on Norwood Avenue, or by leaving narrow openings in his foundation walls at short intervals and calling what was left a series of "piers."

FIFTH

If the bill should have been amended at the hearing by inserting a prayer for a mandatory injunction, the objection should have been made then, and the amendment would have been allowed. If it is not too late to make the objection, it is likewise not too late to make the amendment.

SIXTH

The decree should be affirmed with costs.

EDWIN B. &. PHILIP GOODELL,
Of Counsel with Respondent.

THE ARTHUR H. CRIST CO., Cooperstown, N. Y.
New York Office, 220 Broadway

New Jersey Court of Errors and Appeals.

BETWEEN HELEN E. MARSH, *Complainant-Respondent,* AND JOSEPH A. MARSH, *Defendant-Appellant.*	On Appeal From Chancery.

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

This action is brought to enjoin an alleged violation of building restrictions.

Appellant, Joseph A. Marsh, on August 27, 1917, purchased from the Executors and Trustees of Edward S. Ellis, a plot of land at the Northeast corner of Norwood Avenue and Sunset Park North, Montclair. The deed to appellant contained this covenant: "That no building shall be erected on said lot, unless the front foundation wall of said building is at least 75 feet from the front of the above premises on Sunset Park North." The facts, about which there is little, if any dispute, show: That one Ralph Stout had purchased from the Executors of Erwin J. Crane, a plot of land described in paragraph two of the complaint, subject to restrictions somewhat similar to the above; that Ralph Stout sold one lot to the predecessors in title of the appellant, and later sold respondent her lot; that prior to October 1, 1910, and prior to his conveyance to Ellis, Ralph Stout had erected on the lot now owned by appellant a substantial house (Exhibit C-3)' *facing Norwood Avenue.* There was a lawn and good-sized terrace on the Sunset Park North side, and no approaches to the house from that side. And the whole design was such as could leave no doubt in anyone's mind that it faced Norwood Avenue only.

The foundation wall on the South side, that is the side

toward Sunset Park North, was 75 feet 6 inches from that street, but extending out beyond the foundation about 14 feet there was built a porch 14 feet wide and 20 feet long, supported by three small cement piers, one at each outer corner, and one in the centre. This entire porch was shingled right down to the ground, thus concealing the nature of its support. (See Exhibit C-3, a photograph taken in the summertime.)

This porch was built and used as a living porch with removable screens in summer, as shown in the photograph. In winter it was entirely enclosed by replacing the screens by sashes and glass, the same as it is at the present time.

(Case p. 25, li. 30 to 40).

The floor was of hard wood, and was varnished like the floor of the living room, but was somewhat lower. It was reached only by a door leading from the living room. (Case p. 25, li. 20). It was provided with a radiator connected with the regular heating system and was heated and used in winter. (Case p. 37, li. 1 to 15—p. 26, li. 13 to 14). It had electric lights connected with the regular wiring system. (Case p. 25, li. 26). There were rugs on the floor. Plants were kept there, and in other respects it was furnished as a living room.

This was the situation on October 1, 1910, of the house now owned by the appellant. Respondent did not buy her property until February 7, 1911. She then bought the lot next, East to the one owned by the appellant; and about a year later commenced the building of her house and still another year elapsed before the house was actually ready for occupancy. (Case p. 18, li. 35 to 40).

Ellis lived six or seven years in the house in question, using the porch in the manner above indicated. He died and his executors sold to the appellant. Exhibit D-1 and D-2.

Some time in October, 1917, defendant commenced and has completed certain work now complained of. The only change made is to put over this living porch a sleeping porch co-extensive therewith, and of similar design with

open spaces for screens in summer, and removable sashes in winter. (Exhibit D-3). This upper porch is covered with a flat tin roof which has no connection with the main roof of the house. (Case p. 27, li. 13 to 21).

It is to be carefully noted that the lower porch is to remain, both inside and out, and in its use, just what it has been for the last six or seven years. No change has at any time been made to the foundation or the support of this porch, and none is contemplated. (Case p. 26, li. 33 to 35).

At respondent's request this statement is added:

That respondent obtained in the Court of Chancery a rule to show cause why a preliminary injunction should not issue.

On the return day of the rule to show cause, taken in the above matter, complainant asked for a preliminary injunction. This was refused by the Vice Chancellor in an order in which the following language occurs:

"It is on this twenty-seventh day of November, nineteen hundred and seventeen, ordered that the motion on behalf of said complainant for the temporary injunction be and the same is hereby denied, but with the understanding that it defendant proceeds with said addition, he does so at his peril."

LAW.

FIRST: THE RESTRICTION IN QUESTION DOES NOT APPLY, AS APPELLANT'S HOUSE FRONTED NORWOOD AVENUE; NO PART OF THE BUILDING CAN BE SAID TO FRONT ON SUNSET PARK NORTH.

Howland vs. Andrus, 81 N. J. Eq., page 175.

Thompson vs. Diller, 146 N. Y. Sup., page 438, (1914).

Berry, on Restrictions (1915 Edition), Secs. 234, 235.

In the deed from Crane's Executors to Stout, (Case p. 3, li. 25 to 35), a large plot was conveyed of which appellant's and respondent's lots are a part. It contained

the following restrictions: "That no building shall be erected on said lot unless the front foundation wall of the said building is at least 75 feet from the front of the above described tract and the party of the first part do for themselves, their heirs, executors, administrator, successors and assigns, covenant and agree, that they will sell no other lots facing on Sunset Park North, except subject to the same restrictions."

So far as the language was concerned this large plot might either face Norwood Avenue or Sunset Park North. At any rate, Stout built the house now in question, (Exhibit C-3) and faced it toward Norwood Avenue. It was completed in the spring of 1910. (Case p. 24, li. 16 to 18). He sold the house completed to Ellis on October 1, 1910.

When respondent purchased her lot in 1911, she knew that the corner lot fronted on Norwood Avenue, and not Sunset Park North. There could be no guess work. The structure was there and what was front, and what was side, had been passed upon by the common grantor, Stout. To hold now, for the purpose of this covenant, that the part facing Sunset Park North can in any sense be the front foundation wall, would do violence to the plain meaning of common English words, as was said in the Andrus case above cited.

In the Andrus case, Wildwood Avenue would correspond to Sunset Park North, and Norwood Avenue to Park Street. Andrus had built his house "fronting" Park Street and only 40 feet South of the line of Wildwood Avenue; whereas, it was contended that the building line was 60 feet South of Wildwood Avenue.

Vice Chancellor Emery at the trial in Chancery attempted to get around this by saying, "That for the purpose of the covenant, the line of the dwelling 'fronting' toward the street from which the measurements are to be taken is to be considered as the 'front' line intended by the covenant, although this line might in fact be the side line of the dwelling.

The Court of Errors unanimously reversing the Vice Chancellor, says:

"In this quotation it will be observed that the words 'front' and 'front line' are used in two distinct senses. When he speaks of a house which fronts toward Park Street, he uses the word in its correct and only sense. When he speaks of the *side* line of the house as *fronting* towards Wildwood Avenue, he uses the word in a sense which, we believe, cannot be justified. Every man knows in an instant what is meant by the 'front line' of a house. It is not the 'side line'; and in order to make this covenant mean what the Court of Chancery says it means, the language must be radically changed. Cent. Dict., tit. "Front"; Stand. Dict., tit. "Front."

The word "side" may be used in a generic sense so as to include the "front," but it also has a specific meaning, which distinguishes it from "front." The word "front" as applied to a house is always specific.

In the present case this becomes important as the framers of the covenant have used the word "front" foundation wall, all of which, no matter what angle it is viewed from, is more than 75 feet from the street.

SECOND:

EVERY DOUBT AND AMBIGUITY IN THE LANGUAGE OF A COVENANT RESTRICTING THE OWNERS USE OF HIS PROPERTY MUST BE RESOLVED IN FAVOR OF THE OWNERS RIGHT.

6. Amer. & Eng. Enc. of Law, p. 513.

This to a certain extent supplements and applies to point one, but there is a further peculiarity. The building prohibited is one whose *front foundation wall* invades the restricted area. Where is the foundation in the present case that violated the restriction? It cannot be that the three little cement piers under the porch (Case p. 26, li. 17 to 30) come within that language; for those were built by Stout six or seven years ago, and although they extend 14 feet into the restricted area, it is conceded by respondent in paragraph six of her bill of complaint (Case p. 4, li. 20) that the structure complied with the restrictions. No changes have been made. Can it be said

that what has for years been regarded by all parties, as piers supporting a porch, now becomes a front *foundation wall,* because the sleeping porch is superimposed on the old porch? The learned Vice Chancellor in his conclusion remarks that assuming the front foundation wall is that part fronting Norwood Avenue, the restriction is broken if any part of it comes nearer than 75 feet to Sunset Park North. The evidence, however, is that it does not. Its nearest point is 75 feet 6 inches away from Sunset Park North. (Case p. 25, li. 4).

The right of the owner of property to full liberty in his use of it, so long as it does not interfere with the equal rights of others in the use and enjoyment of their property is protected to the full extent, and every alleged contract or agreement to restrict that right must be construed strictly in favor of the one who is seeking to make lawful use of his own.

Howland vs. Andrus, 81 N. J. Eq., p. 175.

Atlantic City vs. New Auditorium Pier Company, 1 Rob., 610.

Atlantic City vs. Young Amusement Company, 63 N. J. Eq., p. 831.

Fortesque vs. Carroll, 76 N. J. Eq., p. 583.

In each of these four cases the Court of Chancery had decreed an injunction restraining an owner against certain specific use of his property, and in each of the cases this Court reversed the decree of the Court below. In each of these cases the Court of Chancery, as in the present case, attempted to interpret the restriction according to the apparent intent rather than according to the strict language used.

In Atlantic City vs. Young Amusement Company, there was an agreement in a conveyance of a strip of 60 feet of land of defendants to complainants, that defendants should not be prohibited from building a pier in front of their property and connecting the same to the new walk about to be erected by the complainant on said strip of land, and upon the further condition that said pier should be at least 1000 feet in length, and constructed in a cer-

tain manner, and that the defendants *should not permit the sale of any commodity upon the same,* and should be confined to charging only an entrance fee.

At the time this agreement was made, the defendants had erected a pier of wood upon their lands. Complainants sought to restrain defendants from the selling of commodities on the pier, already built, holding that the spirit and reason of the agreement justified it. This Court however, reversed the Court of Chancery.

In Fortesque vs. Carroll, 76 N. J. Eq., p. 583. This was a case in which the Court of Chancery had enjoined the defendant from constructing a house designed for two families on his lot. The words of the covenant were, "Not more than one building shall be erected on a single lot as embodied on the plan."

The structure which the defendant was erecting, although a single building, in that it was all enclosed within the same exterior walls and under one roof, nevertheless, was held to be two buildings, within the meaning of the covenant, because it was designed to afford a residence for two separate families.

Reasoning upon the apparent purpose and intent of the restriction, and considering that the property was residence property, this decision was not unnatural *if the Court were free* to indulge in such reasoning, and to interpret the restriction according to the apparent intent rather than according to the strict language used. This Court, by a majority of ten to five, reversed the Court of Chancery and declared, by the opinion of Mr. Justice Garrison, who spoke for the court, as follows:

"By the failure to observe this distinction between construction and use, the court below was misled into a finding of fact by which a structure that, on one day was either one building or two, would the next day become two buildings, to become one building again on the third day, according as its adjustment to particular modes of occupancy might be varied; whereas had the criterion applied been that suggested by the words of the covenant itself, viz., one of construction, the erection, if one building as a matter of construction, would have remained so,

regardless of its intended occupancy, until some change of construction was made that resulted in the erection of two buildings where previously but one had been constructed. *If the view thus expressed does no more than render it doubtful whether the appellant had violated the restriction in his deed the result would be a reversal of the decree of the Court below. For it is well settled that in cases where the right of complainant to relief by the enforcement of a restricted covenant is doubtful, 'to doubt is to deny.'"*

Justice Garrison then proceeds to give two reasons for the rule. One is because restrictions for the lawful use of property are against common right. The other is because restrictions in the framing of which *a subsequent purchaser has had no voice* ought to be so clear that by the acceptance of the deed that declares them he may resonably be deemed to have understood and acceded to them; and he states the resulting principle as follows (p. 586):

"Courts of Equity do not aid one man to restrict another in the uses to which he may put his land unless his right to such aid is clear."

The case of Newberry vs. Barkalow, 75 N. J. Eq., p. 128, is another case showing how the restriction must be gathered only from the language used, and not from the spirit or intent. In this case the question was as to the proper construction of a resolution of a corporation, which restriction the buyer of lots from it to a uniform building line "on the main avenues." The corporation had laid out its grounds into streets and lots, and had made a map of the same, upon which the streets running in one direction were marked "streets" and the streets running at right angles to these were made 20 feet wider and were called "avenues." It was attempted to show that by the resolution was meant to include also the thoroughfares marked "streets," as well as those marked "avenues."

We suppose there can be no doubt that the word "avenue" may be used in a general sense so as to include any public thoroughfare. Indeed, one definition of

the word "avenue" in the Century Dictionary is "a street." Nevretheless, because the public map of the property had made a distinction between streets and avenues, it was not sufficiently clear that the word "avenue" had been used in a general sense to justify the court in restricting the erection of a house upon one of the streets within the building line.

There is one other case in this court in which a restrictive agreement has been construed and the same principle maintained. We refer to Walker vs. Renner, 15 Dick., 493.

In this case, owners of a tract of land in Hudson County, desiring to establish an attractive neighborhood for residences, caused a map of the property to be made, which was filed in the register's office. Upon this map a tract of land was laid out in streets with lots designated thereon. Among the lots so designated were more than 100 lots marked as 25 feet in width, front and rear, and 105 feet in depth. With a view to sales, complainant had a deed prepared and printed in blank, which contained certain restrictions, among which is the following:

And the party of the second part doth hereby further covenant and agree to and with the parties of the first part, their heirs and assigns, for and in behalf of himself, his heirs and assigns, that the lot (with a blank left for the letter S) hereby to be conveyed is not to be subdivided, and that no more than one residence is to be erected upon the same.

Complainant thereupon proceeded to convey by one of these deeds two lots described by the map numbers, without any further description. The deed contained the letter S inserted after the word lot. The restrictive covenant in this deed, therefore, read, "The lots hereby conveyed is not to be sub-divided, and that no more than one residence is to be erected upon the same." And the grantee in that deed thereupon conveyed to the defendant, who proceeded to erect a house on each of the lots described in his deed. Vice Chancellor Pitney, to whom the case was referred, advised an injunction, relying upon the language of the deed. And, in his opinion he very

justly says, that if the property had been described in one lot fifty feet in width, and it then provided that it should not be sub-divided, and that only one residence should be erected on the same there would have been no difficulty; and since that was the purport and effect of the deed he adopted that construction. This Court, with one dissenting voice, reversed the Court of Chancery and again by the official headnote declared the principle that "all restrictions upon the use of land conveyed in fee which restrain the grantee from exercising the rights of an owner are strictly construed.

THIRD:

THE COMPLAINANT IS ESTOPPED BY HER ACQUIESCENCE AND LACHES.

Trout vs. Lucas, 54 N. J. Eq., p. 361.
Smith vs. Spencer, 81 N. J. Eq., p. 389.

It is not contended that there was delay in applying for relief when this work was commenced on the upper porch. What is meant is this: If the restriction is violated, either a structure has been built, the front foundation wall of which comes within the 75 feet of the street, or else the supports to the porch and the covering of shingles which is over them must have all along been regarded as the front foundation. The evidence shows that no change whatsoever has been made to the foundation or to the piers supporting the porch, or the covering of shingles over it, for the last seven years. The structure was there complete when respondent bought her lot, and no objection has ever been raised to it by her or any other person. It is respectfully submitted, therefore, that this having been acquiesced in by the respondent as a structure within the meaning of the covenant, i. e., a structure with its front foundation wall 75 feet from the street, she is now estopped from saying that these piers are really a front foundation wall, because a sleeping porch has been put on the top of the old structure. If the restriction was ever broken, it was broken when the house was originally built.

FOURTH:

RESPONDENT IS IN NO POSITITION TO COMPLAIN. IF THERE EVER WAS A GENERAL SCHEME, IT COULD ONLY INCLUDE FOUR LOTS, AND WAS DISREGARDED ON THE VERY FIRST HOUSE BUILT.

See Peek vs. Matthews, L. R. 3 Eq., p. 515.
Ocean City vs. Headly, 62 Eq., p. 322.

As shown above the Executors of Crane sold to Stout, a tract which included both the appellant's and respondent's land, and with slightly different restrictions. (Case p. 3, li. 10 to 30 of complaint). If the alleged scheme of development meant anything at all, the idea was to have a line of houses fronting on Sunset Park North, setting back a uniform distance therefrom, with the front foundation wall 75 feet away from the street. What happened? The very first house built fronted Norwood Avenue and instead of keeping 75 feet back from the Sunset Park North side, a solid structure or porch was built wholly within the restricted area. Exhibit C-3 is a photograph taken in summer and does not show its solid and substantial character as clearly as when the windows and window frames are in. At any rate, this substantial porch 14 feet by 20 feet forming to all intents and purposes an intregal part of the house, and heated, decorated and used as a living room was erected.

If then, the design or scheme was to have three or four houses facing Sunset Park North, it was at once broken when this structure was erected. If, as respondent's counsel contends, the scheme was clearly for the purpose of maintaining a uniform building line, such building line was very effectually invaded by this solid and substantial structure. Certainly respondent could not have placed much reliance on any general scheme, when this condition existed when she bought, and when this house was the only house there.

FIFTH:

THE RELIEF GRANTED BY THE DECREE IS BEYOND THE PRAYER OF THE BILL. THE BILL SEEKS AN INJUNCTION TO PREVENT THE ERECION OF A CERTAIN STRUCTURE. THE DECREE IS FOR A MANDATORY INJUNCTION TO TEAR DOWN A STRUCTURE ALREADY BUILT.

SIXTH:

THE DECREE OF THE COURT OF CHANCERY SHOULD BE REVERSED.

CHARLES JONES,

Of Counsel for Appellant.