

New Jersey Court of Errors and Appeals.¹⁰

BETWEEN FRANK P. HAGERTY,
Appellant,

and

JOHN LEE,
Respondent.

On appeal from an
order dissolving
the injunction.

BRIEF OF I. W. SCHULTZ.

OF COUNSEL WITH APPELLANT.²⁰

The facts presented by the bill and affidavits of complainant are proper and sufficient to ask the aid of the Court of Chancery for the relief prayed for.

Complainant claims his right to protection under an easement by reservations in a deed by him to Christopher S. Winters, the grantor of defendant. (Page 3, lines 11-34.)

Which reservations, in substance, are incorporated in the deed from Winters to defendant. (Page 11, lines 23-34; page 12, lines 1-7.)

30

That Winters went into possession of the land sold to him by complainant, built upon the lot and observed the complainant's easement. Afterwards complainant built upon his lot, next adjacent, a building, with windows for light in the side of the building, overlooking the Winters lot. (Page 3, lines 37-40; page 4, lines 1-47.)

That on June 2, 1886, Winters sold the land sold to him by complainant to John Lee, the defendant, the deed containing substantially the same reservations

contained in the deed from complainant to Winters, and that he entered into possession. (Page 4, lines 38-40; page 5, lines 1-12.)

That on the 10th day of January, 1888, defendant completely obstructed the light and air from two important windows and impaired the light and air of two other windows. (Page 5, lines 25-35.)

Charges that Lee ought to be compelled to remove so much of his said building erected as interferes with 10 complainant's windows, excluding the air and light therefrom, and that he ought to be restrained from continuing said erection and from making any further erections or obstructions to windows of complainant, excluding light and air. (Page 6, lines 18-25.)

Prayer for process and injunction. (Page 7, lines 1-20.)

That said obstruction is a great injury to complainant's premises as to its value, and a great injury to the health of complainant and his family. (Page 7, lines 20-23-40; page 8, lines 8-9.)

Easements may be created by reservation.

Cowdrey vs. Colburn, 7 Allen, p. 13.

Winters and Lee cannot deny the binding force of the reservation in the deed to Winters from complainant, because the principle adopted in this State is that a grantee and those claiming under him cannot deny the binding force of a reservation in the deed under which his title was acquired.

Sheppard vs. Hunt, 3 Green Ch., 293-294.

30 Earle vs. Mayor, etc., New Brunswick, 9 Vroom, 51-52.

Rosankrans vs. Snover, 4 C. E. Green, 420.

Cooper vs. Louanstein, 10 Stewart, 304-307.

Washburn on Easements, etc., 4th Ed., p. 657.

Reservations or exceptions of this kind operate as a grant of a newly-created easement by the grantee of the land to the grantor.

Goddard's Law of Easements, page 108 (Bennett Edition.)

The defendant admits, by his answer, of the convey-

ance from complainant to Winters and of the reservations set forth in said deed as recited in the bill. (Page 13, lines 15-30.)

Also admits of the conveyance of the same premises by deed from Winters to defendant, and of the statements as to reservations as recited in amended bill. (Page 15, lines 1-11.)

Also admits that Winters entered into possession thereof, and that he erected a frame dwelling house twenty-four feet deep from Main street, on one-half of 10 the foundation referred to. (Page 15, lines 20-30.)

Also admits that defendant took possession of same premises as set forth in the bill, and did begin the erection of an addition to his building, as alleged in the bill. (Page 16, lines 22-25.)

And that said addition cuts out only two windows, one on the third and one on the fourth story of complainant's building. (Page 17, lines 21-23.)

Also admits that complainant did erect about the time stated in his bill of complaint (October, 1884), a 20 brick and frame store room and dwelling. (Page 15, lines 37-40.)

The answer does not deny that the obstruction will be an injury to the health of complainant and his family, as alleged in complainant's affidavit. (Page 8.)

Does not deny complainant's title derived from levy, as alleged on page 2.

Therefore, insofar as the answer admits and does not meet and deny the allegations of the bill, the bill is true.

30

Merwin vs. Smith et al., 1 Green ch., 192.

I respectfully submit that defendant admits of the existence of the easements or reservations to the complainant. Also that defendant admits disturbing the same. It is within the province of the Court to take judicial notice that the light and air will be diminished.

Ware vs. Chew, 16 Stewart, 500.

The easements being admitted, as well as the disturbance thereof, and the injury to the health of complainant and his family not being denied, the case is

one in which Chancery will assume jurisdiction.

In case of private nuisances Chancery has concurrent jurisdiction with Courts of law.

Gardner vs. Village of Newburg, 2 Johns. ch., 162; Carlisle vs. Cooper, 6 C. E. Green, p. 579.

If complainant is thrown out of the Court of Chancery he will be subjected to constant litigation, and it is in the jurisdiction of this Court to prevent it.

This controversy being a matter of nuisance, and it
10 appearing that the complainant has been in the undisputed enjoyment of his right during the possession of Winters and Lee till the 10th day of January, 1888, when complainant's right was disturbed by Lee, and the complainant having filed his bill promptly upon the commission of the act of interference with such right the Court of Chancery will take complete cognizance.

Carlisle vs. Cooper, 6 C. E. Green, 583.

Where the injury is irreparable as where loss of
20 health, or permanent ruin to property may or will ensue from the wrongful act or erection, a Court of Equity will interfere by injunction to prevent the nuisance, as well as to remedy it if already done, although an action for damages would lie at law.

Story's Eq. Jurisprudence, vol. 2, § 925, p. 231, 13th Ed.

The English rule requiring the complainant's legal rights to be first established in a Court of law before the Court of Equity will give relief, has in general not
30 been enforced in its strictness in the American Courts. In New Jersey it has been somewhat relaxed.

Carlisle vs. Cooper, p. 580.

This cause, as it stands by the pleadings, the complainant's right to relief by injunction is clear.

Kirkpatrick vs. Peshine, 9 C. E. Green, 216; Pope vs. Bell, 8 Stewart, 3-4.

Whatever objection might have been made to the frame of the bill originally, none can be made since the defendants have not demurred but gone to issue upon the facts. It is too late to object to the jurisdic-

tion of the Court after the defendants have answered and put themselves on the merits instead of demurring to so much of the bill as seeks relief.

Underhill vs. Van Courtland, 2 Johns. ch., 369.

Second. The answer does not fully answer the equity of the bill, and is insufficient. The matters in the answer which do not admit the allegations of the bill are not sworn to as within the personal knowledge of the defendant.

10

Holdredge vs. Gwynne, 3 C. E. Gr., 32.

Higbee vs. R. R. Co., 4 C. E. Gr., 280.

Horner vs. Joles, 2 Beas., 22.

The answer, while it admits of the existence of the easement, denies the construction put upon it by the complainant is the proper one, and insists there is no injury, and if there be that, the complainant have an adequate remedy at law. It should be left until the final hearing.

20

Pope vs. Bell, 8 Stew., p. 4.

The positive denial of the defendant is clearly not a fact within his knowledge, but a question of legal construction, which defendants cannot settle by an answer, and which the Court ought not to decide except upon final hearing.

Boston Franklinite Co. vs. N. J. Zinc Co., 2 Beas., 218.

The mere denial of the complainant's right by the defendant's answer will not oust the Court of its jurisdiction by injunction.

Carlisle vs. Cooper, 580.

It is not denied that complainant extended the wall, erected the structure thereon, put windows therein for light and air under his reservation without hindrance from said Winters. Nor is there any evidence or statement that complainant was disturbed in his rights by Winters. If Winters (who stood by and saw com-

plainant expend his money on his estate, relying upon his easement) would have interrupted the enjoyment of such easement, equity would have enjoined him.

Herman on Estoppel, 8 Res Judicata, § 1140, p. 1277.

Washburn on Easements and Servitudes, p. 112, 4th Ed.

Third. A right to have the light and air which would naturally flow to a window, unobstructed by the owner of adjoining land, whether such right is acquired by prescription or otherwise, is an easement.

Goddard's Law of Easements, Bennett Ed., p. 33.

Apparent servitudes are those the existence of which is shown by external works, as a door, a window, a water course.

Gale & Wheatly on Easements, 1839 Ed., pp. 16-17.

There is no evidence or statement to the contrary that the easement enjoyed by the complainant was not continuous or apparent. The defendant does not rest his defence or denial on the ground of ignorance.

Taking the allegations of the answer as true as stated by the learned Chancellor, I think his Honor erred in ordering that the injunction be dissolved, with costs, not only because the bill was not fully and properly denied to warrant the dissolution, as above stated, but because this defendant cannot now deny the complainant's rights at all, by answer or otherwise. I respectfully submit that the defendant admits of the title of the complainant in his estate; admits of the title in himself through Winters; admits of the reservations and easements in the deeds from Hagerty to Winters and from Winters to himself; also, that Winters was possessed of his premises, and admits title and possession in himself of the premises over which complainant claims the easement of light and air, etc.

Defendant also admits of the record of the several deeds, and being in possession of the premises, he is charged with actual and constructive notice of the complainants easements and reservations.

In this position of things the defendant is chargeable, by incontestible legal presumption, with full knowledge of the stipulations in question.

Brewer vs. Marshall & Cheeseman, 4 C. E. Gr., p. 541.

Defendant must have seen the building of complainant, and defendant's property overlooked by the windows of complainant. It is presumed, therefore, that defendant contracted with reference to complainant's¹⁰ easements: "The parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the then condition and state of the property, and if an easement to which it is subject be open and visible and of a continuous character, the purchaser is supposed to have been willing to take the property as it was at the time, subject to such burden." Even if the Winters deed to defendant did not set out the complainant's reservations, defendant took the property subject to the complainant's easement because it was²⁰ open and visible.

Devlin on Deeds, § 912, vol. 2.

Devlin on Deeds, § 739, vol. 2.

Where a servitude is continuous and apparent, a purchaser at a private or judicial sale takes subject to it. It makes no difference whether reference is made to the servitude in the deed of the dominant tenement or not.

Cannon vs Boyd, Am. L. Reg., XIII N. S. P., 456.

Supposing the reservations not to be binding in law, they will be enforced in equity because the defendant took the premises with actual and constructive notice of the same.

Kerr on Injunction, 1871 Ed., p. 530.

Sugden on Vendors, 596.

The defendant having purchased the premises subject to a continuous and apparent easement, took the same subject to the burden of that easement and will

be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the complainant having a right thereto, and has not parted with or impaired the same, was entitled at the time defendant bought.

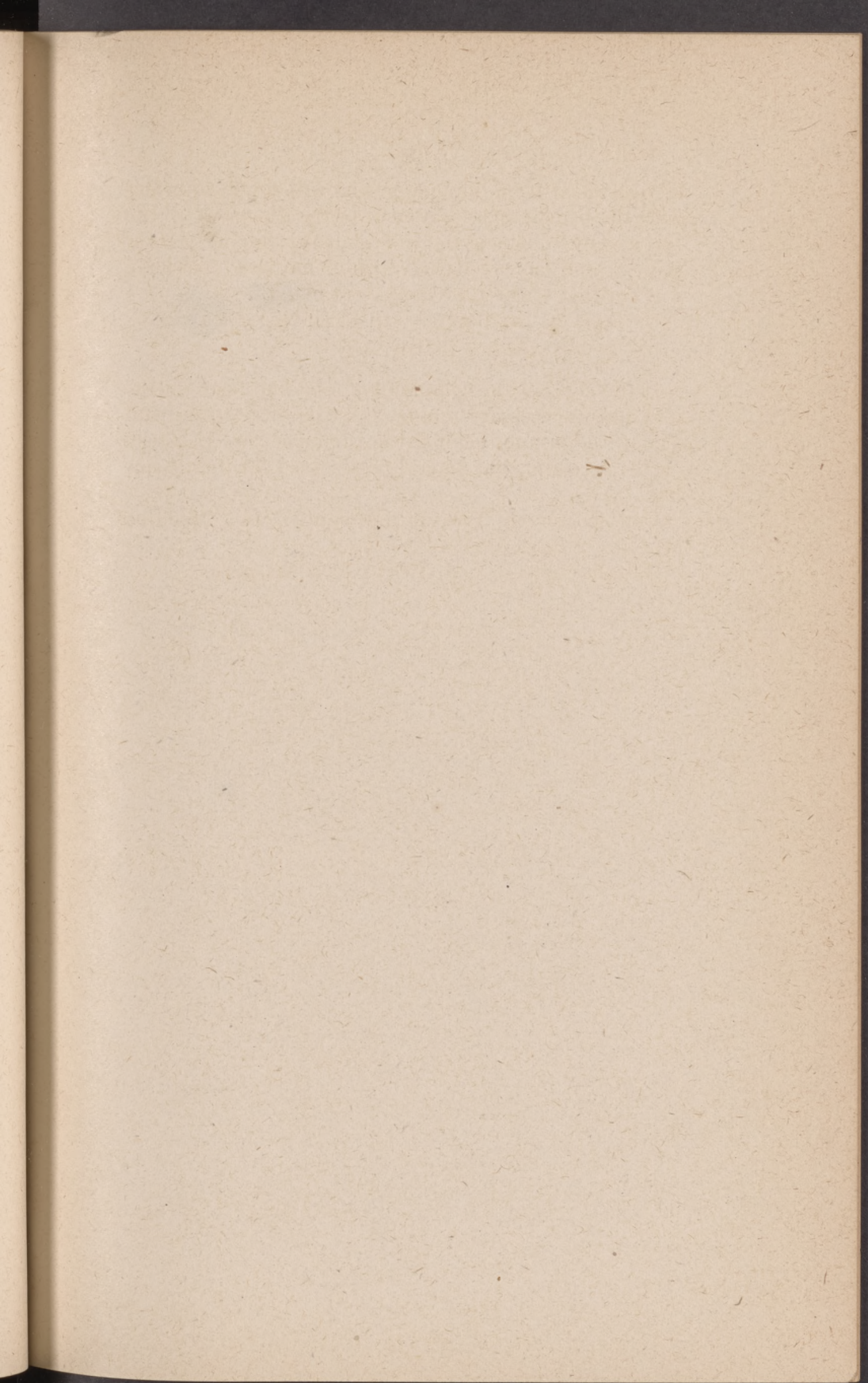
De Luze vs. Bradbury, 10 C. E. Gr , p. 70-84.

Seymour vs. Lewis, 2 Beas., 439-446-447.

If the right of the complainant to maintain an unlimited and unnecessary number of windows is doubtful or not, the injunction ought not to have been dissolved on that account, but should be reserved for final hearing.

Van Kuren vs. Trenton Locomotive and Machine Mfg Co., 2 Beas., 305.

Boston, etc., vs. N. J. Tire Co., 2 Beas., 218.





NEW JERSEY
Court of Errors and Appeals.

JOHN LEE,
Respondent,
and
FRANK P. HAGERTY,
Appellant.

RESPONDENT'S POINTS.

1. There was no grant of an easement shown by the complainant in the deed, as the deed was the deed of a third party, and not signed by defendant Lee.

Coahn v. Lowenstein, 10 Stewart 284.

Convery v. Troy R. R. Co., 40 New York 209.

Pitney v. Haws, 13 Pick. 323.

Cutler v. Tufts, 3 Pick. 277.

2. All the equity of the bill answered, and the case simply shows that the injunction is sought to restrain the erection of a building that will obstruct unnecessary windows, and the right to maintain such windows should be established at law before an injunction should issue.

Citizens' Coach Co. v. Camden Horse R. R., 2 Stewart 299.

3. The complainant entirely fails to bring himself within the terms of the reservation, even supposing it were binding on defendant, which it is not.

4. The complainant sets forth the reservation on which he claims his injunction that in case he should build on the common line between the parties he reserved the right to put windows in said building overlooking the tract described. He fails to show that he built on the common line, and the defendant denies that he did so build and sets forth that he built on the land of the defendant, thus destroying complainant's whole case.

See cases above cited.

Dev. on Deeds, Vol. 2, 979.

5. The bill shows no irreparable injury—nothing that cannot be remedied at law.

City Coach Co. v. Camden Horse R. R. Co., 2 Stew. 299.

Morris C. & R. R. Co. v. C. R. R., 1 C. E. Gr. 419.

Robens v. Maxwell, 1 Gr. Ch. 64.

High on Inj., § 848.

6. The reservation, if good at all, does not allow him to fill his house with windows, but only with so many as to give sufficient light and air, and defendant says the complainant has an abundance for that purpose without the use of the ones he proposes to obstruct.

J. I. BLAIR REILEY,

Att'y of Respondent.

D. J. G. SHIPMAN & SON,

Of Counsel.

Court of Errors and Appeals.

FRANK P. HAGERTY,	}	Petition.
Appellant,		
and		
JOHN LEE ET AL.,		
Respondents.	}	

Bill of Complaint.

[Filed January 11, 1888.]

IN CHANCERY OF NEW JERSEY.

Between Frank P. Hagerty,	}	On Bill for Injunction.
Complainant,		
v.		
John Lee,		
Defendant.	}	

*To his Honor, Alexander T. McGill, Chancellor of the State
of New Jersey :*

10

Humbly complaining, sheweth unto your honor, your orator, Frank P. Hagerty, of the town of Phillipsburg, in the county of Warren, and State of New Jersey, that your orator, being seized in fee simple of or otherwise well entitled unto certain premises situate, lying and being in the town of Phillipsburg, in the county of

Warren, and State of New Jersey, containing in front on the southerly side of Main street, containing in front on said street fifty feet and extending that width southwardly two hundred and twenty-two feet to Union street, conveyed unto your orator by Morris Levy and Julia, his wife, by their indenture of deed, dated the tenth day of July, eighteen hundred and eighty-four, and recorded in the clerk's office of the county of Warren, in Book of Deeds number one hundred and twenty-four, on page 10 five hundred and twenty-one, as by the said indenture to which your orator craves leave to refer when produced will more fully appear.

And your orator further respectfully shows, that by a certain indenture bearing date the tenth day of July, eighteen hundred and eighty-four, and made between your orator and his wife, Flora Hagerty, of the one part, and Christopher S. Winters, (the vendor to the defendant hereinafter mentioned) then residing in the town of Phillipsburg, aforesaid, of the other part, for a consideration, gave, granted, bargained, sold, aliened, released, 20 enfeoffed, conveyed and confirmed unto the said Christopher S. Winters, his heirs and assigns, forever, the western portion of the tract above described, and particularly described as follows: "All that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the town of Phillipsburg, in the county of Warren and State of New Jersey, beginning at a corner in the south edge of Main street, which corner is also the northwest corner of another lot belonging 30 to grantor (meaning your orator) hereof, at a distance of twenty-five feet from the northwest corner of land belonging to Sarah Hagerty, and runs, thence (1) in a southerly course along line of lands of grantors (your orator), and in line parallel to line of lands of Sarah Hagerty, a distance of two hundred and twenty-two feet more or less to a corner in the north edge of Union street; thence (2) along the north edge of Union street twenty-five feet in a westerly course to a corner of the Frelinghuysen tract; thence (3) in a northerly course 40 along the line of the Frelinghuysen tract and in line

parallel to line first herein described two hundred and twenty-one feet, more or less, to corner in the south edge of Main street; thence (4) along the south edge of Main street in an easterly direction a distance of twenty-five feet to the place of beginning. Wherein one-half of the tract of land that Morris Levy and wife, by their deed dated the tenth day of July, eighteen hundred and eighty-four, conveyed to Frank P. Hagerty (your orator) in fee. * * * * The said Frank P. Hagerty (your orator) and wife, convey the tract of land above de-10
scribed to the said Christopher S. Winters, in fee subject to the payment of mortgage. * * * * The party of the first part (your orator) reserving the right to the free use of the light and air over said tract above described, and in case he should build on the common line between the parties (meaning your orator and said Winters) he reserves the right to put windows in said building overlooking the tract above described. It being agreed between the parties hereto, that in case either party builds on the common line for a distance of 20
twenty-four feet, more or less, from the south edge of Main street, the line is to be in the middle of the foundation wall, the thickness of the wall to be at the option of the parties (meaning your orator and Winters) hereto, and that the expense of the wall and partition to the roof of the building shall be equally borne share and share alike by each. The party of the first part further reserving the right to continue the wall in the same way and manner as last above mentioned, but the erection thereof to be at their own expense, with the further right 30
to use the whole wall," said deed being recorded in the Warren county clerk's office, in Deed Book number one hundred and twenty-four of deeds, page three hundred and ninety-six, as by the said indenture to which your orator craves leave to refer when produced will more fully appear.

And your orator further respectfully shows, that the said Winters entered into the possession of said premises, and that within a short time after the conveyance of the tract last above described by your orator, to the said 40

Christopher S. Winters, the said Winters, upon a foundation wall of thickness agreed upon by your orator and said Winters, the said Winters erected a frame structure, a dwelling house, twenty-four feet deep, from the south edge of Main street, on the one-half of the foundation above referred to.

And your orator further shows, that the said Winters, in erecting his said dwelling, respected and observed the rights of your orator as reserved in the deed above last
10 described.

And your orator further shows, that about the month of October, in the year eighteen hundred and eighty-four, he commenced the erection of a brick and frame store room and dwelling on his lands next adjacent to the property of the said Winters (your orator's said lot being the remainder of the tract first above described), on the common foundation wall above mentioned, and at his own expense, extended the said wall southwardly, as he had a right
20 to do under the reservation expressed in the deed from your orator to said Winters, for a distance of about sixty-eight feet, and erected thereon a frame building with windows for light in the side of the building overlooking said Winters' premises.

And your orator further shows, that the right for the extension of said wall by him, and the erection of the frame structure thereon, and the putting in of the windows for light and air, was reserved in the deed to your orator to said Winters; and that your orator extended
30 the wall, erected the building and put in the windows without let or hindrance from the said Winters.

And your orator further shows, that for a distance of about eighty-two feet from the south edge of Main street, on the east side of your orator's premises, is built up solid by the premises of Sarah Hagerty, and that on that account it is impossible for your orator to obtain light from that side.

And your orator further shows, that on or about the second day of June, eighteen hundred and eighty-six,
40 the said Christopher S. Winters and wife, by their deed,

sold and conveyed the premises last above described, with the easements to your orator therein mentioned and as above described, unto one John Lee, (the defendant hereinafter named), which said deed is recorded in the Warren county clerk's office, in Book of Deeds number one hundred and thirty, page two hundred and seventy-two, as by the said indenture, to which your orator craves leave to refer when produced, will more fully appear.

And your orator further respectfully shows, that the 10 said John Lee entered and took possession of said premises on or about the day last aforesaid; and that on the tenth day of January, eighteen hundred and eighty-eight, without the consent of, or warning or notice to your orator, the said John Lee, the defendant, with carpenters and agents, viz., Reuben Warner and Jacob Apgar, commenced, and are now continuing, the erection of a four story frame structure attached to the building of said John Lee, on his premises, flush up to the building of your orator, the frame for two stories of 20 which is now up, and the timber for the third and fourth stories already cut and on the premises, and the openings in the adjoining building ready to receive the same.

And your orator further says, that Warner, the head carpenter, declared that the building would be four stories high, by means of which the light and air of two important windows (reserved to him, as in second deed above described,) will be completely obstructed, and partially the light and air of two other important win-30 dows, all of which is contrary to the rights of your orator. And your orator well hoped that the said John Lee, defendant, would have complied with such reasonable requests of your orator, as in equity and good conscience he ought to have done.

And your orator further respectfully shows, that he, the said John Lee, at times pretends that, notwithstanding the rights and easements to your orator reserved and expressed in the deed second above described, and subject to which he bought said premises, and notwithstanding 40

the said defendant, John Lee, entered into the possession of his said premises above described long after your orator extended said foundation wall, built his building thereon, put windows in the side of the structure overlooking said Lee's premises for light and air, he has the right to obstruct the windows, above mentioned, of your orator, and obstruct the said light and air from your orator by building or otherwise, whereas your orator charges the contrary of all such pretenses to be the
10 truth.

And your orator further charges, that the said defendant, by the intended erection of his building, has already diminished the value of your orator's premises, and that if he is permitted to continue the erection of his said building he will more greatly damage your complainant's premises, and that the injuries to your orator, by said defendant's erection, cannot be remedied.

And your orator further charges, that the said John Lee ought to be compelled to remove so much of his
20 said building erected as interferes with your orator's windows, excluding the air and light therefrom; and that he ought to be restrained from the continuation of said erection, and from making any further erections or obstructions to the windows of your orator, excluding air and light therefrom.

All which actings, doings and pretenses of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises. In tender consideration
30 whereof, and forasmuch as your orator is without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this honorable court, where matters of this nature are properly cognizable and relievable. In consideration whereof, and to the end that the said John Lee may, upon his oath, full and true, direct and perfect answer make to all and singular the charges and matters aforesaid, as fully and particularly as if the same were here again repeated and he thereunto particularly inter-
40 rogated.

May it please your honor, the premises considered, to grant to your orator not only the State's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said John Lee, Reuben Warner and Jacob Apgar, and all other servants, workmen and agents of him or them, and each and every of them, refrain from erecting the addition to the buildings of the said John Lee now in process of erection, and from obstructing the air and light of your orator's premises, which come through the windows above referred to, and 10 from obstructing the air and light from the premises of your orator's, and from obstructing any of your orator's windows, but also the State's writ of subpœna, directed to the said John Lee, Reuben Warner and Jacob Apgar, defendants, to answer the premises and abide the decree of this court, and to grant unto your orator such further relief as to your honor shall seem meet.

And your orator shall ever pray.

FRANK P. HAGERTY,

Complainant. 20

I. W. SCHULTZ,

Sol'r and of Counsel with Complainant.

State of New Jersey, Mercer county, ss.—The above-named complainant, being duly sworn, on his oath says, that the matters and things set forth in the above bill are true; that three or four days ago he saw some lumber hauled on the premises of the said John Lee; that it did not appear to deponent what the intentions of the said John Lee were relative to said lumber: that at noon yesterday, January tenth, eighteen hundred and eighty-30 eight, deponent accidentally looked out of his window and saw said John Lee, with said Reuben Warner and Jacob Apgar, commencing the erection of the building in said bill mentioned; that deponent did not ascertain until five o'clock of day hereinaforesaid, viz., January tenth inst., that the said structure would be four stories high, and would be built flush up against deponent's premises, and thereby block up two important windows of deponent's house; that said structure was going up very

rapidly, and was, at noon of the date hereof, up to and beyond the third story window and one of the windows in deponent's premises; and deponent further saith, that said erection is a great injury to his premises, not only in value but to the health of your deponent and his family; that if said Lee has the right in this instance to shut up the windows and deprive deponent of light and air, then he can close them all up, in which case deponent's premises will be wholly unfit for dwelling purposes, and will be so injured that it cannot be remedied.

F. P. HAGERTY.

Sworn and subscribed before me, on this eleventh day of January, 1888.

ALLAN McDERMOTT,
Master in Chancery of New Jersey.

State of New Jersey, Mercer county, ss.—The said complainant, Frank P. Hagerty, being further duly sworn, says, that all the statements in the foregoing bill of complaint mentioned, respecting the sale and conveyance of the tract of land therein described to Christopher S. Winters, and which is set out in said bill and deed concerning the reservation to the complainant's rights to build on his lot so adjoining the lot so conveyed, and the reservation of light and air to the windows into building which he might erect from and over the lot so conveyed, are each and all true as therein stated; and it is also true, that the said deed of conveyance above referred to was duly recorded as therein stated; deponent further says, that the statements in bill mentioned, relative to the deed from Winters to Lee as to the reservations therein contained, are true as therein stated; deponent further says, that the carrying on of the structure, and the completion thereof as above stated in said bill, will obstruct the light and air to which this deponent is entitled, and will interfere with his rights, and damage his premises as in said bill stated; and deponent

further says, that what is stated in said bill relative to the erection and construction of said building is true.

F. P. HAGERTY.

Sworn and subscribed before me, on this eleventh day of January, 1888.

JOHN T. BIRD,

V. C.

Order for Injunction.

[Filed January 11, 1888.]

On reading the bill and affidavits thereto annexed in 10 the above stated cause, it is, on this eleventh day of January, in the year of our Lord one thousand eight hundred and eighty-eight, on motion of I. W. Schultz, solicitor and of counsel with the complainant, ordered, that upon filing the said bill, and affidavits thereto annexed, an injunction do issue according to the prayer of said bill.

ALEX. T. MCGILL, JR., C.

Respectfully advised.

JOHN T. BIRD,

V. C.

20

Injunction.

[Filed January 16, 1888.]

State of New Jersey, Warren county, ss.—George Lom-masson, being duly sworn according to law, on his oath says, that he is sheriff of the county of Warren; that

he, as such sheriff, served the annexed writ January 12th, 1888, at 7:40 o'clock A. M. on that day, personally, on each of the within named defendants, by showing to each of them the original writ and reading the same to them, and giving to each of them a true copy thereof, and informing them of the contents thereof.

GEORGE LOMMASSON,

Sheriff.

Sworn and subscribed before me, this fourteenth day
10 of January, A. D. 1888.

WM. O'NEIL,

Surrogate.

New Jersey, to wit: The State of New Jersey to John Lee, Reuben Warner and Jacob Apgar,
[L. s.] their servants, workmen, and agents, and each and every of them, greeting:

Whereas, it hath been represented to us, in our Court of Chancery, on the part of Frank P. Hagerty, complainant, that he has lately exhibited his bill of complaint against you, the said John Lee, Reuben Warner
20 and Jacob Apgar, defendants, to be relieved touching the matters set forth in the said bill.

We therefore, in consideration of the premises, and of the particular matters set forth in the said bill, do strictly enjoin and command you, the said John Lee, Reuben Warner and Jacob Apgar, and all and every the persons before mentioned, and each and every of you, under the penalty that may fall thereon, that you and every of you, do absolutely desist and refrain from erect-
30 ing the addition to the building of the said John Lee in said bill of complaint mentioned, now in process of erection on Main street, Phillipsburg, New Jersey, and from obstructing the air and light of the said complainant's premises adjoining the said building, which come through the windows of complainant's house, and from obstructing the air and light from the said premises of complainant, and from obstructing any of said complainant's windows, until you, the said defendants, shall have

fully answered the said bill of complaint, and our said court shall make other order to the contrary.

Witness, his honor, Alexander T. McGill, Jr., our Chancellor, at Trenton, the eleventh day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

ALLAN McDERMOTT,
Clerk.

I. W. SCHULTZ,
Sol'r.

10

Order to Amend.

[Filed April 3, 1888.]

No appearance having been entered for either of the defendants in the above stated cause; none of the defendants having filed an answer, plea, or demurrer to the complainant's bill; on motion of I. W. Schultz, solicitor for the complainant, it is ordered, on this third day of April, A. D. 1888, that the said complainant be and he is hereby authorized to amend his bill by adding thereto, after the word "named," at the end of the parenthetical clause (the defendant hereinafter named) in the seventh line from the top of the fourth page of the original bill, the following, viz: Which said deed from Christopher S. Winters and wife to said John Lee refers to the reservation and exception mentioned in said deed from said Hagerty to Winters, as follows: "It is expressly agreed by and between the parties hereto, that the said party of the first part conveys these premises subject to the same reservation and limitation in regard to windows as is recited in the said deed above referred to, 30 made by the said Hagerty to the said Winters, and also it is agreed that the same conditions and agreement regarding the trenches and foundation walls, as recited in said deed, shall be binding upon the parties hereto, and

the conditions and covenants in the said deed made by the said Hagerty to the said Winters above referred to in regard to windows, foundation wall, trenches and partitions or other walls are to be binding upon the parties hereto the same as if the said conditions and covenants were herein set forth in the same words as contained in said deed. It is further ordered, that said complainant is hereby authorized to amend his said bill, by amending the clause "with the easements to your orator
10 therein mentioned and as above described," as set out in lines 3, 4, and 5 of fourth page original bill, as to read "with the easements to your orator therein referred to," and by omitting the balance of the clause, "and as above described."

It is further ordered, that this order shall be annexed to the original bill and considered as the bill amended, and that a certified copy of this order be served on the defendant, John Lee, or his solicitor, J. I. B. Reiley.

It is further ordered, that this rule be taken without
20 prejudice to the injunction and without costs.

ALEX. T. MCGILL, JR., C.

Respectfully advised.

JOHN T. BIRD,

V. C.

State of New Jersey, Warren county, ss.—I. W. Schultz, being duly sworn according to law, on his oath, that he served a copy of the within order on J. I. B. Reiley, the solicitor of John Lee, as within said order mentioned, by reading the same to him and by leaving
30 a copy with him in his office, on Main street, in Phillipsburg, N. J.; that said service was made on this third day of April, A. D. 1888.

I. W. SCHULTZ.

Sworn and subscribed before me, on this third day of April, 1888.

[L. s.]

P. F. BRAKELEY, JR.,

Notary Public.

Answer.

[Filed April 5, 1888.]

The answer of John Lee to the bill of complaint of Frank P. Hagerty, complainant.

This defendant in answer to the bill of complaint of the said complainant, or to so much or to such parts thereof as he is advised it is material and necessary for him to make answer to, answers and says, that he cannot tell whether the complainant is seized in fee simple or is otherwise entitled unto the premises in his said bill 10 described, nor whether they were conveyed unto him by Morris Levy and wife by the deed described in the said bill of complaint, and this the defendant leaves the said complainant to make his proof of such title, if he be able so to do.

And this defendant further answers and says, that he has understood, and believes it to be true, that the said complainant did, together with Flora, his wife, convey, as by the said indenture is set forth in the said bill of complaint, to one Christopher S. Winters, certain lands 20 in the said deed of conveyance described, and which lands are correctly set forth in the said bill, except that in the third course it is described as running two hundred and twenty-one feet, more or less, to corner in the south edge of Union street, whereas it should have described it as being in the south edge of Main street.

And this defendant further answering saith, that the deed of the said Hagerty to the said Winters does contain substantially the reservation set forth in the said bill of complaint, but this defendant says that it is a reserva- 30 tion made by the said grantor in his own behalf and is more strongly to be construed against the said grantor.

And this defendant further saith, that the lot so purchased by the said Winters was intended for a building lot, was located on the principal street of a thickly populated town, that the lot was bought with the express

purpose and intention of building and maintaining a dwelling house or houses, or other buildings thereon, and that the complainant knew perfectly well at the time he conveyed the land to the said Winters that the said Winters intended to put a dwelling house and other buildings thereon; and that the said Winters would be entitled to build up to the line established by the said deed between the said Winters' lot and the lot of the said complainant; and that the said reservation of the light and
10 air over said tract can only be construed to mean such light and air as might be left by the said Winters, or any one claiming under him, after such buildings as they desired to erect were erected, and that it could not be construed to mean the light and air over the whole tract, because if it did the land so purchased by the said Winters would be of no value whatever to him or any one holding under him.

This defendant further says, that in the reservation the said complainant makes no reservation of the actual
20 number of windows he should put in his building overlooking the tract above described, and under the said reservation any one building upon the lot of the said Winters, if he was restricted at all in leaving windows in the said building of the said complainant, he would not be required to leave more than two windows unobstructed in the said building, and that the said reservation does not give to the said complainant the right to put into his building as many windows as he shall or may see fit, nor does the said reservation in any wise
30 restrict the owner of the said Winters' tract from building upon said lot such building or buildings as he might see proper to erect upon it, and if need be, in the proper construction thereof, to shut up any windows which might be in any buildings erected by the said complainant.

And the defendant further says, that by the deed aforesaid it was expressly agreed that said Winters might build on the boundary line between the two lots for any distance he might see fit or choose, from the south edge
40 of Main street.

This defendant further saith, that the said Christopher S. Winters and wife did, by this deed of bargain and sale, convey to this defendant the lands above described in the deed of the said complainant to the said Winters with the correction made by this defendant. And this defendant begs leave to refer to said deed, if it be necessary so to do, and in said deed are the statements made, substantially as in the amended bill.

This defendant further saith, that he cannot tell whether for a distance of about eighty-two feet from the 10 south edge of Main street, on the east side of complainant's premises, it is built up solid by the premises of Sarah Hagerty, and that on that account it is impossible for the complainant to obtain light from that side or not; but even if it is, the defendant charges, that the complainant had full knowledge thereof and could have so built his building as to allow him all the light and air necessary for its full enjoyment to come in from that side thereof if he, the complainant, had seen fit to do so.

This defendant admits, that the said Winters, soon 20 after he purchased the said land, entered into the possession thereof, and that he erected a frame dwelling house, twenty-four feet deep, and near the boundary line from the south edge of Main street, on one-half of the foundation above referred to; but this defendant charges, that by the device of the said Hagerty the foundation was placed over on the land of the said Winters, now the land of this defendant, so that the building constructed by said Winters was entirely over on his said 30 land, now the land of this defendant.

And the defendant further says, that he denies that said Winters, in erecting his dwelling house, respected and observed the alleged rights of said complainant as reserved in the deed referred to in the said bill of complaint, but that he, the said Winters, built his house without any regard to the alleged rights of the complainant and just as he desired and saw fit to do. And the defendant further says, that he admits that the complainant did erect, about the time stated in his bill of complaint, a brick and frame store-room and dwelling, 40

but this defendant denies that the complainant built the same wholly on his own land; and he denies also that he, the complainant, extended the foundation wall in the way and manner that he had a right to do, or that said deed gave to the complainant any right to extend the wall in the way and manner that he did extend it; and this defendant insists and charges, that said wall was extended and built in part or whole on the land of said Winters, now the land of this defendant, and denies that
10 the complainant had any right to so build said wall.

And this defendant further denies, that the right for the extension of the said wall, and the erection of the frame structure thereon, and the putting in of all the windows for light and air, was reserved in the deed of the said complainant and wife to said Winters. And this defendant further says, that he cannot say whether the said Winters knew what his rights were, and even if the said Winters did see the said building being erected, and knew that the said windows were being put in it, it
20 would not in any way impair or affect the legal rights or equitable rights of this defendant in the said premises.

This defendant further says, that he took possession of said premises at the time in said bill set forth, and that at about the time set forth in the said bill this defendant did begin the erection of an addition to his said building without notifying said complainant, as he had a right to do, because he was under no obligation to give said complainant any notice. And this defendant denies, that the building, or addition, mentioned in complainant's
30 bill, is to be a four-story structure. And this defendant denies, that the said building which he was attempting to construct when the injunction was served upon him, and which he contemplates completing when the said injunction shall be taken off, has or will interfere in any wise with the legal or equitable rights of the said complainant; and he further denies, that it will interfere with the free use of the air by the said complainant; and he further denies, that it will obstruct the light of the said complainant as contemplated in the reservation
40 in the said deed of conveyance of complainant to said

Winters; but on the contrary, this defendant charges, that the building now in course of construction by this defendant, when completed, will not in any wise interfere with the rights of the said complainant, but will allow him all the light and all the air which are legitimately reserved by the said deed, if any are reserved, which this defendant denies as against him.

This defendant charges, that he is erecting this addition entirely on his own land, and several inches inside of the boundary line between him and the said com- 10
plainant. And he further charges and sets forth, that the said addition is not placed on the ground, but is lifted up and placed on posts about ten feet above the ground, so as to allow a perfectly free circulation of air up to and by the complainant's buildings.

And the defendant further charges, that there are no less than nine windows in the building next to the building which this defendant is erecting; that in the basement and second story of said Hagerty's house there are no windows at all adjacent thereto, but in the third 20
and fourth stories there are windows, and that the building now being erected cuts out only two windows, one on the third and one on the fourth or top story, and still leaves windows or a window in each room sufficient to supply said room with an abundance of light and air. And this defendant charges, that the obstruction of the said two windows, each one in a different room, does not interfere in the least with the rights of the said complainant, and leaves to him all the windows which are necessary to furnish him with the light and air required 30
under the reservation in the said deed.

And this defendant further charges, that the reservation in the said deed does not authorize the said complainant to fill his house with windows, but only authorizes him, if it gives him any power at all, as against this defendant, which he denies, to place in his building so many windows as shall be actually necessary to furnish him with light and air for the said building.

And this defendant charges, that the windows which the said complainant had put therein are more than he 40

had any legal or equitable right to place there, and more than are necessary to furnish him with the light and air necessary for said building, and that the shutting up of the two windows are no interference whatever with the legal or equitable rights of the said complainant.

And this defendant says, that he never authorized any carpenter to make any declarations or statements for him, and denies that he knows anything about what Reuben Warner, or any other carpenter, may have said
10 in reference to said addition or building.

And this defendant further denies, that the construction of the said building or addition has or will damage the property of the said complainant, or that the building thereof will diminish the value of the complainant's property in any way whatever.

This defendant further saith, that the rights of the complainant and the defendant have never been suited in a court of law, and until they have been so suited, no injunction will stand in this court against this defendant.
20 ant. And this defendant further says, that the said bill prays for no positive relief against this defendant, but only contains a prayer for process; and this defendant claims the same benefit against the said complainant as if he had demurred to the said bill of complaint; and this defendant denies, that there is any other matter or thing in said bill of complaint necessary for him to make answer unto, not herein and hereby well and sufficiently answered, traversed or denied, confessed or avoided, is true to the knowledge or belief of this defendant, and he
30 prays to be hence dismissed with his costs in this behalf most unjustly and unreasonably sustained.

J. I. BLAIR REILEY,

Solicitor, and

J. G. SHIPMAN & SON,

Of Counsel with Defendant.

State of New Jersey, county of Warren, ss.—John Lee, the defendant above named, being duly sworn, on his oath says, he has heard the above answer read; that the facts, matters and things therein stated, so far as they

relate to the acts and doings of this defendant, are true of his own knowledge, and so far as they relate to the acts and doings of other people, he believes them to be true; that all the matter stated in said answer, in reference to said building which he has erected, are true of his own knowledge, and that this defendant's building will only impair the light in two windows of complainant's house, one in a room in the third story and one in a room on the fourth story, and that there are still left a window in each of those rooms, which are sufficient to 10 give light and air therein, and that there are in the third and fourth stories of the said house of the complainant annexed to the building of this defendant some seven windows, large and airy, exclusive of the two which are obscured by the defendant's building, which is sufficient to give the complainant plenty of light and air from that side of the house; that complainant's house fronts on Main street, in Phillipsburg, and there are abundance of windows there, as well as in other parts of the building, and deponent says that he lifted up his erection ten feet 20 above the ground in order to give free circulation of air, and that said erection is absolutely necessary to carry on his business, which is that of a photographer, and that his statements in reference to the house being entirely on his own lands are true, and in reference to the common line between said properties.

JOHN LEE.

Sworn and subscribed before me, this fifth day of April, A. D. 1888.

JOSEPH H. WILSON, 30
Master in Chancery of New Jersey.

Answers of Reuben Warner and Jacob Apgar.

[Filed April 5, 1888.]

The answer of Reuben Warner and Jacob Apgar to the bill of complaint of Frank P. Hagerty, complainant.

These defendants, in answer to the bill of complaint of said complainant, or to such parts thereof as they are advised it is material and necessary for them to answer, say, that they are entirely ignorant of all the matters set forth in the bill of complaint, and have no interest what-
10 ever in said suit; they were simply workmen, employed by John Lee to put up said structure in the bill mentioned. That this defendant, Warner, has no particular recollection of making any declarations to complainant, and had no authority from said John Lee to make said declarations, and if he said what is charged in said bill he meant said building would be four stories in height, not that it would be a four-story building, for it will only be a three-story structure, as it is raised up ten feet from the ground on posts.

20 And these defendants know of no other matter which it is necessary for them to answer unto, and they pray to be hence dismissed with their costs in this behalf sustained.

J. I. BLAIR REILEY,
Solicitor, and
J. G. SHIPMAN & SON,
Of Counsel of Defendant.

New Jersey, Warren county, ss.—Reuben Warner and Jacob Apgar, being duly sworn, on their oaths say, they
30 are the defendants above named; that the facts, matters and things therein stated, so far as they relate to their acts and doings, are true, and so far as they relate to the acts and doings of other people they believe they are true.

REUBEN WARNER,
JACOB APGAR.

Sworn and subscribed before me, April 5, 1888.

JACOB S. STEWART,
M. C. C.

Order for Time to File Replication.

[Filed May 10, 1888.]

On good cause shown, and on motion of I. W. Schultz, solicitor of complainant, it is, on this seventh day of May, A. D. 1888, ordered, that the complainant have five days further time within which to file his replication, and that this order, as well the extension of time, be taken without prejudice to the injunction.

ALEX. T. MCGILL, JR., C.

Replication.

[Filed May 10, 1888.]

The complainant joins issue on the several answers of the respective defendants.

I. W. SCHULTZ,
Sol. and of Counsel with Complainant.

Opinion.

[Filed October 8, 1888.]

20

A., who was the owner of a strip of land about fifty feet wide and two hundred and twenty feet deep, sold

the westerly half of that land to B. by a deed which contained the following reservation :

"Reserving the right to the free use of the light and air over the tract above described, in case he should build on the common line between the parties, and the right to put windows in said building overlooking the tract above described," &c.

He afterwards built upon the common line between the lands of B. and himself, and put in his building
10 several windows overlooking B.'s land. B. is about to erect a building on his land that will close two of A.'s windows and partially close two others. Held, that the reservation operates as a grant of a newly created easement, at least to light and air, from B.'s premises, and that if it had been made to appear that the interference with A.'s windows would result in his substantial loss of light and air, he would have been entitled to an injunction ; but as that condition of affairs does not appear, and as his right to maintain windows overlooking B.'s
20 land that are not necessary for light and air is unsettled at law, the injunction heretofore issued to restrain the erection of B.'s proposed building will be dissolved.

On motion to dissolve injunction.

The complainant, who was the owner of a strip of land fronting fifty feet on Main street, in the town of Phillipsburg, and running back southerly that width, two hundred and twenty feet to Union street, conveyed to Christopher S. Winters the westerly half of that land by deed, which in the language of the bill, contains the
30 following reservation :

"Reserving the right to the free use of the light and air over the tract above described in case he should build on the common line between the parties, and the right to put windows in said building, overlooking the tract above described. It being agreed between the parties hereto, that in case either party builds on the common line for a distance of twenty-four feet, more or

less, from the south edge of Union street, the line is to be in the middle of the foundation wall, at the option of the parties hereto, and that the expense of the wall and partition to the roof of the building shall be equally borne, share and share alike by each. The party of the first part reserving the right to continue the wall in the same way and manner as last above mentioned, but the erection thereof to be at his own expense, with the further right to use the whole wall."

Immediately after the delivery of this deed Winters 10 proceeded to erect a frame dwelling twenty-four feet deep, using therein a party wall of the description contemplated.

In October, 1884, the complainant constructed a store and dwelling upon the land which remained to him, using therein a party wall and a continuation of it, extended by him southerly sixty-eight feet. In the extension he made windows overlooking Winters' land.

In June, 1886, Winters sold his property to the defendant, John Lee, by deed which contained the following 20 stipulation:

"It is expressly agreed by and between the parties hereto that the said party of the first part conveys these premises subject to the same reservation and limitation in regard to windows, as is recited in the same deed above referred to, made by the said Hagerty to the said Winters. And also it is agreed that the same conditions and agreement regarding the trenches and foundation walls, as recited in said deed, shall be binding upon the parties hereto, and the conditions and cove- 30 nants in the said deed made by the said Hagerty to the said Winters, above referred to, in regard to windows, foundation wall, trenches and partitions, or other walls, are to be binding upon the parties hereto, the same as if the said conditions and covenants were herein set forth in the same words as contained in said deed."

On January 10th, 1888, without notice to the complainant, Lee commenced to build an addition to the house upon his land close to the complainant's building 40

in such manner as to completely shut out the light from two of the windows in the complainant's house, which overlooked Lee's land, and to partially obstruct the light from two other of those windows. On the next day, when the frame work was partly erected, the bill in this case was filed and an injunction was issued, which restrains the erection of the proposed addition in such manner as to obstruct the passage of light and air through the windows referred to.

- 10 The answer admits the allegations of the bill as to the deeds to Winters and Lee, claims that the proposed building will be so erected as not to obstruct the passage of air, admits that it will obstruct light as in the bill alleged, alleges that the complainant will have an abundance of light in the rooms from which the obstructed windows open through other windows; denies that the deeds, or either of them, give the complainant right to light and air from the defendant's premises, and insists that if those deeds do give that right, it must be limited
20 to a sufficiency.

Motion is now made to dissolve the injunction.

J. G. Shipman, for the motion.

I. W. Schultz, contra.

THE CHANCELLOR:—

- I think that the reservation, in deed from complainant to Winters, operated as a grant of an easement in the lands of Winter. In *Goddard on Easements*, 108, it is said: "An easement cannot strictly be made the subject, either of exception or reservation, in a deed of conveyance of land, for it is neither parcel of the land
30 granted, which circumstance is requisite to enable a thing to be expected, nor does it issue out of the land, as it should, to render it capable of being the subject of a reservation. If, therefore, an easement be incorrectly reserved to a grantor of land, or excepted from the land conveyed, the reservation or exception operates as a grant of a newly created easement by the grantee of the land to the grantor."

Rosenkrans v. Snover, 4 C. E. Green, 420; *Cooper v. Lowenstein*, 10 Stewart, 284.

It seems to be free from question that the easement extends at least to be sufficiency of light and air from the defendant's premises, although the right of the complainant to maintain an unlimited and unnecessary number of windows may be doubtful; at all events, is unsettled.

In such a position of affairs I would have no hesitation in restraining any erection that would so deprive 10 the complainant of light and air as to render his occupation of his house decidedly uncomfortable. But he fails to show that he will suffer substantial privation of light or air by the threatened obstruction of the windows of his house. His bill alleges that two windows will be closed and that two other windows will be partially obstructed and darkened, but it does not state that thereby the passage of light and air to his house will be substantially hindered. The defendant, on the other hand, by his answer insists, that, although the obstruction will 20 shut up two windows, it will leave a window or windows in each room of complainant's house, through which an abundance of air and light may enter.

Taking the allegation of the answer as true, the proposed office of the injunction is to restrain the erection of a building that will obstruct unnecessary windows. The right to maintain such windows should be established at law before an injunction should issue.

Citizen's Coach Co. v. Camden Horse R. R. Co., 2 Stew., 299.. 30

I will order that the injunction be dissolved, with costs.

Order of Reference.

[Filed October 29, 1888.]

It is, on this twenty-ninth day of October, A. D. 1888, on motion of I. W. Schultz, solicitor of complainant, and in the presence of J. G. Shipman, of the firm of J. G. Shipman & Son, of counsel with the defendant, ordered, that the above stated cause be referred to John T. Bird, Esq., Vice Chancellor, and to report thereon to him, and advise what order or decree should be made therein.

10

ALEX. T. MCGILL, JR., C.

Notice.

[Filed November 14, 1888.]

Take notice, that I shall apply to his honor, John T. Bird, Vice Chancellor, (to whom the above stated cause has been referred to hear the same for the Chancellor, and to report thereon to the Chancellor, and advise what order or decree should be made therein, said order bearing date the twenty-ninth day of October, A. D. 1888, a copy of which order is hereto attached,) on Tuesday, the
20 twentieth day of November instant, at ten o'clock in the forenoon, or as soon as I can be heard thereon, at the State House, in the city of Trenton, to fix a time and place for a hearing in the above stated cause.

Dated Nov. 12, 1888.

Yours,

I. W. SCHULTZ,

Sol'r and of Counsel with Compl't.

To J. I. B. REILEY,

Sol'r of Deft., and to

30 J. G. SHIPMAN & SON,

Of Counsel with Deft.,

or to whom it may concern.

State of New Jersey, Warren county, ss.—I. W. Schultz, being sworn according to law, on his oath saith, that on the twelfth of November inst., he served a copy of within notice, with copy of order of reference thereto attached, on J. I. B. Reiley, solicitor of defendant, personally, and on the thirteenth day of November inst., he served a like copy of within notice, with copy of order of reference thereto attached, on George Shipman, Esq., of the firm of J. G. Shipman & Son, of counsel with defendant, John Lee.

10

I. W. SCHULTZ.

Sworn and subscribed before me, on this thirteenth day of November, 1888.

B. F. BRAKELEY, JR.,
Notary Public.

Order to Dissolve Injunction.

[Filed November 20, 1888.]

The defendant having filed his answer to the complainant's bill, and having given notice of a motion to dissolve the injunction granted in this cause, and the matter having been heard before his honor, the Chancellor, at his Chambers, in Jersey City, on the seventh day of May, A. D. 1888, and a motion to dissolve having been argued by J. I. Blair Reiley and J. G. Shipman for the motion, and by I. W. Schultz, in opposition thereto, and the Chancellor having taken time to consider of the said matter, and now being of opinion that the injunction ought to be dissolved: It is, on this twenty-ninth day of October, A. D. 1888, ordered, by the Chancellor, that the said injunction be dissolved, with costs to be paid by the complainant to the defendant. And the complainant having signified his intention to appeal, it is further ordered, that the stay of the injunction con-

30

tinue until the Court of Errors, or this court, shall otherwise direct; provided, however, that the said stay shall be void and for nothing holden if the said appeal shall not be taken on or before December 1st, 1888, by filing notice of appeal in the office of the clerk of this court, and duly serving a copy thereof.

ALEX. T. MCGILL, C.

Proof of Service and Notice of Appeal.

[Filed November 27, 1888.]

State of New Jersey, Warren county, ss.—I. W. Schultz,
10 being duly sworn, says, that on this twenty-eighth day of November, eighteen hundred and eighty-eight, at Phillipsburg, New Jersey, he served a notice, a copy of which is hereto annexed, on J. I. B. Reiley, the solicitor of John Lee, the defendant in this cause, by delivering the same to him personally, and leaving the same with him.

I. W. SCHULTZ.

Sworn and subscribed before me, on this thirtieth day of November, 1888.

20

B. C. FROST,

M. C. C.

Notice of Appeal

The complainant hereby appeals from so much of the order made in this court, in the above stated cause, as declares "that the said injunction be dissolved, with costs to be paid by the complainant to the defendant," to the Court of Errors and Appeals in the last resort in all causes.

I. W. SCHULTZ,

Sol'r and of Counsel with Complainant.

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

I. W. SCHULTZ,
Of Counsel with Complainant.

A true copy.

ALLAN McDERMOTT,
Clerk.

Petition of Appeal.

[Filed December 29, 1888.]

COURT OF ERRORS AND APPEALS. 10

Frank P. Hagerty,	}	Petition, &c.
Appellant,		
and		
John Lee, et als.,		
Respondents.		

To the Honorable the Court of Errors and Appeals in the last resort of all causes:

The humble petition of Frank P. Hagerty, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Alexander T. McGill, Jr.; Chancellor of New Jersey, bearing date the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and eighty-eight, wherein the said Frank P. Hagerty was complainant and the said John Lee and others were defendants, in this respect, to wit, that the said order adjudges that the said injunction (granted to your petitioner) be dissolved with costs to be paid by the complainant to the defendant. And your petitioner humbly appeals from that part of the order of the Chancellor which orders as

aforesaid, upon the ground that the same is erroneous. Your petitioner therefore prays, that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

I. W. SCHULTZ,
Solicitor for and of Counsel with Appellant.

Answer to Petition of Appeal.

10

[Filed January 28, 1889.]

The answer of the said appellees to the petition of appeal of the above named appellant.

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereto, nevertheless, say and admit, that a decree was, at the time mentioned in the said petition of appeal, made and entered in the Court of Chancery in the cause for that purpose in the said petition, as therein stated, but as to the substance
20 and form thereof these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe that the said decree is agreeable to equity and good conscience, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

JOHN I. BLAIR REILEY,
Solicitor of Respondents.
J. G. SHIPMAN & SON,
Of Counsel with Respondents.

Court of Errors and Appeals.

FRANK P. HAGERTY,	}	Petition.
Appellant,		
and		
JOHN LEE ET AL.,		
Respondents.	}	

Bill of Complaint.

[Filed January 11, 1888.]

IN CHANCERY OF NEW JERSEY.

Between Frank P. Hagerty,	}	On Bill for Injunction.
Complainant,		
v.		
John Lee,		
Defendant.	}	

*To his Honor, Alexander T. McGill, Chancellor of the State
of New Jersey:*

10

Humbly complaining, sheweth unto your honor, your orator, Frank P. Hagerty, of the town of Phillipsburg, in the county of Warren, and State of New Jersey, that your orator, being seized in fee simple of or otherwise well entitled unto certain premises situate, lying and being in the town of Phillipsburg, in the county of

Warren, and State of New Jersey, containing in front on the southerly side of Main street, containing in front on said street fifty feet and extending that width southwardly two hundred and twenty-two feet to Union street, conveyed unto your orator by Morris Levy and Julia, his wife, by their indenture of deed, dated the tenth day of July, eighteen hundred and eighty-four, and recorded in the clerk's office of the county of Warren, in Book of Deeds number one hundred and twenty-four, on page 10 five hundred and twenty-one, as by the said indenture to which your orator craves leave to refer when produced will more fully appear.

And your orator further respectfully shows, that by a certain indenture bearing date the tenth day of July, eighteen hundred and eighty-four, and made between your orator and his wife, Flora Hagerty, of the one part, and Christopher S. Winters, (the vendor to the defendant hereinafter mentioned) then residing in the town of Phillipsburg, aforesaid, of the other part, for a consideration, gave, granted, bargained, sold, aliened, released, 20 enfeoffed, conveyed and confirmed unto the said Christopher S. Winters, his heirs and assigns, forever, the western portion of the tract above described, and particularly described as follows: "All that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the town of Phillipsburg, in the county of Warren and State of New Jersey, beginning at a corner in the south edge of Main street, which corner is also the northwest corner of another lot belonging to grantor (meaning your orator) hereof, at a distance of twenty-five feet from the northwest corner of land belonging to Sarah Hagerty, and runs, thence (1) in a southerly course along line of lands of grantors (your orator), and in line parallel to line of lands of Sarah Hagerty, a distance of two hundred and twenty-two feet more or less to a corner in the north edge of Union street; thence (2) along the north edge of Union street twenty-five feet in a westerly course to a corner of the Frelinghuysen tract; thence (3) in a northerly course 30 along the line of the Frelinghuysen tract and in line 40

parallel to line first herein described two hundred and twenty-one feet, more or less, to corner in the south edge of Main street; thence (4) along the south edge of Main street in an easterly direction a distance of twenty-five feet to the place of beginning. Wherein one-half of the tract of land that Morris Levy and wife, by their deed dated the tenth day of July, eighteen hundred and eighty-four, conveyed to Frank P. Hagerty (your orator) in fee. * * * * The said Frank P. Hagerty (your orator) and wife, convey the tract of land above de-10 scribed to the said Christopher S. Winters, in fee subject to the payment of mortgage. * * * * The party of the first part (your orator) reserving the right to the free use of the light and air over said tract above described, and in case he should build on the common line between the parties (meaning your orator and said Winters) he reserves the right to put windows in said building overlooking the tract above described. It being agreed between the parties hereto, that in case either party builds on the common line for a distance of 20 twenty-four feet, more or less, from the south edge of Main street, the line is to be in the middle of the foundation wall, the thickness of the wall to be at the option of the parties (meaning your orator and Winters) hereto, and that the expense of the wall and partition to the roof of the building shall be equally borne share and share alike by each. The party of the first part further reserving the right to continue the wall in the same way and manner as last above mentioned, but the erection thereof to be at their own expense, with the further right 30 to use the whole wall," said deed being recorded in the Warren county clerk's office, in Deed Book number one hundred and twenty-four of deeds, page three hundred and ninety-six, as by the said indenture to which your orator craves leave to refer when produced will more fully appear.

And your orator further respectfully shows, that the said Winters entered into the possession of said premises, and that within a short time after the conveyance of the tract last above described by your orator, to the said 40

Christopher S. Winters, the said Winters, upon a foundation wall of thickness agreed upon by your orator and said Winters, the said Winters erected a frame structure, a dwelling house, twenty-four feet deep, from the south edge of Main street, on the one-half of the foundation above referred to.

And your orator further shows, that the said Winters, in erecting his said dwelling, respected and observed the rights of your orator as reserved in the deed above last
10 described.

And your orator further shows, that about the month of October, in the year eighteen hundred and eighty-four, he commenced the erection of a brick and frame store room and dwelling on his lands next adjacent to the property of the said Winters (your orator's said lot being the remainder of the tract first above described), on the common foundation wall above mentioned, and at his own expense, extended the said wall southwardly, as he had a right
20 to do under the reservation expressed in the deed from your orator to said Winters, for a distance of about sixty-eight feet, and erected thereon a frame building with windows for light in the side of the building overlooking said Winters' premises.

And your orator further shows, that the right for the extension of said wall by him, and the erection of the frame structure thereon, and the putting in of the windows for light and air, was reserved in the deed to your orator to said Winters; and that your orator extended
30 the wall, erected the building and put in the windows without let or hindrance from the said Winters.

And your orator further shows, that for a distance of about eighty-two feet from the south edge of Main street, on the east side of your orator's premises, is built up solid by the premises of Sarah Hagerty, and that on that account it is impossible for your orator to obtain light from that side.

And your orator further shows, that on or about the second day of June, eighteen hundred and eighty-six,
40 the said Christopher S. Winters and wife, by their deed,

sold and conveyed the premises last above described, with the easements to your orator therein mentioned and as above described, unto one John Lee, (the defendant hereinafter named), which said deed is recorded in the Warren county clerk's office, in Book of Deeds number one hundred and thirty, page two hundred and seventy-two, as by the said indenture, to which your orator craves leave to refer when produced, will more fully appear.

And your orator further respectfully shows, that the 10 said John Lee entered and took possession of said premises on or about the day last aforesaid; and that on the tenth day of January, eighteen hundred and eighty-eight, without the consent of, or warning or notice to your orator, the said John Lee, the defendant, with carpenters and agents, viz., Reuben Warner and Jacob Apgar, commenced, and are now continuing, the erection of a four story frame structure attached to the building of said John Lee, on his premises, flush up to the building of your orator, the frame for two stories of 20 which is now up, and the timber for the third and fourth stories already cut and on the premises, and the openings in the adjoining building ready to receive the same.

And your orator further says, that Warner, the head carpenter, declared that the building would be four stories high, by means of which the light and air of two important windows (reserved to him, as in second deed above described,) will be completely obstructed, and partially the light and air of two other important win-30 dows, all of which is contrary to the rights of your orator. And your orator well hoped that the said John Lee, defendant, would have complied with such reasonable requests of your orator, as in equity and good conscience he ought to have done.

And your orator further respectfully shows, that he, the said John Lee, at times pretends that, notwithstanding the rights and easements to your orator reserved and expressed in the deed second above described, and subject to which he bought said premises, and notwithstanding 40

the said defendant, John Lee, entered into the possession of his said premises above described long after your orator extended said foundation wall, built his building thereon, put windows in the side of the structure overlooking said Lee's premises for light and air, he has the right to obstruct the windows, above mentioned, of your orator, and obstruct the said light and air from your orator by building or otherwise, whereas your orator charges the contrary of all such pretenses to be the
10 truth.

And your orator further charges, that the said defendant, by the intended erection of his building, has already diminished the value of your orator's premises, and that if he is permitted to continue the erection of his said building he will more greatly damage your complainant's premises, and that the injuries to your orator, by said defendant's erection, cannot be remedied.

And your orator further charges, that the said John Lee ought to be compelled to remove so much of his
20 said building erected as interferes with your orator's windows, excluding the air and light therefrom; and that he ought to be restrained from the continuation of said erection, and from making any further erections or obstructions to the windows of your orator, excluding air and light therefrom.

All which actings, doings and pretenses of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises. In tender consideration
30 whereof, and forasmuch as your orator is without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this honorable court, where matters of this nature are properly cognizable and relievable. In consideration whereof, and to the end that the said John Lee may, upon his oath, full and true, direct and perfect answer make to all and singular the charges and matters aforesaid, as fully and particularly as if the same were here again repeated and he thereunto particularly inter-
40 rogated.

May it please your honor, the premises considered, to grant to your orator not only the State's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said John Lee, Reuben Warner and Jacob Apgar, and all other servants, workmen and agents of him or them, and each and every of them, refrain from erecting the addition to the buildings of the said John Lee now in process of erection, and from obstructing the air and light of your orator's premises, which come through the windows above referred to, and 10 from obstructing the air and light from the premises of your orator's, and from obstructing any of your orator's windows, but also the State's writ of subpœna, directed to the said John Lee, Reuben Warner and Jacob Apgar, defendants, to answer the premises and abide the decree of this court, and to grant unto your orator such further relief as to your honor shall seem meet.

And your orator shall ever pray.

FRANK P. HAGERTY,

Complainant. 20

I. W. SCHULTZ,

Sol'r and of Counsel with Complainant.

State of New Jersey, Mercer county, ss.—The above-named complainant, being duly sworn, on his oath says, that the matters and things set forth in the above bill are true; that three or four days ago he saw some lumber hauled on the premises of the said John Lee; that it did not appear to deponent what the intentions of the said John Lee were relative to said lumber: that at noon yesterday, January tenth, eighteen hundred and eighty-30 eight, deponent accidentally looked out of his window and saw said John Lee, with said Reuben Warner and Jacob Apgar, commencing the erection of the building in said bill mentioned; that deponent did not ascertain until five o'clock of day hereinaforesaid, viz., January tenth inst., that the said structure would be four stories high, and would be built flush up against deponent's premises, and thereby block up two important windows of deponent's house; that said structure was going up very

rapidly, and was, at noon of the date hereof, up to and beyond the third story window and one of the windows in deponent's premises; and deponent further saith, that said erection is a great injury to his premises, not only in value but to the health of your deponent and his family; that if said Lee has the right in this instance to shut up the windows and deprive deponent of light and air, then he can close them all up, in which case deponent's premises will be wholly unfit for dwelling purposes, and will be so injured that it cannot be remedied.

F. P. HAGERTY.

Sworn and subscribed before me, on this eleventh day of January, 1888.

ALLAN McDERMOTT,
Master in Chancery of New Jersey.

State of New Jersey, Mercer county, ss.—The said complainant, Frank P. Hagerty, being further duly sworn, says, that all the statements in the foregoing bill of complaint mentioned, respecting the sale and conveyance of the tract of land therein described to Christopher S. Winters, and which is set out in said bill and deed concerning the reservation to the complainant's rights to build on his lot so adjoining the lot so conveyed, and the reservation of light and air to the windows into building which he might erect from and over the lot so conveyed, are each and all true as therein stated; and it is also true, that the said deed of conveyance above referred to was duly recorded as therein stated; deponent further says, that the statements in bill mentioned, relative to the deed from Winters to Lee as to the reservations therein contained, are true as therein stated; deponent further says, that the carrying on of the structure, and the completion thereof as above stated in said bill, will obstruct the light and air to which this deponent is entitled, and will interfere with his rights, and damage his premises as in said bill stated; and deponent

further says, that what is stated in said bill relative to the erection and construction of said building is true.

F. P. HAGERTY.

Sworn and subscribed before me, on this eleventh day of January, 1888.

JOHN T. BIRD,
V. C.

Order for Injunction.

[Filed January 11, 1888.]

On reading the bill and affidavits thereto annexed in 10 the above stated cause, it is, on this eleventh day of January, in the year of our Lord one thousand eight hundred and eighty-eight, on motion of I. W. Schultz, solicitor and of counsel with the complainant, ordered, that upon filing the said bill, and affidavits thereto annexed, an injunction do issue according to the prayer of said bill.

ALEX. T. MCGILL, JR., C.

Respectfully advised.

JOHN T. BIRD,
V. C.

20

Injunction.

[Filed January 16, 1888.]

State of New Jersey, Warren county, ss.—George Lom-masson, being duly sworn according to law, on his oath says, that he is sheriff of the county of Warren; that

he, as such sheriff, served the annexed writ January 12th, 1888, at 7:40 o'clock A. M. on that day, personally, on each of the within named defendants, by showing to each of them the original writ and reading the same to them, and giving to each of them a true copy thereof, and informing them of the contents thereof.

GEORGE LOMMASSON,
Sheriff.

Sworn and subscribed before me, this fourteenth day 10 of January, A. D. 1888.

WM. O'NEIL,
Surrogate.

New Jersey, to wit: The State of New Jersey to John Lee, Reuben Warner and Jacob Apgar,
[L. s.] their servants, workmen, and agents, and each and every of them, greeting :

Whereas, it hath been represented to us, in our Court of Chancery, on the part of Frank P. Hagerty, complainant, that he has lately exhibited his bill of com-
20 plaint against you, the said John Lee, Reuben Warner and Jacob Apgar, defendants, to be relieved touching the matters set forth in the said bill.

We therefore, in consideration of the premises, and of the particular matters set forth in the said bill, do strictly enjoin and command you, the said John Lee, Reuben Warner and Jacob Apgar, and all and every the persons before mentioned, and each and every of you, under the penalty that may fall thereon, that you and every of you, do absolutely desist and refrain from erect-
30 ing the addition to the building of the said John Lee in said bill of complaint mentioned, now in process of erection on Main street, Phillipsburg, New Jersey, and from obstructing the air and light of the said complainant's premises adjoining the said building, which come through the windows of complainant's house, and from obstructing the air and light from the said premises of complainant, and from obstructing any of said complainant's windows, until you, the said defendants, shall have

fully answered the said bill of complaint, and our said court shall make other order to the contrary.

Witness, his honor, Alexander T. McGill, Jr., our Chancellor, at Trenton, the eleventh day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

ALLAN McDERMOTT,
Clerk.

I. W. SCHULTZ,
Sol'r.

10

Order to Amend.

[Filed April 3, 1888.]

No appearance having been entered for either of the defendants in the above stated cause; none of the defendants having filed an answer, plea, or demurrer to the complainant's bill; on motion of I. W. Schultz, solicitor for the complainant, it is ordered, on this third day of April, A. D. 1888, that the said complainant be and he is hereby authorized to amend his bill by adding thereto, after the word "named," at the end of the parenthetical clause (the defendant hereinafter named) in the seventh line from the top of the fourth page of the original bill, the following, viz: Which said deed from Christopher S. Winters and wife to said John Lee refers to the reservation and exception mentioned in said deed from said Hagerty to Winters, as follows: "It is expressly agreed by and between the parties hereto, that the said party of the first part conveys these premises subject to the same reservation and limitation in regard to windows as is recited in the said deed above referred to, 30 made by the said Hagerty to the said Winters, and also it is agreed that the same conditions and agreement regarding the trenches and foundation walls, as recited in said deed, shall be binding upon the parties hereto, and

the conditions and covenants in the said deed made by the said Hagerty to the said Winters above referred to in regard to windows, foundation wall, trenches and partitions or other walls are to be binding upon the parties hereto the same as if the said conditions and covenants were herein set forth in the same words as contained in said deed. It is further ordered, that said complainant is hereby authorized to amend his said bill, by amending the clause "with the easements to your orator
10 therein mentioned and as above described," as set out in lines 3, 4, and 5 of fourth page original bill, as to read "with the easements to your orator therein referred to," and by omitting the balance of the clause, "and as above described."

It is further ordered, that this order shall be annexed to the original bill and considered as the bill amended, and that a certified copy of this order be served on the defendant, John Lee, or his solicitor, J. I. B. Reiley.

It is further ordered, that this rule be taken without
20 prejudice to the injunction and without costs.

ALEX. T. MCGILL, JR., C.

Respectfully advised.

JOHN T. BIRD,

V. C.

State of New Jersey, Warren county, ss.—I. W. Schultz, being duly sworn according to law, on his oath, that he served a copy of the within order on J. I. B. Reiley, the solicitor of John Lee, as within said order mentioned, by reading the same to him and by leaving
30 a copy with him in his office, on Main street, in Phillipsburg, N. J.; that said service was made on this third day of April, A. D. 1888.

I. W. SCHULTZ.

Sworn and subscribed before me, on this third day of April, 1888.

[L. s.]

P. F. BRAKELEY, JR.,
Notary Public.

Answer.

[Filed April 5, 1888.]

The answer of John Lee to the bill of complaint of Frank P. Hagerty, complainant.

This defendant in answer to the bill of complaint of the said complainant, or to so much or to such parts thereof as he is advised it is material and necessary for him to make answer to, answers and says, that he cannot tell whether the complainant is seized in fee simple of or is otherwise entitled unto the premises in his said bill 10 described, nor whether they were conveyed unto him by Morris Levy and wife by the deed described in the said bill of complaint, and this the defendant leaves the said complainant to make his proof of such title, if he be able so to do.

And this defendant further answers and says, that he has understood, and believes it to be true, that the said complainant did, together with Flora, his wife, convey, as by the said indenture is set forth in the said bill of complaint, to one Christopher S. Winters, certain lands 20 in the said deed of conveyance described, and which lands are correctly set forth in the said bill, except that in the third course it is described as running two hundred and twenty-one feet, more or less, to corner in the south edge of Union street, whereas it should have described it as being in the south edge of Main street.

And this defendant further answering saith, that the deed of the said Hagerty to the said Winters does contain substantially the reservation set forth in the said bill of complaint, but this defendant says that it is a reserva-30 tion made by the said grantor in his own behalf and is more strongly to be construed against the said grantor.

And this defendant further saith, that the lot so purchased by the said Winters was intended for a building lot, was located on the principal street of a thickly populated town, that the lot was bought with the express

purpose and intention of building and maintaining a dwelling house or houses, or other buildings thereon, and that the complainant knew perfectly well at the time he conveyed the land to the said Winters that the said Winters intended to put a dwelling house and other buildings thereon; and that the said Winters would be entitled to build up to the line established by the said deed between the said Winters' lot and the lot of the said complainant; and that the said reservation of the light and
10 air over said tract can only be construed to mean such light and air as might be left by the said Winters, or any one claiming under him, after such buildings as they desired to erect were erected, and that it could not be construed to mean the light and air over the whole tract, because if it did the land so purchased by the said Winters would be of no value whatever to him or any one holding under him.

This defendant further says, that in the reservation the said complainant makes no reservation of the actual
20 number of windows he should put in his building overlooking the tract above described, and under the said reservation any one building upon the lot of the said Winters, if he was restricted at all in leaving windows in the said building of the said complainant, he would not be required to leave more than two windows unobstructed in the said building, and that the said reservation does not give to the said complainant the right to put into his building as many windows as he shall or may see fit, nor does the said reservation in any wise
30 restrict the owner of the said Winters' tract from building upon said lot such building or buildings as he might see proper to erect upon it, and if need be, in the proper construction thereof, to shut up any windows which might be in any buildings erected by the said complainant.

And the defendant further says, that by the deed aforesaid it was expressly agreed that said Winters might build on the boundary line between the two lots for any distance he might see fit or choose, from the south edge
40 of Main street.

This defendant further saith, that the said Christopher S. Winters and wife did, by this deed of bargain and sale, convey to this defendant the lands above described in the deed of the said complainant to the said Winters with the correction made by this defendant. And this defendant begs leave to refer to said deed, if it be necessary so to do, and in said deed are the statements made, substantially as in the amended bill.

This defendant further saith, that he cannot tell whether for a distance of about eighty-two feet from the 10 south edge of Main street, on the east side of complainant's premises, it is built up solid by the premises of Sarah Hagerty, and that on that account it is impossible for the complainant to obtain light from that side or not; but even if it is, the defendant charges, that the complainant had full knowledge thereof and could have so built his building as to allow him all the light and air necessary for its full enjoyment to come in from that side thereof if he, the complainant, had seen fit to do so.

This defendant admits, that the said Winters, soon 20 after he purchased the said land, entered into the possession thereof, and that he erected a frame dwelling house, twenty-four feet deep, and near the boundary line from the south edge of Main street, on one-half of the foundation above referred to; but this defendant charges, that by the device of the said Hagerty the foundation was placed over on the land of the said Winters, now the land of this defendant, so that the building constructed by said Winters was entirely over on his said land, now the land of this defendant. 30

And the defendant further says, that he denies that said Winters, in erecting his dwelling house, respected and observed the alleged rights of said complainant as reserved in the deed referred to in the said bill of complaint, but that he, the said Winters, built his house without any regard to the alleged rights of the complainant and just as he desired and saw fit to do. And the defendant further says, that he admits that the complainant did erect, about the time stated in his bill of complaint, a brick and frame store-room and dwelling, 40

but this defendant denies that the complainant built the same wholly on his own land; and he denies also that he, the complainant, extended the foundation wall in the way and manner that he had a right to do, or that said deed gave to the complainant any right to extend the wall in the way and manner that he did extend it; and this defendant insists and charges, that said wall was extended and built in part or whole on the land of said Winters, now the land of this defendant, and denies that
10 the complainant had any right to so build said wall.

And this defendant further denies, that the right for the extension of the said wall, and the erection of the frame structure thereon, and the putting in of all the windows for light and air, was reserved in the deed of the said complainant and wife to said Winters. And this defendant further says, that he cannot say whether the said Winters knew what his rights were, and even if the said Winters did see the said building being erected, and knew that the said windows were being put in it, it
20 would not in any way impair or affect the legal rights or equitable rights of this defendant in the said premises.

This defendant further says, that he took possession of said premises at the time in said bill set forth, and that at about the time set forth in the said bill this defendant did begin the erection of an addition to his said building without notifying said complainant, as he had a right to do, because he was under no obligation to give said complainant any notice. And this defendant denies, that the building, or addition, mentioned in complainant's
30 bill, is to be a four-story structure. And this defendant denies, that the said building which he was attempting to construct when the injunction was served upon him, and which he contemplates completing when the said injunction shall be taken off, has or will interfere in any wise with the legal or equitable rights of the said complainant; and he further denies, that it will interfere with the free use of the air by the said complainant; and he further denies, that it will obstruct the light of the said complainant as contemplated in the reservation
40 in the said deed of conveyance of complainant to said

Winters; but on the contrary, this defendant charges, that the building now in course of construction by this defendant, when completed, will not in any wise interfere with the rights of the said complainant, but will allow him all the light and all the air which are legitimately reserved by the said deed, if any are reserved, which this defendant denies as against him.

This defendant charges, that he is erecting this addition entirely on his own land, and several inches inside of the boundary line between him and the said com-¹⁰plainant. And he further charges and sets forth, that the said addition is not placed on the ground, but is lifted up and placed on posts about ten feet above the ground, so as to allow a perfectly free circulation of air up to and by the complainant's buildings.

And the defendant further charges, that there are no less than nine windows in the building next to the building which this defendant is erecting; that in the basement and second story of said Hagerty's house there are no windows at all adjacent thereto, but in the third²⁰ and fourth stories there are windows, and that the building now being erected cuts out only two windows, one on the third and one on the fourth or top story, and still leaves windows or a window in each room sufficient to supply said room with an abundance of light and air. And this defendant charges, that the obstruction of the said two windows, each one in a different room, does not interfere in the least with the rights of the said complainant, and leaves to him all the windows which are necessary to furnish him with the light and air required³⁰ under the reservation in the said deed.

And this defendant further charges, that the reservation in the said deed does not authorize the said complainant to fill his house with windows, but only authorizes him, if it gives him any power at all, as against this defendant, which he denies, to place in his building so many windows as shall be actually necessary to furnish him with light and air for the said building.

And this defendant charges, that the windows which the said complainant had put therein are more than he⁴⁰

had any legal or equitable right to place there, and more than are necessary to furnish him with the light and air necessary for said building, and that the shutting up of the two windows are no interference whatever with the legal or equitable rights of the said complainant.

And this defendant says, that he never authorized any carpenter to make any declarations or statements for him, and denies that he knows anything about what Reuben Warner, or any other carpenter, may have said
10 in reference to said addition or building.

And this defendant further denies, that the construction of the said building or addition has or will damage the property of the said complainant, or that the building thereof will diminish the value of the complainant's property in any way whatever.

This defendant further saith, that the rights of the complainant and the defendant have never been suited in a court of law, and until they have been so suited, no injunction will stand in this court against this defend-
20 ant. And this defendant further says, that the said bill prays for no positive relief against this defendant, but only contains a prayer for process; and this defendant claims the same benefit against the said complainant as if he had demurred to the said bill of complaint; and this defendant denies, that there is any other matter or thing in said bill of complaint necessary for him to make answer unto, not herein and hereby well and sufficiently answered, traversed or denied, confessed or avoided, is true to the knowledge or belief of this defendant, and he
30 prays to be hence dismissed with his costs in this behalf most unjustly and unreasonably sustained.

J. I. BLAIR REILEY,
Solicitor, and
J. G. SHIPMAN & SON,
Of Counsel with Defendant.

State of New Jersey, county of Warren, ss.—John Lee, the defendant above named, being duly sworn, on his oath says, he has heard the above answer read; that the facts, matters and things therein stated, so far as they

relate to the acts and doings of this defendant, are true of his own knowledge, and so far as they relate to the acts and doings of other people, he believes them to be true; that all the matter stated in said answer, in reference to said building which he has erected, are true of his own knowledge, and that this defendant's building will only impair the light in two windows of complainant's house, one in a room in the third story and one in a room on the fourth story, and that there are still left a window in each of those rooms, which are sufficient to 10 give light and air therein, and that there are in the third and fourth stories of the said house of the complainant annexed to the building of this defendant some seven windows, large and airy, exclusive of the two which are obscured by the defendant's building, which is sufficient to give the complainant plenty of light and air from that side of the house; that complainant's house fronts on Main street, in Phillipsburg, and there are abundance of windows there, as well as in other parts of the building, and deponent says that he lifted up his erection ten feet 20 above the ground in order to give free circulation of air, and that said erection is absolutely necessary to carry on his business, which is that of a photographer, and that his statements in reference to the house being entirely on his own lands are true, and in reference to the common line between said properties.

JOHN LEE.

Sworn and subscribed before me, this fifth day of April, A. D. 1888.

JOSEPH H. WILSON, 30
Master in Chancery of New Jersey.

Answers of Reuben Warner and Jacob Apgar.

[Filed April 5, 1888.]

The answer of Reuben Warner and Jacob Apgar to the bill of complaint of Frank P. Hagerty, complainant.

These defendants, in answer to the bill of complaint of said complainant, or to such parts thereof as they are advised it is material and necessary for them to answer, say, that they are entirely ignorant of all the matters set forth in the bill of complaint, and have no interest what-
10 ever in said suit; they were simply workmen, employed by John Lee to put up said structure in the bill mentioned. That this defendant, Warner, has no particular recollection of making any declarations to complainant, and had no authority from said John Lee to make said declarations, and if he said what is charged in said bill he meant said building would be four stories in height, not that it would be a four-story building, for it will only be a three-story structure, as it is raised up ten feet from the ground on posts.

20 And these defendants know of no other matter which it is necessary for them to answer unto, and they pray to be hence dismissed with their costs in this behalf sustained.

J. I. BLAIR REILEY,
Solicitor, and
J. G. SHIPMAN & SON,
Of Counsel of Defendant.

New Jersey, Warren county, ss.—Reuben Warner and Jacob Apgar, being duly sworn, on their oaths say, they
30 are the defendants above named; that the facts, matters and things therein stated, so far as they relate to their acts and doings, are true, and so far as they relate to the acts and doings of other people they believe they are true.

REUBEN WARNER,
JACOB APGAR.

Sworn and subscribed before me, April 5, 1888.

JACOB S. STEWART,
M. C. C.

Order for Time to File Replication.

[Filed May 10, 1888.]

On good cause shown, and on motion of I. W. Schultz, solicitor of complainant, it is, on this seventh day of May, A. D. 1888, ordered, that the complainant have five days further time within which to file his replication, and that this order, as well the extension of time, be 10 taken without prejudice to the injunction.

ALEX. T. MCGILL, JR., C.

Replication.

[Filed May 10, 1888.]

The complainant joins issue on the several answers of the respective defendants.

I. W. SCHULTZ,
Sol. and of Counsel with Complainant.

Opinion.

[Filed October 8, 1888.]

20

A., who was the owner of a strip of land about fifty feet wide and two hundred and twenty feet deep, sold

the westerly half of that land to B. by a deed which contained the following reservation :

"Reserving the right to the free use of the light and air over the tract above described, in case he should build on the common line between the parties, and the right to put windows in said building overlooking the tract above described," &c.

He afterwards built upon the common line between the lands of B. and himself, and put in his building
10 several windows overlooking B.'s land. B. is about to erect a building on his land that will close two of A.'s windows and partially close two others. Held, that the reservation operates as a grant of a newly created easement, at least to light and air, from B.'s premises, and that if it had been made to appear that the interference with A.'s windows would result in his substantial loss of light and air, he would have been entitled to an injunction ; but as that condition of affairs does not appear, and as his right to maintain windows overlooking B.'s
20 land that are not necessary for light and air is unsettled at law, the injunction heretofore issued to restrain the erection of B.'s proposed building will be dissolved.

On motion to dissolve injunction.

The complainant, who was the owner of a strip of land fronting fifty feet on Main street, in the town of Phillipsburg, and running back southerly that width, two hundred and twenty feet to Union street, conveyed to Christopher S. Winters the westerly half of that land by deed, which in the language of the bill, contains the
30 following reservation :

"Reserving the right to the free use of the light and air over the tract above described in case he should build on the common line between the parties, and the right to put windows in said building, overlooking the tract above described. It being agreed between the parties hereto, that in case either party builds on the common line for a distance of twenty-four feet, more or

less, from the south edge of Union street, the line is to be in the middle of the foundation wall, at the option of the parties hereto, and that the expense of the wall and partition to the roof of the building shall be equally borne, share and share alike by each. The party of the first part reserving the right to continue the wall in the same way and manner as last above mentioned, but the erection thereof to be at his own expense, with the further right to use the whole wall."

Immediately after the delivery of this deed Winters¹⁰ proceeded to erect a frame dwelling twenty-four feet deep, using therein a party wall of the description contemplated.

In October, 1884, the complainant constructed a store and dwelling upon the land which remained to him, using therein a party wall and a continuation of it, extended by him southerly sixty-eight feet. In the extension he made windows overlooking Winters' land.

In June, 1886, Winters sold his property to the defendant, John Lee, by deed which contained the following²⁰ stipulation:

"It is expressly agreed by and between the parties hereto that the said party of the first part conveys these premises subject to the same reservation and limitation in regard to windows, as is recited in the same deed above referred to, made by the said Hagerty to the said Winters. And also it is agreed that the same conditions and agreement regarding the trenches and foundation walls, as recited in said deed, shall be binding upon the parties hereto, and the conditions and cove-³⁰nants in the said deed made by the said Hagerty to the said Winters, above referred to, in regard to windows, foundation wall, trenches and partitions, or other walls, are to be binding upon the parties hereto, the same as if the said conditions and covenants were herein set forth in the same words as contained in said deed."

On January 10th, 1888, without notice to the complainant, Lee commenced to build an addition to the house upon his land close to the complainant's building⁴⁰

in such manner as to completely shut out the light from two of the windows in the complainant's house, which overlooked Lee's land, and to partially obstruct the light from two other of those windows. On the next day, when the frame work was partly erected, the bill in this case was filed and an injunction was issued, which restrains the erection of the proposed addition in such manner as to obstruct the passage of light and air through the windows referred to.

- 10 The answer admits the allegations of the bill as to the deeds to Winters and Lee, claims that the proposed building will be so erected as not to obstruct the passage of air, admits that it will obstruct light as in the bill alleged, alleges that the complainant will have an abundance of light in the rooms from which the obstructed windows open through other windows; denies that the deeds, or either of them, give the complainant right to light and air from the defendant's premises, and insists that if those deeds do give that right, it must be limited
- 20 to a sufficiency.

Motion is now made to dissolve the injunction.

J. G. Shipman, for the motion.

I. W. Schultz, contra.

THE CHANCELLOR:—

- I think that the reservation, in deed from complainant to Winters, operated as a grant of an easement in the lands of Winter. In *Goddard on Easements*, 108, it is said: "An easement cannot strictly be made the subject, either of exception or reservation, in a deed of conveyance of land, for it is neither parcel of the land granted, which circumstance is requisite to enable a thing to be expected, nor does it issue out of the land, as it should, to render it capable of being the subject of a reservation. If, therefore, an easement be incorrectly reserved to a grantor of land, or excepted from the land conveyed, the reservation or exception operates as a grant of a newly created easement by the grantee of the land to the grantor."
- 30

Rosenkrans v. Snover, 4 C. E. Green, 420; *Cooper v. Lowenstein*, 10 Stewart, 284.

It seems to be free from question that the easement extends at least to be sufficiency of light and air from the defendant's premises, although the right of the complainant to maintain an unlimited and unnecessary number of windows may be doubtful; at all events, is unsettled.

In such a position of affairs I would have no hesitation in restraining any erection that would so deprive 10 the complainant of light and air as to render his occupation of his house decidedly uncomfortable. But he fails to show that he will suffer substantial privation of light or air by the threatened obstruction of the windows of his house. His bill alleges that two windows will be closed and that two other windows will be partially obstructed and darkened, but it does not state that thereby the passage of light and air to his house will be substantially hindered. The defendant, on the other hand, by his answer insists, that, although the obstruction will 20 shut up two windows, it will leave a window or windows in each room of complainant's house, through which an abundance of air and light may enter.

Taking the allegation of the answer as true, the proposed office of the injunction is to restrain the erection of a building that will obstruct unnecessary windows. The right to maintain such windows should be established at law before an injunction should issue.

Citizen's Coach Co. v. Camden Horse R. R. Co., 2 Stew., 299.. 30

I will order that the injunction be dissolved, with costs.

Order of Reference.

[Filed October 29, 1888.]

It is, on this twenty-ninth day of October, A. D. 1888, on motion of I. W. Schultz, solicitor of complainant, and in the presence of J. G. Shipman, of the firm of J. G. Shipman & Son, of counsel with the defendant, ordered, that the above stated cause be referred to John T. Bird, Esq., Vice Chancellor, and to report thereon to him, and advise what order or decree should be made therein.

10

ALEX. T. MCGILL, JR., C.

Notice.

[Filed November 14, 1888.]

Take notice, that I shall apply to his honor, John T. Bird, Vice Chancellor, (to whom the above stated cause has been referred to hear the same for the Chancellor, and to report thereon to the Chancellor, and advise what order or decree should be made therein, said order bearing date the twenty-ninth day of October, A. D. 1888, a copy of which order is hereto attached,) on Tuesday, the
20 twentieth day of November instant, at ten o'clock in the forenoon, or as soon as I can be heard thereon, at the State House, in the city of Trenton, to fix a time and place for a hearing in the above stated cause.

Dated Nov. 12, 1888.

Yours,

I. W. SCHULTZ,

Sol'r and of Counsel with Compl't.

To J. I. B. REILEY,

Sol'r of Deft., and to

30 J. G. SHIPMAN & SON,

Of Counsel with Deft.,

or to whom it may concern.

State of New Jersey, Warren county, ss.—I. W. Schultz, being sworn according to law, on his oath saith, that on the twelfth of November inst., he served a copy of within notice, with copy of order of reference thereto attached, on J. I. B. Reiley, solicitor of defendant, personally, and on the thirteenth day of November inst., he served a like copy of within notice, with copy of order of reference thereto attached, on George Shipman, Esq., of the firm of J. G. Shipman & Son, of counsel with defendant, John Lee. 10

I. W. SCHULTZ.

Sworn and subscribed before me, on this thirteenth day of November, 1888.

B. F. BRAKELEY, JR.,
Notary Public.

Order to Dissolve Injunction.

[Filed November 20, 1888.]

The defendant having filed his answer to the complainant's bill, and having given notice of a motion to dissolve the injunction granted in this cause, and the 20 matter having been heard before his honor, the Chancellor, at his Chambers, in Jersey City, on the seventh day of May, A. D. 1888, and a motion to dissolve having been argued by J. I. Blair Reiley and J. G. Shipman for the motion, and by I. W. Schultz, in opposition thereto, and the Chancellor having taken time to consider of the said matter, and now being of opinion that the injunction ought to be dissolved: It is, on this twenty-ninth day of October, A. D. 1888, ordered, by the Chancellor, that the said injunction be dissolved, with costs to be 30 paid by the complainant to the defendant. And the complainant having signified his intention to appeal, it is further ordered, that the stay of the injunction con-

tinue until the Court of Errors, or this court, shall otherwise direct; provided, however, that the said stay shall be void and for nothing holden if the said appeal shall not be taken on or before December 1st, 1888, by filing notice of appeal in the office of the clerk of this court, and duly serving a copy thereof.

ALEX. T. MCGILL, C.

Proof of Service and Notice of Appeal.

[Filed November 27, 1888.]

State of New Jersey, Warren county, ss.—I. W. Schultz,
10 being duly sworn, says, that on this twenty-eighth day of November, eighteen hundred and eighty-eight, at Phillipsburg, New Jersey, he served a notice, a copy of which is hereto annexed, on J. I. B. Reiley, the solicitor of John Lee, the defendant in this cause, by delivering the same to him personally, and leaving the same with him.

I. W. SCHULTZ.

Sworn and subscribed before me, on this thirtieth day of November, 1888.

20

B. C. FROST,

M. C. C.

Notice of appeal

The complainant hereby appeals from so much of the order made in this court, in the above stated cause, as declares "that the said injunction be dissolved, with costs to be paid by the complainant to the defendant," to the Court of Errors and Appeals in the last resort in all causes.

I. W. SCHULTZ,

Sol'r and of Counsel with Complainant.

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

I. W. SCHULTZ,
Of Counsel with Complainant.

A true copy.

ALLAN McDERMOTT,
Clerk.

Petition of Appeal.

[Filed December 29, 1888.]

COURT OF ERRORS AND APPEALS. 10

Frank P. Hagerty,	}	Petition, &c.
Appellant,		
and		
John Lee, et als.,		
Respondents.		

To the Honorable the Court of Errors and Appeals in the last resort of all causes:

The humble petition of Frank P. Hagerty, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Alexander T. McGill, Jr., Chancellor of New Jersey, bearing date the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and eighty-eight, wherein the said Frank P. Hagerty was complainant and the said John Lee and others were defendants, in this respect, to wit, that the said order adjudges that the said injunction (granted to your petitioner) be dissolved with costs to be paid by the complainant to the defendant. And your petitioner humbly appeals from that part of the order of the Chancellor which orders as

aforesaid, upon the ground that the same is erroneous. Your petitioner therefore prays, that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

I. W. SCHULTZ,
Solicitor for and of Counsel with Appellant.

Answer to Petition of Appeal.

10

[Filed January 28, 1889.]

The answer of the said appellees to the petition of appeal of the above named appellant.

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereto, nevertheless, say and admit, that a decree was, at the time mentioned in the said petition of appeal, made and entered in the Court of Chancery in the cause for that purpose in the said petition, as therein stated, but as to the substance
20 and form thereof these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe that the said decree is agreeable to equity and good conscience, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

JOHN I. BLAIR REILEY,
Solicitor of Respondents.
J. G. SHIPMAN & SON,
Of Counsel with Respondents.

WITNESSES AND APPEALS

It is further stated that the same is erroneous. It is further stated that the said order of the court is erroneous. It is further stated that the particularist aforesaid is erroneous. And that the said order is erroneous. And that the said order is erroneous.

W. SCHULTZ
Counsel with appeal

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

WITNESSES

THE DAY & NIGHT

OF THE

THE DAY & NIGHT

THE DAY & NIGHT

THE DAY & NIGHT

THE DAY & NIGHT

