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# New Jersey Court of Errors and Appeals

## AMENDED NOTICE OF APPEAL.

10

### IN CHANCERY OF NEW JERSEY

BETWEEN,

IRA D. EMERY,

Complainant,

and

JOHN HANSEN and HULDA S.

HANSEN,

Defendants.

64-533

On Bill, etc.

20

The defendants John Hansen and Hulda S. Hansen hereby appeal from the final decree made in the above entitled cause on June 27, 1929, by the Chancellor upon the advice of Vice-Chancellor Maja Leon Berry to the Court of Errors and Appeals in the last resort in all causes.

30

Dated, September 21, 1929.

QUINN, PARSONS & DOREMUS,  
Solicitors for and of counsel  
with defendants John Hansen  
and Hulda S. Hansen.

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

QUINN, PARSONS, DOREMUS,  
Of Counsel with Defendants.

40

*Petition of Appeal*

Service of the within is hereby acknowledged  
this 26th day of September, 1929.

APPLEGATE, STEVENS, FOSTER,  
LEONARD & REUSSILLE,

10

Solr. of Complainant.

**PETITION OF APPEAL.**

NEW JERSEY COURT OF ERRORS AND AP-  
PEALS

20 IRA D. EMERY,

Complainant-Appellee,

vs.

JOHN HANSEN and HULDA S.  
HANSEN,

Defendants-Appellants.

On Appeal  
from the  
Court of  
Chancery.

30 *To the Honorable the Court of Errors and Ap-  
peals in the Last Resort in all Causes:*

The petition of John Hansen and Hulda S. Han-  
sen, the Appellants in the above entitled cause,  
respectfully shows that:

1. Petitioners find themselves aggrieved by a  
final decree made in the Court of Chancery by his  
Honor Edwin Robert Walker, Chancellor of the  
40 State of New Jersey, bearing date June 27, 1929,

*Petition of Appeal*

in a certain cause in said Court of Chancery wherein the said Ira D. Emery was complainant and the said John Hansen and Hulda S. Hansen were defendants, in this respect, to wit: the said decree adjudges that the counterclaim filed by the defendants be dismissed and a decree of foreclosure be entered. 10

2. And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the counterclaim of the defendants was dismissed by said decree and in that said foreclosure was not stayed until the determination of the defendants' damages in a court of law. 20

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

QUINN, PARSONS & DOREMUS,  
Solicitors for and of Counsel  
with Appellant. 30

Service of the within Petition of Appeal is hereby acknowledged this 6th day of September, 1929.

APPLEGATE, STEVENS, FOSTER,  
LEONARD & REUSSILLE,  
Solicitors of Complainant. 40



**BILL OF COMPLAINT.**

(Filed July, 1927)

## IN CHANCERY OF NEW JERSEY

*To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:* 10

The complainant, Ira D. Emery, of the Borough of Rumson, in the County of Monmouth and State of New Jersey, respectfully shows that:

(1) On November 27, 1925, John Hansen and Hulda S. Hansen, being indebted to Ira D. Emery in the sum of Six Thousand One Hundred Dollars (\$6,100.00), executed to him a bond of that date to secure that sum, payable one year from the date when the principal sum shall have been reduced to Four Thousand Six Hundred Dollars (\$4,600.00) by the payment of installments hereinafter mentioned, with interest at the rate of six per cent per annum, payable half yearly from the date of the bond. 20

(2) To secure payment of the bond, said John Hansen and Hulda S. Hansen executed to said Ira D. Emery a mortgage of even date with the bond; and thereby conveyed to him, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the Clerk's Office of Monmouth County, in Book 755 of Mortgages, page 294 &c. 30

*Bill of Complaint*

(3) The mortgaged premises are described as follows:

10 BEGINNING at a point in the northeasterly line of the Oceanic Road, said point being distant twenty-seven feet southeasterly from the southeast corner of formerly the Mary M. Ward property; thence (1) north-easterly at right angles with the Oceanic Road, one hundred fifty feet to a point; thence (2) southeasterly, parallel with the Oceanic Road, thirty-seven feet to a point; thence (3) southwesterly, parallel with the first course, one hundred fifty feet to a point in the northeasterly line of the Oceanic Road; thence (4) northwesterly, along the northeasterly line of Oceanic Road, thirty seven feet, to the point or place of beginning.

20 (4) The said bond contained an agreement that if any installment of interest should remain unpaid for thirty (30) days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagor, his representatives or assigns, become immediately due. Said bond contained the further provision that the principal sum due was to be decreased every six months in the sum of One Hundred and Fifty Dollars (\$150.00), the first payment to begin on June 1, 1926.

30 (5) On June 1, 1926, the sum of One Hundred and Fifty Dollars (\$150.00) became due in accordance with the provisions of said bond, and no part thereof has yet been paid. Complainant has

40

*Bill of Complaint*

elected that the whole principal sum with all unpaid interest shall be now due.

(6) The said John Hansen and Hulda S. Hanson, or one of them, has always been in possession of the mortgaged premises. 10

(7) The whole amount of principal, with interest thereon from November 27, 1925, is due upon complainant's bond and mortgage.

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

(1) That John Hansen and Hulda S. Hanson, his wife, who are the defendants to this suit, may answer this bill of complaint and each statement therein made: 20

(2) That an account may be taken of the amount due on complainant's mortgage:

(3) That the defendants, or one of them, may be decreed to pay complainant the amount so found due, with interest and costs, by a short day, to be appointed by this Court; and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands: or 30

(4) That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainant the amount so found due on his mortgage, with interest and costs:

(5) That a writ of subpoena may issue, commanding said defendants to answer this bill of 40



*Answer and Counterclaim*

1. On November 27th, 1925, the complainant and his wife, by deed bearing that date, conveyed the premises described in the complaint, to the defendants.

2. Said deed was recorded in Book 1327 of 10  
Deeds, for Monmouth County, page 304, on November 28th, 1925.

3. As by reference to said deed will appear, complainant warranted said premises with full covenants and warranties, and more particularly warranted that he was the true and lawful and right owner of all and singular the above described land and premises, and every part and parcel thereof, and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, were not encumbered by any limitation or any encumbrance whatsoever, by which the title of the said party of the second part thereby made or intended to be made, can or may be changed, charged, altered or defeated in any way whatsoever, and also the complainant in said deed warranted that he had good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid; and did further warrantee that he would defend said lands and premises unto the defendants from all claims or demands of any person, and from all manner of encumbrances whatsoever. 20  
30

4. Upon the receiving of said deed, the defendants executed and delivered as part of the purchase price for said premises, bond and mortgage 40

*Answer and Counterclaim*

described in the bill of complaint. Thereafter the defendants discovered that said premises were not free and clear of encumbrance, but that over said premises existed a roadway or right-of-way, and that a portion of the dwelling house and the  
10 entire garage on said premises, as purchased by the defendants, are located within the right-of-way, the title of which is encumbered by the existence of said right-of-way.

5. At the time, namely, on November 27th, 1925, when defendants purchased the premises as part of the premises purchased there then existed on said premises a dwelling house and garage, the  
20 existence of which dwelling house and garage entered largely into the consideration of purchase price of said premises.

6. Thereafter, to wit, in June, 1926, defendants learned that said premises were subject to an encumbrance; a portion of the dwelling house was left in a right-of-way as hereinafter described, and that also the garage upon the premises sold to the defendants was left in the right-of-way. Said right-of-way is delineated upon a map filed  
30 in the Monmouth County Clerk's office on September 19th, 1901, Freehold, New Jersey, which map is entitled "Map of Waterway owned by Dr. Ehrick Parmly, Oceanic, N. J., George D. Cooper, C. E., August 30th, 1901."

7. Complainant's predecessor in title, Ehrick Parmly, had prior to November 27th, 1925, made conveyances of certain lands to various and divers parties, conveying lands to said parties with  
40 the right of using said waterway. The various

*Answer and Counterclaim*

parties to whom said Ehrick Parmly conveyed lands, and the deeds by which said conveyances were made, which deeds conveyed the right of using said waterway to the grantees, are as follows:

To Edward J. Bruce, deed recorded in Book 679 of Deeds page 279; To Teresa Cochrane, deed recorded in Book 694 of Deeds, page 89; To Benjamin F. Johnson, deed recorded in Book 714 of Deeds, page 84; to Clarence A. Ford, deed recorded in Book 722 of Deeds, page 223; to Caroline Snyder deed recorded in Book 719 of Deeds, page 229; to Mary A. Wengerter, deed recorded in Book 729 of Deeds, page 279; to Emma Elizabeth Pomphrey, deed recorded in Book 756 of Deeds, page 337; to Mary Boyce, deed recorded in Book 778 of Deeds, page 167. All of the above mentioned deeds and the books and pages referred to, are as they exist in the Monmouth County Clerk's Office.

8. Reference in this Counter-claim is made to said deeds as if they were more fully set out in this Counter-claim. Defendants specifically charge that said deeds gave to the respective grantees a right of use of said waterway, and referred to said waterway specifically designating it by title of the said map.

9. Defendants, upon discovering the existence of this right-of-way, by their solicitors notified the complainant on August 26th, 1926, and thereafter were in continual communication with the complainant, or his various solicitors.

*Answer and Counterclaim*

10 10. Thereafter, in October, 1926, complainant agreed with the defendants that he would obtain releases from all property owners interested in said easement or right-of-way, and would also obtain a vacation of said right-of-way by the Borough of Rumson.

11. Complainant has, notwithstanding the offers, continually refused, and still does refuse to perfect the title and clear off and avoid the encumbrance now a lien upon said premises.

20 12. By reason of the existence of said easement or right-of-way, and by reason of the encroachment of the dwelling house and the existence of the garage upon said right-of-way, the property of the defendants has greatly depreciated in value. Defendants more expressly charge that the existence of said right-of-way has rendered the house and lot valueless. The house is partially located upon said right-of-way, and there remains not sufficient land after the deduction of said right-of-way, to erect a house, or move the house, nor is there sufficient room for the garage.

30 13. Defendants further say and charge that they are unable to sell said premises and that said premises have no market value.

14. The premises covered by said right-of-way, which are a portion of the premises conveyed to the defendants, are more particularly described as follows:

40 BEGINNING at a point in the northeasterly line of the Oceanic Road, said point being distant

*Answer and Counterclaim*

twenty-seven feet southerly from the southeast corner of formerly the Mary M. Ward property, thence (1) northeasterly at right angles with the Oceanic Road, one hundred and fifty feet to a point; thence (2) southeasterly parallel with the Oceanic Road, twenty-three feet more or less to a point in the easterly side of said waterway; thence (3) Beginning again at the aforesaid beginning point, and running southeasterly along the northeasterly line of Oceanic Road, six feet to a point; thence (4) north forty-five degrees thirty minutes east one hundred and fifteen feet to a point; thence (5) north thirty-six degrees east be the distance what it may, to the ending point of the second course.

10

20

15. Defendants paid the sum of \$8600 for said premises, of which the sum of \$6100 was represented by said purchase money mortgage. Defendants have further expended considerable sums of money in the improvement of said premises.

16. Defendants charge that said property by reason of the existence of said easement, is of little value, and ask by way of counter-claim against said mortgage by reason of the warranties of said complainant, to be allowed as a credit upon said mortgage, the loss in value of said premises, by reason of the existence of said encumbrances, and charge the said premises have been depreciated and are depreciated by reason of the existence of said easement, in the sum of \$7000.

30

40

*Answer and Counterclaim*

Wherefore, defendants pray by way of counterclaim against the complainant—

1. That the validity of the said easement and the rights of the complainant and defendants under said easement, may be adjudicated by this court.
2. That this court may determine the value of said property with the existence of said easement.
3. That an allowance or reduction in the amount of said mortgage to the full amount of depreciation of said property, by reason of said easement, may be allowed.
- 20 4. That the defendants may have such further relief as this Honorable Court may grant in the premises.

And the defendants will ever pray, etc.

QUINN, PARSONS & DOREMUS,  
Solicitors for and  
of Counsel with defendants.



*Replication and Answer to Counterclaim*

(8) He denies the allegations contained in paragraph 8.

10 (9) He denies the allegations contained in paragraph 9, but admits that sometime subsequent to the execution of the said bond and mortgage by the defendants, they claimed a defect in the title of the premises which he had conveyed to them.

(10) He denies the allegations contained in paragraph 10.

20 (11) Of the allegations contained in paragraphs 11, 12, 13 and 14, he leaves defendants to their proof.

(12) Of the allegations contained in paragraph 15, he admits that the purchase price was \$8,600.00, and that the mortgage aforementioned is in the sum of \$6,100.00. Of the remaining allegations contained in said count, he has no knowledge.

(13) Of the allegations contained in paragraph 16 he leaves defendants to their proof.

30 14. The easement complained of by defendants as encumbering the premises purchased by them from complainant, has been abandoned.

40 (15) At the time of executing the conveyance aforementioned to defendants, complainant had no knowledge of the existence of the alleged right-of-way, but was of the belief that his title was perfect, and, therefore, of the opinion that the title which he conveyed to defendants was also free from any imperfections.

*Replication to Answer to Counterclaim*

(16) It appearing from the aforementioned counter-claim of defendants that they were likewise, at the time of said conveyance to them, unaware of any record imperfections in the title, complainant is ready and willing to cancel said purchase money mortgage upon defendants' reconveying to him the premises in question, and paying reasonable sum for their occupancy of the same, less the reasonable value of improvements made by defendants, should any there be. 10

APPLEGATE, STEVENS, FOSTER,  
LEONARD & REUSSILLE,

Solicitors for and  
of Counsel with Complainant. 20

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**REPLICATION TO ANSWER TO COUNTERCLAIM.**
**IN CHANCERY OF NEW JERSEY**

BETWEEN,

IRA D. EMERY,

Complainant,

and

JOHN HANSEN and HULDA S.

HANSEN,

Defendants.

30

On Bill, &c.

Defendants, John Hansen and Hulda S. Hansen join issue on the answer of complainant to the counterclaim of these defendants. 40

QUINN, PARSONS & DOREMUS,  
Attorneys of Defendants.



*Conclusions*

plainant to defendant, after describing the property which is subject to the mortgage, contained this clause.

“Together with the use in common with others of a passageway on the south side of within described premises from the main road to the water.” 10

The deed also contained the usual covenants of warranty and seisin and against encumbrances. In the deed by which complainant obtained title to this and adjoining lands this right-of-way is described as follows:

“Subject however to a right-of-way to the North Shrewsbury River granted by Ehrick Parmly and latterly by Dalton Parmly and Lillian E. Parmley to various parties who have as a rule purchased land or lots from the said Ehrick, Dalton and Lillian E. Parmly.” 20

Prior to the conveyance from the complainant to the defendant the complainant had erected a house and garage on the lands in question, both of which buildings encroached upon the driveway mentioned in the clause of the deed above quoted. It also appears that the driveway, which is alleged to have a width of 33 feet throughout its length, overlaps the defendant's lot about six feet at the front and gradually widens to over twenty feet at the rear. The result of this situation is that the width of the driveway where it abuts the defendants' lot varies in width from 27 feet in front to ten feet at its narrowest point. 30 40

*Conclusions*

This fact was not discovered by any of the parties until long after the conveyance was made and the mortgage given. At the time this conveyance was made both the complainant and the defendant understood that the passageway referred to in the deed was actually laid out to the northward of the buildings and a passageway in this location has actually been used by the defendants ever since the property was purchased by them and this without interruption or complaint from anyone. It was not until a considerable time after the date of the conveyance that the true location of the right-of-way was learned by the parties.

There is neither allegation nor proof of fraud in this transaction; nor is there any suit pending which challenges the right of the defendants to occupy the overlapping portion of the passageway, or to use the driveway in its present location; nor are these rights questioned in any way by anyone but the defendants themselves.

It has been uniformly held in this state that on the foreclosure of a purchase money mortgage, in the absence of fraud or actual or constructive eviction, the mortgagor will not be permitted to set up a breach of covenant of title or against encumbrances in abatement of the amount due, but will be left to his remedy at law by action on the covenant. See *Shannon v. Marselis*, 1 N. J. Eq. 426; *Van Wagoner v. McEwen*, 2 N. J. Eq. 412; *Glenn's Admr. v. Whipple*, 12 N. J. Eq. 50; *Hulfish v. O'Brien*, 20 N. J. Eq. 230; affirmed

*Conclusions*

22 N. J. Eq. 471; *Price's Excrs. v. Lawton*, 27 N. J. Eq. 325; affirmed 28 N. J. Eq. 274; *Frenche v. McConnell*, 38 Atl. Rep. 687 (E. & A.); *Ralke-witz v. Kara*, 89 N. J. Eq. 203 (E. & A.); *Haw-thorne v. Odenson*, 94 N. J. Eq. 588; *Mills v. Brunetto*, 6 N. J. Adv. Repts. 1814, 143 Atl. Rep. 832. The cases cited by counsel for the defend-ant, viz: *Kuhnen v. Parker*, 56 N. J. Eq. 286; *Peterson v. Reid*, 76 N. J. Eq. 377; and *Curtis Warner Corporation v. Thirkettle*, 134 Atl. Rep. 299, are not opposed to the doctrine of the cases above cited. The first two were on demurrer to answer alleging fraud. In the *Thirkettle* case fraud was both alleged and proved as it was in *Hawthorne v. Odenson*, *supra*, cited by both coun-  
sel. 10 20

In view of these decisions my course is plain. The complainant is entitled to a decree for the amount due on his mortgage and the counter-claim will be dismissed.

Decided May 21, 1929.

## FINAL DECREE.

## IN CHANCERY OF NEW JERSEY

	BETWEEN,		} On Bill, etc.
10	IRA D. EMERY,	Complainant,	
		and	
	JOHN HANSEN and HULDA S. HANSEN,	Defendants.	

20 This cause on a bill to foreclose a purchase money mortgage and on a counterclaim for abatement coming on to be heard in the presence of Lester C. Leonard of the firm of Applegate, Stevens, Foster, Leonard & Reussille, solicitors of the complainant, and Theodore D. Parsons of the firm of Quinn, Parsons & Doremus, solicitors of the defendants, and the court having taken proofs orally and having considered the arguments of counsel; and it appearing therefrom to the satisfaction of the court that the counterclaim filed by defendant should be dismissed;

30 And it further appearing to the satisfaction of the court that there is due to complainant for principal and interest upon his mortgage as of October 11th, 1928, the day of final hearing, the sum of Seven Thousand One Hundred Fifty-one Dollars and fourteen cents (\$7,151.14), together with costs; and that for that purpose sale should be made of the whole of the mortgaged premises,  
40 described as follows: All that certain lot, tract or parcel of land and premises, hereinafter par-

*Final Decree*

ticularly described, situate, lying and being in the Borough of Rumson, in the County of Monmouth and State of New Jersey, BEGINNING at a point in the northeasterly line of the Oceanic Road, said point being distant twenty-seven feet southeasterly from the southeast corner of formerly the Mary M. Ward property; thence (1) northeasterly at right angles with the Oceanic Road, one hundred fifty feet to a point; thence (2) southeasterly, parallel with the Oceanic Road thirty seven feet to a point; thence (3) southwesterly, parallel with the first course, one hundred fifty feet to a point in the northeasterly line of the Oceanic Road; thence (4) northwesterly, along the northeasterly line of Oceanic Road, thirty seven feet, to the point or place of beginning.

Intended to be the same land and premises conveyed to John Hansen and Hulda S. Hansen, his wife by Ira D. Emery and Mary A. Emery, his wife.

Together with the use in common with others of a passageway on the west side of within described premises from the main road to the water.

It is thereupon on this 27th day of June, 1929, ORDERED, ADJUDGED and DECREED, that the counterclaim of the defendant be and the same is hereby dismissed and that the mortgaged premises above described be sold, as aforesaid, to raise and satisfy the money due to the said complainant, that as to say the sum of Seven Thousand One Hundred Fifty-one Dollars and fourteen cents (\$7,151.14), together with lawful interest thereon, to be computed from October 11th,

*Final Decree*

1928, with the complainant's costs to be taxed, including a counsel fee of Two Hundred Fifty Dollars (\$250.00), which is hereby allowed to said complainant; and that a writ of *feri facias* issue for that purpose out of this court, directed to the Sheriff of the County of Monmouth, commanding him to make sale according to law of the part of said mortgaged premises hereinabove described, and that out of the money arising from said sale he pay to the complainant, or his solicitor, his said debt, interest and costs, and that in case more money shall be raised by said sale than shall be sufficient to answer said payment, that such surplus be brought into this court to abide the further order of this court, unless otherwise previously disposed of by this court, and that the Sheriff make return, without delay, of his proceedings by virtue of said writ.

And it is further ORDERED, ADJUDGED and DECREED that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of this decree.

And it is further ORDERED, ADJUDGED and DECREED that this decree shall be without prejudice to any rights of the defendants to bring an action at law upon the covenants of the deed by which they obtained title to the premises described herein from the complainant.

E. R. WALKER,

C.

Respectfully advised,  
Maja Leon Berry,  
V. C.

## TESTIMONY.

## IN CHANCERY OF NEW JERSEY

BETWEEN, IRA D. EMERY, <div style="text-align: right; padding-right: 20px;">Complainant,</div> and JOHN HANSEN and HULDA S. HANSEN, <div style="text-align: right; padding-right: 20px;">Defendants.</div>	}	On Bill, &c.	10
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Transcript of testimony taken in the above cause before Hon. Maja Leon Berry, Vice-Chancellor, at Chancery Chambers, Long Branch, New Jersey, on Thursday, the 11th day of October, A. D. 1928, at 10 o'clock A. M. 20

## Appearances:

Lester C. Leonard, Esq., of Applegate, Stevens, Foster, Leonard & Reussille, Esqs., representing the complainant.

Theodore D. Parsons, Esq., of Quinn, Parsons & Doremus, Esqs., representing the defendants. 30

Mr. Leonard: By consent I offer in evidence the bond and mortgage which are the subject of the bill of complaint filed herein, and ask them to be marked.

(Bond from John Hansen and Hulda S. Hansen, his wife, to Ira D. Emery, dated November 27th, 1925, amount \$6,100, marked Exhibit C-1.)

*Exhibits Offered in Evidence*

(Mortgage between John Hansen and Hulda Hansen, his wife, and Ira D. Emery, dated November 27th, 1925, marked Exhibit C-2.)

10 Mr. Leonard: It can be stipulated that neither the principal sum due upon the mortgage marked Exhibit C-2, nor any interest thereon has been paid, and that upon the mortgage there is due the principal sum therein named of \$6,100, together with interest from November 27th, 1925.

Mr. Parsons: Yes.

Mr. Leonard: We rest.

20 Mr. Parsons: If your Honor please, I offer in evidence and Mr. Leonard has already consented thereto, a map of the property belonging to John and Hulda Hansen, situate in the Borough of Rumson, New Jersey, delineating the house and garage and the lot of the defendants and also delineating upon the map a right of way to the river as per map of right of way owned by Dr. Ehrick Parmly, Oceanic, made by George D. Cooper, C. E., Red Bank, New Jersey, dated August 30th, 1901, filed in Freehold.

(Map marked Exhibit D-1.)

30 Mr. Parsons: Also I wish to offer in evidence transcripts, which by agreement of counsel, are to be taken in lieu of certified deeds.

Mr. Leonard: Are those the nine deeds referred to, in the bill?

Mr. Parsons: I think I am short one or two of them.

40 Mr. Leonard: I might say that we procured certified copies of the nine deeds mentioned in the complaint and as Mr. Parsons has not the

*Exhibits Offered in Evidence*

certified copies, I will be very glad to let him have ours. There are eight deeds referred to.

Mr. Parsons: All right.

The Court: Do I understand from this map that the house is built on a portion of the supposed right of way? 10

Mr. Parsons: Yes, sir; and also the garage.

The Court: The garage also. That right of way, or supposed right of way, is 27 feet—

Mr. Parsons: It is 27 feet from the outside right of way to Hansen's lot as shown in his deed.

The Court: Then the lot which he purchased and which the mortgage covered is the lot 37 by 150? 20

Mr. Parsons: That is correct. I offer in evidence deed from Ehrick Parmly to Edward J. Bruce, bearing date October 18th, 1901, and recorded in Book 679 of Deeds for Monmouth County, page 279.

(Deed marked Exhibit D-2.)

Mr. Parsons: I think your Honor perhaps would like to have me read the clause from the deed. The clause in the deed is: "together with a right of way to the North Shrewsbury River 30 on land of the party of the first part as located on map entitled 'Map of Waterway' made by George D. Cooper, filed September 16th, 1901, in the office of the Clerk of Monmouth County."

The Court: Where is that map? Have you that map?

Mr. Parsons: I have not. That is what I meant to state to your Honor, that that map there, Exhibit D-1, the right of way on that map 40 is a copy from the right of way on the map at

*Exhibits Offered in Evidence*

Freehold, made by Mr. Randolph. After making it at Freehold, he also physically surveyed the premises.

The Court: Let me ask you this: from whom did Hansen get title, from Emery?

10 Mr. Parsons: From Emery.

The Court: The Land & Loan Company owns property on the other side of this right of way now?

Mr. Parsons: Yes, sir.

The Court: Did they at the time of the conveyance to Hansen?

Mr. Parsons: I believe they did. I believe they have owned it five or six years.

20 The Court: Emery owned on one side of the right of way, and the Land & Loan Company on the other side?

Mr. Parsons: Yes.

The Court: Is this easement appurtenant to the land of the Land & Loan Company?

Mr. Parsons: I understand it is. So your Honor can obtain a view of the situation, this easement was made appurtenant to lots that are on the south side of the Oceanic Road, the lots  
30 that are away from the river and across the street from where Hansen lives. This deed to Bruce contains land on the south side of Oceanic Road.

I also offer in evidence deed from Ehrick Parmly to Theresa Cochrane, bearing date June 3rd, 1902, and recorded in Book 694 of Deeds of Monmouth County, page 89, which contains the same clause.

40 (Deed marked Exhibit D-3.)

*Exhibits Offered in Evidence*

Mr. Parsons: Also deed from Ehrick Parmly to Benjamin F. Johnson, dated July 11th, 1903, recorded in Book 714 of Deeds for Monmouth County, page 74, which contains the identical clause.

(Deed marked Exhibit D-4.)

10

Mr. Leonard: It is not quite identical. I don't know if it is a mistake in the Clerk's Office or not, but it does not refer to a map of 1901. There is no map of 1891, I believe. It is probably a topographical map.

Mr. Parsons: The statement in the deed to Johnson, Exhibit D-4, states that the map was made on August 30th, 1891, but otherwise it corresponds with the other clauses.

20

I also offer in evidence deed from Ehrick Parmly to Clarence A. Ford, made December 16th, 1903, recorded in Book 722 of Deeds for Monmouth County, page 223. This also contains the clause giving a right of way.

(Deed marked Exhibit D-5.)

Mr. Parsons: I offer also deed from Ehrick Parmly to Caroline Snyder, bearing date November 12th, 1903, and recorded in Book 719 of Deeds for Monmouth County at page 229. This contains the same error as the other deed and refers to a map made on August 30th, 1891, but otherwise gives the right of way.

30

(Deed marked Exhibit D-6.)

Mr. Parsons: Also deed from Ehrick Parmly to Mary A. Wengertner, bearing date April 20th, 1904, and recorded in Book 729 of Deeds for Monmouth County, page 279. This deed also contains the error that the map was made in 1891, but

40

*Exhibits Offered in Evidence*

otherwise contains the clause as to the right of way.

(Deed marked Exhibit D-7.)

10 Mr. Parsons: I also offer in evidence deed from Ehrick Parmly to Emma Elizabeth Pomphrey, bearing date April 14th, 1905, and recorded in Book 750 of Deeds for Monmouth County, page 337. This deed contains the clause as to the right of way, but also contains the error as to the map being made in August, 1891.

(Deed marked Exhibit D-8.)

20 Mr. Parsons: I also offer in evidence deed from Ehrick Parmly to Mary Boyce and Caroline Snyder, bearing date June 21st, 1906, and recorded in Book 778 of Deeds for Monmouth County, page 167. This contains the clause as to the right of way, but also contains the error as to the map being made in August, 1891.

(Deed marked Exhibit D-9.)

Mr. Parsons: I also offer in evidence map of property of the Estate of Ehrick Parmly, containing 296.81 acres made by George D. Cooper, C. E., of Red Bank, N. J., April 14th, 1908.

(Map marked Exhibit D-10.)

30 The Court: As I understand it, that map shows the lots which are the subject of these deeds which you have just offered in evidence, and that immediately in front of those lots lies the property of the defendants, in a sort of irregular-shaped piece designated on the map as 1.20 acres.

40 Mr. Parsons: If I may state to the Court as I understand it, the 1.20 acres were conveyed to the complainant who divided them up into two or three lots and sold one of the lots to the defend-

*Exhibits Offered in Evidence*

ant. The defendants only own a portion of the 1.20 acres.

I also offer in evidence the abstract of the deed from Dalton Parmly and Lillie E. Parmly, his wife, to Ira D. Emery, bearing date April 29th, 1925, and recorded in Book 1296 of Deeds for Monmouth County, page 164, describing that tract of land which has also been referred to on Exhibit D-10 as follows: "Which is the whole of that tract or parcel of land containing 1.20 acres, as described on the map entitled, 'A map of the Estate of Ehrick Parmly,' drawn by George D. Cooper, C. E., Red Bank, and filed at the County Clerk's Office at Freehold, February 10th, 1912, and designated as Map No. 8, subject, however, to a right of way to the North Shrewsbury River, granted by Ehrick Parmly and later by Dalton Parmly and Lillie E. Parmly to various parties who have as a rule purchased land or lots from the said Ehrick, Dalton and Lillie E. Parmly."

(Marked Exhibit D-11.)

Mr. Parsons: I offer in evidence the original deed from Ira D. Emery and Mary A. Emery, his wife, to John Hansen and Hulda S. Hansen, bearing date November 27th, 1925, and recorded in the Monmouth County Clerk's Office in Book 1327 of Deeds for said county on page 304.

(Deed marked Exhibit D-12.)

Mr. Parsons: This deed contains the following clause: "Together with the use in common with others of a passageway on the west side of within described premises from the main road to the water."

The Court: Is that the opposite side from which this right of way was?

*Ira D. Emery—Direct*  
*Percy A. Gaddis—Direct*

Mr. Parsons: No, on the same side. Your Honor will note that the map which has been offered in evidence and marked Exhibit D-1, as it gets down toward the northerly portion of this lot, there is a distance exactly 10 feet between the west line of the lot and the west line of the right of way.

The Court: This shows the distances very much shorter than it is on there (indicating). It doesn't show the distance as 10 feet.

Mr. Parsons: I calculated that by the rule. The deed, Exhibit D-12, is a full covenant and warranty deed with the usual covenants and encumbrances.

IRA D. EMERY, complainant, sworn for defendants.

Mr. Leonard: Mr. Parsons tells me that the only purpose in calling Mr. Emery is to have him admit that \$8,600 was a fair price for the premises in 1925. We will admit it.

The Court: All right, Mr. Emery, that is all.

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PERCY A. GADDIS, sworn for defendants.

Direct-examination by Mr. Parsons:

Q. Mr. Gaddis, where do you live? A. 45  
 40 Union Street, Red Bank, New Jersey.

*Percy A. Gaddis—Direct*

Q. How long have you lived there? A. For the past eight years, since 1920 when I bought the house.

Q. Where is your place of business? A. Jersey City, New Jersey, 562 Newark Avenue, the office I built in 1900. 10

Q. What is your business, Mr. Gaddis? A. My business is real estate and expert appraiser. I have been in business the past thirty-five years and specialized as appraiser and expert bearing on condemnations and easements, surface and sub-surface, and that sort of thing since the last twenty-five years.

Q. Mr. Gaddis, for whom have you done appraisal work? 20

Mr. Leonard: Mr. Gaddis' qualifications are admitted.

Q. Mr. Gaddis, in your line of appraisals, have you made appraisals of the effect of easements and rights of way across property? A. I have.

Q. Over what period of time? A. For the past twenty years.

Q. Have you made those appraisals for the Federal Government? A. Not as long ago as 30 that. My experience with them began in 1914.

Mr. Leonard: I admit all the qualifications.

Q. Mr. Gaddis, have you examined the property of John and Hulda Hansen at Rumson, New Jersey? A. I have.

Q. Have you also examined the map which has been offered in evidence and marked Exhibit D-1? 40  
A. I have a copy of it here.

*Percy A. Gaddis—Direct*

Q. And did you examine this map? A. I have.

Q. Have you a copy of that map before you?

A. I have.

Q. Bearing in mind the testimony of Mr. Emery that the fair value of this property in  
10 1925 was \$8,600, can you give us the amount of depreciation which that property suffered by reason of the existence of a right of way or easement across it?

Mr. Leonard: Isn't it in order that he be informed of the nature and extent of the right of way and show his familiarity with it before he becomes qualified to pass upon its detriment? I admitted his qualifications, but I didn't know with that admission went the admission that he was acquainted with this particular property and with this particular easement.  
20

The Court: Ask him then, Mr. Parsons.

By Mr. Parsons:

Q. Mr. Gaddis, are you acquainted with this particular property? A. I am.

Q. Have you personally examined the prop-  
30 erty? A. I have. I have been over the ground and in the building.

Q. Have you also examined the deed and the abstract of the deed showing reference to the right of way? A. I have.

Q. Have you also examined the map showing and delineating the right of way? A. I have.

Q. I now ask you, bearing in mind the state-  
40 ment of Mr. Emery that the fair value of the property was \$8,600 in the year 1925, what was

*Percy A. Gaddis—Cross*

the depreciation suffered by the property by reason of the existence of the right of way? A. \$7,930.

CROSS-EXAMINATION by Mr. Leonard:

Q. So in your judgment the house and lot is worth what at the present time? A. \$790—beg pardon, \$670. 10

Q. That is all the whole thing is worth? A. Yes, all the remainder is worth in the condition with that easement there.

Q. So for seven hundred and some odd dollars you would, of course, throw in the house, the house would be included in it? A. Part of the house would be. 20

Q. What did you propose to do, cut the house in half? A. It was not my business to make any proposition. I found the house encroaching over on another piece of property. Then I considered that the building could not be removed, altered or repaired in a practical manner to conform to the plot, and the salvage value would not exceed the cost of demolition.

Q. In other words, what Mr. Hansen paid \$8,600 for you now say is worth about \$700? A. \$30 less than that. 30

Q. \$670? A. Yes, sir.

By the Court:

Q. Just tell me how you arrived at that conclusion? A. I first formed a judgment as to the value of land in that location.

Q. What do you place the value of land at per foot on Oceanic Road? A. Thirty dollars. Then 40

*Percy A. Gaddis—Cross*

there being only 56 per cent of the land left, I took 56 per cent of that \$1,200, which is a trifle more than \$30 a front foot. I considered it had some advantage outside of a normal inside lot, having the advantage in the deed of a driveway there, a means of access outside of the road itself.

10 Q. What is the value you placed on the land?

A. \$30 a foot would show \$1,100, and in my judgment \$1,200 would have been a fair value of the land.

Q. That is less the easement, you mean? A. No; the land as was, the entire plot 37 by 150.

20 Q. What is it worth assuming that the easement is a valid and existing easement? A. I placed the same unit value per front foot on the average width of the lot, which would be 20 feet and 75 feet.

Q. That is how much? A. I took the base that I had allowed for the entire lot. There was 56 per cent of the lot left. I took 56 per cent of that figure, which is \$672.

30 Q. You place no value at all on anything except the lot? A. No, because the garage, there isn't room for a car, the garage could not be cut down and allow room for a car to go in in the way it is originally built. Neither could the house be moved or altered on that property.

40 Q. What I am trying to find out is the basis of your estimate of the value of this property subject to this easement at \$670. Now, you tell me that you base that on the value of the land at \$30 per front foot, is that correct? A. That is the basis of the land value of a plot in that

*Percy A. Gaddis—Cross*

location having the advantage of a driveway on the side.

Q. Now, you place no value whatever on the house? A. No, I do not. After the cutting, the way it would have to be cut, provided this is subject to an easement as you state, it would then leave the house with the bathroom cut off, cut through the kitchen and some other room so as not to make it a practical proposition to alter the house. 10

Q. Is there no salvage value to the house at all? A. Very, very little. It would cost—it is practically even with the cost of demolition which you would be put to to get it off.

Q. You examined the house, I presume? A. 20 I did.

Q. Tell me what kind of a house it is? A. It is a two-story, or at least it is a two-story house as the photograph will illustrate to your Honor, no finished rooms upstairs, with merely an attic, six rooms and bath with a cellar underneath, a cellar built of hollow tile cemented over on the outside.

Q. And of what construction is the house itself? A. Ordinary frame construction with studs, plastered on the inside and sheathed on the outside with rough sheathing and with unusually wide leather boards I believe 10 inches or 9½ inches or 10 inches, about 8½ exposed to the weather. 30

Q. Do you know anything about the cost of building it? A. No, I do not know. I could form my judgment on it.

Q. Are you familiar with the cost of building houses of that character? A. I am more familiar 40

*Percy A. Gaddis—Cross*

with the market value of the entire property, land and building. That is the way I usually sell. I have had some experience in building.

10 Q. I am trying to find out just what the value of this property is, I mean the building, now, exclusive of the land, irrespective of any easements or anything of that kind. If you can give me an estimate of the value of the property, what it would cost to build it, I should like to know. A. I haven't attempted to analyze in my best judgment the \$8,600 which was the consideration paid as the result of the meeting of the minds of a willing buyer and a willing seller. If I divided that, the land I would put at \$1,200, the building  
20 or house at \$6,800 and the garage at \$600.

Q. On what do you base the estimate of the value of the house, merely the price at which it was sold, deducting the price of the land? A. That was the way I had analyzed it.

Q. Do you think that is a fair method of arriving at the valuation of a property and a building? A. I do, as we have two well settled established figures, that is, I presume the \$1,200 for the land. There is no question about the \$8,  
30 600. Of course, the difference meant the addition of the improvement to the land.

Q. You don't think the cost of building had anything to do with the value, merely the selling price? A. They usually do. If you ask my opinion there, I think the cost of construction would be a trifle lower, perhaps ten to fifteen per cent.

Q. I asked you a while ago what it would cost  
40 to construct such a house. I ask you again. A. In the neighborhood of \$6,000, in my judgment to construct that house.

*Percy A. Gaddis—Cross*

Q. And the garage? A. Around \$500, between four and five hundred.

Q. And now, assume—which presumption may be altogether unjustified, but for the sake of argument, assume that that house and garage were moved to another lot in the immediate vicinity, what would the house and garage be worth for the purpose of removal to another lot? A. That would depend entirely upon the lot and the facilities you could get. If you moved it to a lot of the same width, that is, 37 feet, and put it on it, it would have pretty near or very close the market value of the property at the present time, assuming there was no easement there and the garage would be worthless.

Q. You mean the garage could not be moved? A. No, I don't mean that. I do mean to move it to a 37-foot lot the same size as this, to put it on the same size lot you could not get access to the rear, as the building is 35 feet and 6 inches wide over-all on a 37-foot lot.

Q. Let us assume we put it on a lot large enough to use them. A. If the locality were comparable and the man is still satisfied with it.

Q. I am not interested at all with what a man may be satisfied with. I am asking you what this house and garage are worth if moved on a suitable lot? A. Very close to their present value, in the neighborhood of \$6,500.

Q. And what would it cost to move it, if you know? A. I don't know. I am not in touch with the moving people.

Mr. Parsons: I have a house-mover here, your Honor.

The Court: That is all.

*Oliver G. Frake—Direct*

OLIVER G. FRAKE, sworn for defendants.

Direct-examination by Mr. Parsons:

Q. Mr. Frake, you live at Red Bank, New Jersey? A. Yes, sir.

10 Q. You are a member of the firm of Earling, Johnson & Frake Company? A. Yes, sir.

Q. What is the business of that firm? A. Contracting and building.

Q. How long have you been engaged in this business as contractor and builder?

Mr. Leonard: Qualifications admitted.

Q. Have you examined the house of John Hansen at Rumson, New Jersey? A. I have.

20 Q. Will you describe the house? A. The house has six rooms on the first floor. There is no room finished—there is a half story on the second floor, just a floor laid. There is a sun parlor enclosed on the front.

Q. I show you, Mr. Frake, a photograph, and ask you if that represents the house of Mr. Hansen? A. Yes, the rear of it. It shows the front part of the garage and the rear of the house.

30 Mr. Parsons: I offer this photograph in evidence.

(Photograph marked Exhibit D-13.)

By Mr. Parsons:

Q. I show you another picture and ask you if that represents the garage? A. Yes, sir; it does.

Mr. Parsons: I offer that in evidence.  
(Photograph marked Exhibit D-14.)

*Oliver G. Frake—Cross*

Q. I show you another picture and ask you if that represents the front of the house? A. It does; yes, sir.

Mr. Parsons: I offer that in evidence.  
(Photograph marked Exhibit D-15.) 10

Q. Mr. Frake, directing your attention to the dwelling house, can you tell us the value of that dwelling house separated from its foundation and moved from this lot ready to be placed in another lot; in other words, irrespective of the cost of moving it or separating it from its foundations, can you tell me the value of that house ready to be placed upon another lot? A. Why, I should consider the value, in my judgment, to be 20  
\$1,000.

Q. Did you also examine the garage? A. I did.

Q. Can you tell us the value of the garage?  
A. In the same condition as the house would be?

Q. Yes. A. Well, \$100.

CROSS-EXAMINATION by Mr. Leonard:

Q. I understand, Mr. Frake, that by the mere lifting of the house from its present foundation 30  
it becomes worth \$1,000? A. I understood the expense of lifting it up and taking it off the present lot.

Q. It would cost more to take it off the present lot than to merely lift it off the foundation? A. Yes.

Q. Did I understand you to say that by lifting the house off its present foundation, the house would thus become worth \$1,000? A. I would be 40

*Oliver G. Frake—Cross*

willing to give \$1,000. I consider that is what, in my judgment, it is worth.

Q. Your judgment is guided solely by what you would give for it? A. Yes.

10 Mr. Leonard: That is all.

By the Court:

Q. Do I understand you to mean that by lifting this house off its foundations preparatory to moving it, that then at that time in that condition, this building is worth \$1,000; is that correct? A. Yes.

20 Q. How do you arrive at that valuation? A. In my judgment of what that building would cost to put it on a lot and to repair it after being moved, making your repairs on it. You have various things to repair where they get damaged.

Q. Now, what do you estimate to be the cost of repairing it after you have moved it? A. That would all depend on who is going to move it.

Q. Assuming that it is moved by a competent mover—there are such people, are there not? A. Yes.

30 Q. Let us assume that it is moved by a competent mover, what would be the cost of the repairs which could reasonably be necessary after the house was moved? A. Outside of putting it on the foundation, just the damage to the building?

Q. Yes. A. I would say \$500 would cover the cost of repairs due to moving it.

40 Q. What would the house cost to build? A. I figured that at about \$6,600, the cost of building the house as it stands there in the present position.

*Oliver G. Frake—Cross*

Q. Assuming you spent \$500 on the repairs to the house, the house in its new location would be worth \$6,600? A. Yes, it would, all completed the same as the way it was.

Q. Why did you say it is worth only \$1,000 the moment it is lifted? A. Because as soon as you start to lift the building, the value is not there. It depreciates. You have got to put a foundation under it after that. You have got to dig a cellar. 10

Q. Of course you have. That all goes into the cost of moving, doesn't it, from one lot to another? A. The foundation and all?

Q. Yes. Do you know anything about the cost of moving? A. I do not.

Q. What would it cost to dig a cellar and build a foundation to put this house on, a foundation and cellar similar to where it is now? A. I should say, in my judgment, around twelve or fourteen hundred dollars. 20

Q. Then you estimate that there would be \$500 worth of repairs on the house in addition? A. Yes.

Q. That would be seventeen to nineteen hundred dollars that would be charged up against the house in putting it on another lot? A. Yes. 30

Q. That is exclusive of the actual moving? A. Yes, sir.

Q. The expense of moving, I presume, would depend largely on the distance that it was moved?

A. It would, yes.

The Court: All right.

*William D. Layton—Direct*

WILLIAM D. LAYTON, sworn for defendants.

Direct-examination by Mr. Parsons:

10 Q. Mr. Layton, you live at Shrewsbury, New Jersey? A. Yes, sir.

Q. You are employed by S. S. Thompson & Company? A. Yes, sir.

Q. In what capacity are you employed by S. S. Thompson & Company? A. House moving.

Q. How long have you been engaged as a house mover? A. I have been in charge eleven years.

20 Q. Have you examined the property of John Hansen at Rumson, New Jersey? A. I have.

Q. Can you tell us the reasonable cost of moving that house just from the lot without picking out another lot first?

Mr. Leonard: May I ask him a question?

Mr. Parsons: Certainly.

By Mr. Leonard:

30 Q. You work for S. S. Thompson & Company? A. Yes.

Q. Now, the bids that S. S. Thompson & Company gives for moving, do you prepare them? A. Yes, sir.

Q. Does not Mr. Thompson assist? A. Sometimes.

Q. He O. K's every one, doesn't he? A. He signs them.

Q. And he goes over them? A. Not always.

40 Q. Have you ever given an estimate yourself without your figures being supervised? A. I have.

*William D. Layton—Direct*

Q. That estimate was adopted by the company?

A. The estimates were all signed by the company.

Q. Your estimate went out in the name of the company? A. Yes.

Q. Does that occur very often? A. What occur 10  
very often?

Q. In other words, you are not the chief figurer in the company on moving, are you? A. Yes, sir; I am.

Q. You are? A. Yes, sir.

By Mr. Parsons:

Q. Mr. Layton, I now ask you the question I asked you before: What would be the fair cost 20  
of moving that house just from the lot? A. Just off the lot, you mean?

Q. Yes. A. \$800.

Q. Directing your attention to the garage, what would be the fair cost of moving that, just off the lot? A. \$100.

Q. Now, Mr. Layton, you know the locality there, do you not? A. I do, yes, sir.

Q. You know Parmly Park is across the road? 30  
A. Yes.

Q. Can you tell us the reasonable cost of moving this house to a foundation situated in a lot in Parmly Park as near as possible to the present location? A. Is that figuring for furnishing the foundation?

Q. No. Just setting it out on a foundation furnished to you. A. And the garage included?

Q. Yes, we will include the garage also? A. 40  
About \$1,500.

*William D. Layton—Cross*  
*Newton Doremus—Direct*

CROSS-EXAMINATION by Mr. Leonard:

Q. In your estimate of \$800 you have in mind merely severing the house from its present foundation, or moving it from its foundation? A.  
 10 Loading and moving from the present lot.

Q. That is in your estimate of \$800? A. Yes, sir.

By the Court:

Q. When you say "loading," what do you mean, just the jacking up and putting it on the skids? A. Yes.

Q. Ready for rollers? A. Sliding. You slide  
 20 all houses.

Q. You slide them on rollers, don't you? A. No, sir; we slide them on timbers. Houses are skidded nowadays instead of rolled.

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NEWTON DOREMUS, sworn for the defendants.

30 Direct-examination by Mr. Parsons:

Q. Mr. Doremus, you live at Red Bank, New Jersey? A. Yes, sir.

Q. You are president of the Land & Loan Company? A. Yes, sir.

Q. Your business is what? A. Real estate.

Q. How long have you been engaged in the real estate business?

40 Mr. Leonard: His qualifications as a real estate expert are admitted.

*Newton Doremus—Direct*

Q. Mr. Doremus, have you examined the house of John Hansen at Rumson, New Jersey? A. I have.

Q. Directing your attention to that house, what was the fair value of that house in 1925, at the present time keeping out from your estimate anything about a right of way or easement? A. Considering a lot 37 by 150? 10

Q. That is the lot, yes. A. The house and lot, the building and the lot?

Q. Yes. A. \$7,110.

Q. You have examined the map made by Mr. Randolph showing the easement? A. I have.

Q. Taking into consideration that there is an easement existing on the premises and directing your attention to the map showing the location of that easement, how much, in your opinion, was the Hansen property depreciated by the existence of that easement? 20

Mr. Leonard: I object. Of course, the existence has not been shown yet.

The Court: He is just assuming the existence of the easement.

A. The difference between what it is worth on this condition of the easement and the difference between the full lot, 37 by 150, the damage you mean, the difference between the two? 30

Q. Yes. A. \$6,510.

By the Court:

Q. You mean it is worth \$6,510 less with the easement than it would be without the easement?

A. It is worth \$6,510 without the easement. 40

*Newton Doremus—Direct*

Q. Without the easement. I thought you said it was worth \$7,110 a minute ago, or \$7,100? A. \$7,110.

Q. Now, that is with a full-sized lot, the house as it stood, the house and the garage as they  
10 stood in 1925, are they worth \$7,110? A. To my judgment.

Q. Assuming that there is an easement there as shown by this map, what do you think the property is worth? A. What do I think it is worth?

Q. With the easement? A. Why, \$1,110.

Q. How do you arrive at that figure? A. Well, I value the buildings at \$500.

20 Q. And how do you arrive at that valuation? A. They would have to be removed; that is my judgment.

Q. I know, but there must be some process by which you arrive at that conclusion as to the value. What I want to know is what that process is. A. That is what I would want to give for them if I had to move them from the premises.

Q. Merely what you would give? A. Yes.

30 Q. It has no relation to what somebody else might be willing to give? A. No.

Q. When you said that this property was worth in 1925, \$7,110, that valuation did not take into consideration that fact that it was sold for \$8,600? A. No, sir.

Q. You figure that it was sold for more than it was worth, then? A. I do.

By Mr. Parsons:

40 Q. Mr. Doremus, have you on occasions yourself had buildings which had to be moved? A. Yes.

*Newton Doremus—Cross*

Q. Is your statement or estimate of the value of this building based upon the experience you gained in having a building which you had to have moved? A. Yes.

CROSS-EXAMINATION by Mr. Leonard: 10

Q. The Land & Title Company own land immediately to the west? A. Yes.

Q. To the Hansen property? A. Yes.

Q. What did it ask a front foot for that property in 1925? A. Mr. Leonard, the two properties, while they are on either side of this right of way in question, there is no comparison whatever.

Q. I don't believe you understood my question, Mr. Doremus. What did your company ask per front foot in 1925 for the property lying to the west of the Hansen property? A. These lots that you ask me about now are on the water. They have frontage on this road. 20

By the Court:

Q. We are not asking about that. He is asking what price you held them at per foot on Oceanic Avenue? A. The River Road going through Rumson? 30

Q. Whatever it is. A. I don't recall. I couldn't tell without looking at the maps.

Q. Was it more or less than \$30? A. More.

Q. How much more, approximately? A. Well, I can tell you better now what we are asking for it. It is about \$90 a foot on the water. We don't go by the frontage on the road at all. That is the reason I can't give you the price. 40

*Newton Doremus—Cross*

Q. Has there been an increase in the price since 1925? A. I don't know that there has.

Q. The price is \$90 fronting on the river instead of on the road? A. They are irregular shaped; they have a long frontage on the road  
10 and they go at an angle toward the river. This locality was different. It is such a different class of property, that there is no comparison whatever. That is the reason I didn't look up the cost of it in 1925.

By Mr. Leonard:

Q. To the left of the picture marked Exhibit D-13 appears part of the Land & Loan Company's  
20 property? A. To the right.

Q. To the right of the picture? A. Yes, taken from the rear of the lot.

Q. To the right of the picture? A. Yes, sir.

Q. When you fixed the value of the Hansen premises in 1925 at \$7,110, you figured merely on the lot 150 by 35 feet? A. Yes.

Q. You didn't take into consideration that with that lot went the right to use a right-of-way lying immediately to the west thereof, did you?  
30 A. I considered that location, that is, I considered \$30 a foot a liberal price with the right-of-way or not.

Q. Did you confine your consideration merely to a lot 37 feet by 100, or did you consider that there was an easement, a right-of-way to the river, lying immediately to the west thereof? A. Yes, used in common with others. It could not be used alone.

*Newton Doremus—Cross*

Q. You took into consideration that easement in fixing your valuation of \$7,100? A. No, I did not.

By the Court:

Q. Why didn't you? Didn't you consider the easement of any value to that lot, assuming there was 37 feet of that lot with a right-of-way to the river, doesn't that make the property worth any more? A. I presume it would. 10

Q. How much more? A. In use with others. You could not have exclusive use of it.

Q. Nobody has exclusive use of it, do they? They don't have the exclusive use of the street in front? A. It might be worth 25 per cent more. 20

Q. That would be \$37.50 a front foot instead of \$30, is that right? A. Yes, sir.

Mr. Leonard: That is all.

Mr. Parsons: If your Honor please, I gather from Mr. Leonard's objection that he felt that we had not proved the existence of the right-of-way in question when we offered the map in evidence. My understanding was it would have the same effect as representing the original map from Freehold. 30

Mr. Leonard: It was.

Mr. Parsons: We rest, then.

(Argument.)

The Court: Are you making a motion?

Mr. Leonard: No.

The Court: I am going to hear all the testimony and reserve the legal questions until the end. 40

*Ira D. Emery—Direct*

COMPLAINANT'S PROOFS IN ANSWER TO  
COUNTERCLAIM

10 IRA D. EMERY, recalled on behalf of complainant.

Direct-examination by Mr. Leonard:

Q. Mr. Emery, you are the complainant in this action? A. Yes, sir.

Q. And the holder of the bond and mortgage that is the subject of this foreclosure suit? A. Yes, sir.

20 Q. You purchased the premises, did you not, from Mr. Parmly? A. Yes, sir.

Q. Did you make your purchase from any map? A. Yes, sir.

Q. I show you what purports to be a map of property of Dalton Parmly, scale one-inch to thirty feet, made by George D. Cooper, C. E., May 9th, 1923, and ask you if that is the map from which you purchased? A. Yes, sir.

Mr. Leonard: The map is offered.

30 The Court: Does that map show this right-of-way that has been referred to?

Mr. Leonard: It shows the right-of-way lying to the west of the Hansen premises.

The Court: All right.

(Map marked Exhibit C-3.)

40 Mr. Leonard: Mr. Parsons, may it not be understood that certain pencil marks which appear on this map marked C-3 were made by me in preparing this case, and were not upon the blueprint?

*Ira D. Emery—Direct*

By Mr. Leonard:

Q. What was the condition of the entire property that you bought from Mr. Parmly when you bought it? A. Do you mean the shape it was in?

Q. Yes, with regard to the presence or absence of underbrush? A. It was terrible. You could not see under it. 10

By the Court:

Q. All covered by underbrush? A. Not all of it, sir; no, sir.

Q. That is what he is trying to find out. A. There is a ledge along there I can show you. This represents a bank along there (indicating) that was full of briers. At the time of purchase, you could not see this side of the property for briers; there were all kinds of briers along there. 20

Q. Between this ledge and the street it was clear, but the other side of the ledge it was all brush and brier? A. Yes, along that bank, see.

By Mr. Leonard:

Q. On this map marked Exhibit C-3, I direct your attention to a line over which appears the notation 27 feet, and also to the point upon the map where the figure 10 appears, and ask you to describe the condition with regard to the presence or absence of undergrowth on the area encompassed by those two figures. A. There was nothing in that line except sand burrs with a few small low briers. In the rear was full brush. 30

Q. In the rear, by referring to the rear, you mean what? A. To this figure and all that is back way down here (indicating). 40

*Ira D. Emery—Direct*

Q. Did you undertake to clear it up? A. Yes.

Q. Did anyone undertake to help you? A. My son and another gentleman that has passed away since I cleared it up.

10 Q. How long did it take you to clear it up?

Mr. Parsons: I object as immaterial.

A. We were working there all summer.

The Court: I do not see what materiality it has.

(Argument.)

20 The Court: The situation seems to be that this man bought according to one map and other people bought according to another one.

By Mr. Leonard:

Q. Did you complete the clearing of the land before you sold to Hansen, or afterwards? A. Before.

30 Q. Will you point out on this map marked Exhibit C-3 the area described in your deed to Mr. Hansen, the defendant? A. I took this property; I started at that point (indicating). I found some surveyor's stake to guide me. I worked from that map originally. Those pencil marks were mine, I guess I laid my property off 37 feet.

Q. I referred, when I mentioned pencil marks, to those in there (indicating). Are they yours? A. No. There are some here (indicating).

Q. I am not asking about those. You prolonged the line at a 90-degree angle? A. Yes.

40 Q. Directing your attention to the northwesterly line, at the time you sold it to him, what was

*Ira D. Emery—Direct*

to the west of that line, with reference to the condition of the soil? A. This 37 feet.

Q. With reference to the condition of the soil. A. Well, the soil—I did not disturb the soil because there was quite a knoll there.

Q. You haven't graded the property? A. Not that right-of-way; no, sir. The other part I did. 10

The Court: In order that I may not overlook the fact when I come to consider this testimony, let it appear on the record now from an inspection of the maps which have been offered in evidence and also an inspection of what counsel say is a tracing of the Cooper map of 1901 referred to in the deed as showing the right-of-way, that the triangular piece of property later purchased by Mr. Emery appears to have had a frontage on Oceanic Road of 355 feet from a point at an angle in Oceanic Road to the easterly side of the right-of-way in question. The map Exhibit D-10, which is the map of the property of the Estate of Ehrick Parmly by Cooper, April 14th, 1908, shows the triangular strip, triangular plot, of 1.21 acres as having a frontage of 355 feet on Oceanic Road the same as the tracing to which I have just referred. The right-of-way as indicated on the tracing is not shown on this map, but the line bounding the west side of this triangular lot shows distances of 115.65 feet corresponding to the distances shown on the westerly side of the right of way as shown on the tracing to which I have referred. 20 30 40

*Ira D. Emery—Direct*

10 This indicates a clear discrepancy between the two maps, because if the westerly line of the right-of-way there measured on an angle shows it to be 115.65 feet, then there could not be 355 feet along Oceanic Road between the angle at the point of measurement and this right-of-way as shown. Either the distance on Oceanic Road as shown on this map is incorrect, or the boundary line as shown on the westerly side of this triangular plot is misplaced on this map. The same situation is shown on the other map, Exhibit D-1. The same is perfectly clear on the tracing of the 1901 map that the easterly line of the proposed right-of-way was intended to have been placed 355 feet westerly from the angle in Oceanic Road, that angle being just to the eastward of the brook.

20 Mr. Parsons: I offer this map of the right-of-way in evidence, subject to the checking of the map and explanation by Mr. Randolph or Mr. Cooper, Civil Engineers, either one of them.

30 (Tracing marked Exhibit D-16.)

Q. When you bought this property from Parmly, did you make a search? A. Yes, sir.

Q. Do you know if Mr. Hansen since your conveyance to him has been using the right-of-way to the west of his premises to which you refer in your deed to him? A. I do not.

40 Mr. Parsons: Mr. Doremus, if your Honor please, has just scaled this out of

*Ira D. Emery—Cross*

the tracing. By scaling it is evident that 355 feet is intended to run over to this point by the scale (indicating).

The Court: I do not think that is a fair interpretation of the map. There is thirty-three feet width from one side of the right-of-way to the other. 10

## CROSS-EXAMINATION by Mr. Parsons:

Q. Mr. Emery, when you purchased this property you obtained a deed from Mr. Parmly, did you? A. Yes, sir.

Q. And did you read that deed you received from Mr. Parmly? A. I did. 20

Mr. Leonard: He is bound by it, anyway.

Q. Did you find there was in the deed a mention made of subject to a right-of-way? A. Yes, sir.

Q. You started to build Mr. Hansen's house, did you not? A. After I made the deal; yes, sir.

Q. When you started building the house, did Mr. Johnson come up and speak to you about the right-of-way? Did you have any conversation with Mr. Johnson about the right-of-way when you were building the house? A. Yes. 30

Q. What conversation did you have? A. Mr. Johnson came over here and talked with me about my improvements, I had already built two houses when I started Mr. Hansen's. He spoke of the right-of-way. He said there is a right-of-way.

Q. At that time when you were building, did he mention to you about the right-of-way? A. He said there was a right-of-way, yes. 40

*Ira D. Emery—Cross*

Q. Didn't he question your right to build at that point? A. No, sir.

Q. Did you know a man named Earl? A. Dead and gone, yes.

10 Q. You have lived at Rumson for how long, Mr. Emery? A. Forty years.

Q. Did not Mr. Earl at his own expense make a survey?

Mr. Leonard: We are getting into a different realm.

The Court: This is cross-examination.

20 Q. Mr. Emery, did not Mr. Earl during his lifetime make a survey of that right-of-way? A. I know nothing about it.

Q. Did you have any talk with Mr. Johnson about that? A. No, sir.

Q. Isn't it true that Mr. Pomphrey used that right-of-way for a horse and wagon prior to the time that you went in there? A. I can't answer that.

Q. You lived at Rumson, didn't you? A. Yes.

30 Q. Didn't you know that he did? A. I know he couldn't, not all the way through.

Q. Not down to the river? A. No, sir.

Q. At the time, Mr. Emery, of this title closing, or immediately before the title closing, didn't Mr. Higginson mention to you about the existence of this right-of-way? A. No, sir.

Q. Didn't he take it up with you? A. No, sir.

Q. Didn't you say that you could fix matters satisfactorily? A. No, sir.

40 Q. Did you not, after Mr. Higginson had mentioned to you about this right-of-way say that

*Ira D. Emery—Re-direct*

you had known about it? A. Only about the present one.

Q. What one? A. The present one that is there.

Q. About the right-of-way that is part of the—  
A. Yes. 10

Q. Did you make any endeavor, Mr. Emery, when you read your deed over from Mr. Parmly to check over on that right-of-way? A. I did not; no, sir.

Q. You had no search made at all? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. Leonard:

Q. You said that you bought from this map (indicating) marked Exhibit C-3? A. Yes, sir. 20

(Recess to 2 o'clock P. M.)

Afternoon Session, 2 P. M.

Mr. Parsons: Your Honor, I have just heard from Mr. Randolph. The doctor called up to say that his wife and baby had been in a rather severe automobile accident, and that they are taking them down to the hospital, so he could not possibly get here this afternoon. I wanted him to go over this matter and explain it to you. 30

The Court: We might take his testimony later if it is needed.

*Andrew R. Coleman—Direct*

ANDREW R. COLEMAN, sworn for complainant, testified as follows:

Direct-examination by Mr. Leonard:

10 Q. Mr. Coleman, you are a photographer? A. Yes, sir.

Q. You have a studio at Red Bank? A. Red Bank.

Q. And you took the pictures marked Exhibits D-13, D-14 and D-15? A. Yes, sir.

Q. I show you a fourth photograph and ask you if you took that? A. Yes, sir.

20 Q. At the same time that you took the other three? A. At the same time; yes, sir.

Q. And it is a picture of the same locality? A. The same locality, yes.

Q. And it truly represents the conditions as they were when you took that photograph a couple of days ago? A. Yes, sir. What is that?

Q. The picture truly represents the conditions as they were when you took that picture two or three days ago? A. Yes.

30 Mr. Leonard: I offer the photograph in evidence.

(Marked Exhibit C-4.)

By Mr. Parsons:

Q. Mr. Coleman, do you know what the conditions were in 1925? A. Oh, no; I don't know anything about it.

40 Mr. Leonard: It was not offered for that purpose.

*John Hansen—Direct*

By Mr. Leonard:

Q. Before you took the picture marked Exhibit D-15, did you make any measurements? A. Yes, sir.

Q. Can you indicate on that photograph what measurements you took? A. I took a measurement from a monument. 10

Mr. Leonard: Pointing to the extreme left of the photograph.

A. (Continued) I took a picture from a point on the extreme left of the picture where the monument stood to a spot near the other side of the picture marked by a handkerchief.

Q. What did you find that distance to be? A. 20  
27 feet.

Mr. Parsons: That is all. No cross-examination.

JOHN HANSEN, sworn on behalf of complainant, testifies as follows:

30

Direct-examination by Mr. Leonard:

Q. Mr. Hansen, you are the defendant in this action, are you not? A. Yes, sir.

Q. When you purchased the property in question from Mr. Emery in 1925, had any grass been sown? A. No, sir.

Q. Any grass that now appears on the property, you put there? A. Yes. 40

*John Hansen—Direct*

Q. I show you Exhibit D-15 and ask you if you can point out on that photograph the westerly line of your property? A. As it is or should have been?

10 Q. As it was and is according to the deed.

Mr. Parsons: Make an X on there.  
(Witness marks an X.)

Q. You point to an X on the photograph as what you consider to be your westerly line? A. Yes.

Q. Now, beyond that westerly line I call your attention to a driveway that appears on the picture. Do you see it? A. Yes, sir.

20 Q. There are cinders on that driveway, are there not? A. Yes.

Q. Who put the cinders on there? A. I did.

Q. You use that driveway to get to your garage? A. I do.

Q. Looking at the photograph and a bit to the rear of your property, you will notice a see-saw? A. Yes.

Q. Is that on your property? A. No, sir.

30 Q. And to the rear of that see-saw is a swing. Do you see that? A. Yes.

Q. Is that on your property? A. No, sir.

Q. Is the see-saw yours? A. Yes.

Q. And the swing, is that yours? A. Yes, sir.

Q. Now, to the left of the picture you will notice a dog house? A. Yes, sir.

Q. Is the dog house yours? A. Yes, sir.

Q. Is the dog house on your property? A. No, sir.

40 Q. Do you keep a dog in the dog house? A. Off and on.

*John Hansen—Direct*

Q. I show you a picture marked Exhibit D-14 which shows a dog and ask you if that dog is yours? A. Yes, sir.

Q. At times you keep the dog chained? A. Yes.

Q. To the dog house? A. Yes. 10

Q. The dog house, the see-saw and the swing are on what you consider to be part of the right-of-way? A. Yes, sir.

Q. How long have you used what you know to be a part of the right-of-way for those purposes? A. Since the time I moved in. I moved in say the 1st of December, 1925.

Q. In other words, you use part of the right-of-way as a sort of play yard? A. In the back, off the garage, yes. 20

Q. You have stored cement blocks to the rear, on the left of your property? A. They are not laying on mine, nor on my right-of-way.

Q. A few feet to the rear of the dog house appearing on Exhibit D-14, there are a number of cement blocks, are there not? A. Yes.

Q. To whom do they belong? A. They belong to me.

Q. And on top of the cement blocks is a chicken house or what used to be a chicken house or rabbit pen? A. Rabbit cage. 30

Q. Quite a long one. That is yours? A. Yes.

Q. You planted the grass lying to the west of your westerly line, the grass appearing upon Exhibit D-15? A. Yes, sir.

Q. And then there is a little tree to the west of the mark that you made. Did you plant that? A. My wife did. 40

*John Hansen—Direct*

Q. And you have kept the lawn? A. Yes, sir.

Q. I show you Exhibit C-4, and ask you if you recognize that photograph? A. Yes, sir.

Q. That is somewhat to the rear and to the left of your property, is it not? A. Yes, sir.

10 Q. Have you ever gone down that lane? A. Yes, sir.

Q. Often? A. On an average of three times a week.

Q. What for? A. To look at the river.

Q. Did you go down with boots? A. I do.

Q. You have to go down with boots? A. No, sir; not necessarily.

20 Q. It is too much a marsh near the river or some feet this side of the river, is it not? A. At the very bottom, yes.

Q. For the last couple of years or so you have taken the pains to see that this high marsh grass was cut down? A. I have.

Q. Before your purchase of the property that area was thickly grown with the high grass that you see on either side of opening on that picture, is that right? A. Yes, it wasn't as well taken care of as it is today.

30 Q. Just recently you have cut down some of the tall grasses? A. No, sir; not recently.

Q. Whenever you have cut them down you made a little pile of some of them to the side of your right-of-way? A. I have cut the grass and thrown it one side every summer.

Q. Why did you do that? A. What else should I do with it?

40 Q. Is that your answer? A. I must put it somewhere.

*John Hansen—Direct*

Q. Why did you cut the grass or the high grass; so that a path might be made as appears on Exhibit C-4? A. Why I cut it?

Q. Yes. A. To have an access to the river which will be walkable for any and all that want to use it. 10

Q. In your deed you recall that you had a right-of-way to the river? A. Yes, sir.

Q. And you wanted to make sure that it was not rendered impassible? A. Yes, sir.

Q. What do you consider the present value of your house, Mr. Hansen? A. With the incumbrances as it is today? You want me to answer that?

Q. Things as they are. What do you consider the value of your property? A. Next to nothing. 20

Q. Would you be willing to return it to Mr. Emery?

Mr. Parsons: I object to that as an improper question at this time.

The Court: Objection sustained.

Q. Do you know if property values in the vicinity of your house have increased or decreased in value since November, 1925? A. Apparently decreased. 30

Q. They have decreased? A. If any, decreased.

Q. And is it because of what you understand to be a decrease playing a part in your saying that the property is practically useless or worthless to you at the present time? A. Let me get this straight once more. 40

Mr. Leonard: Strike out the question.

*Howard S. Higginson—Direct*

Q. Does the fact that property in this vicinity has decreased in value since 1925 play any part in your statement? A. No, sir.

Q. That the property is worthless at the present time? A. No, sir.

10 Q. From a door on the west side of your house you have run a timber walk to the driveway leading to your garage, have you not? A. Yes.

Q. When did you do that? A. Approximately three years ago.

Mr. Parsons: That is all.

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20 HOWARD S. HIGGINSON, sworn for the complainant, testifies as follows:

Direct-examination by Mr. Leonard:

Q. Mr. Higginson, you are an attorney and counsellor-at-law of this state, are you not? A. I am.

Q. Specializing in title work? A. Yes, sir.

Q. With offices at Red Bank, New Jersey? A.  
30 Yes, sir.

Q. I show you Exhibit D-16, and ask you if you recognize that tracing? A. I do.

Q. Who made it? A. I did.

Q. When? A. I don't know the exact date; I should say the early part of January, 1926.

Q. That is a tracing of what? A. Of the map on file at Freehold.

Q. Is the lettering appearing on this tracing  
40 copied from the original? A. Yes.

*Howard S. Higginson—Cross*

Q. Now, directing your attention to the figures that occasionally appear on the various lines, were those figures copied? A. The figures are the same as appear on the map at Freehold.

Mr. Leonard: In other words, the tracing is identical. 10

## CROSS-EXAMINATION by Mr. Parsons:

Q. Mr. Higginson, some time after the title was passed between Mr. Emery and Mr. Hansen, you made a search, did you not? A. I did.

Q. And in connection with—

Mr. Leonard: He makes the witness his own, will he not—going out of the scope of the direct-examination. I object to that at this time. I do not think it is cross-examination. 20

The Court: You are offering him as your own witness now, Mr. Parsons?

Mr. Parsons: I don't think it is material. I was simply going to ask him about the discussion. I will withdraw him. That is all, Mr. Higginson.

*Emma Pomphrey—Direct, Cross*

Mrs. EMMA POMPHREY, sworn on behalf of complainant, testifies as follows:

Direct-examination by Mr. Leonard:

10 Q. Mrs. Pomphrey, you live where? A. I live on the main road.

Q. In Rumson? A. Sure.

Q. How old are you Mrs. Pomphrey? A. I am seventy-two next March.

Q. And are you the Mrs. Pomphrey to whom Ehrick Parmly in 1905 sold a piece of property?

A. Yes.

Q. Do you live on that piece of property now?

20 A. Yes. I lived there twenty-three years.

Q. Do you know where Mr. Hansen lives across the street? A. Yes.

Q. Do you recall a little driveway which is now to the west of Mr. Hansen's property? A. Yes, I have been down it.

Q. When were you down it? A. Once in twenty-three years.

Q. Why didn't you go again? A. Because I didn't think it was worthwhile going on. It was

30 all brambles and mud.

CROSS-EXAMINATION by Mr. Parsons:

Q. When was that once, Mrs. Pomphrey? A. Well, it was about seven years after I moved there.

Q. About seven years afterwards? A. Yes.

Q. Do you, of your own knowledge, know if your husband used that for his horse and wagon?

40 A. There he is (indicating); you can ask him yourself.

*Mrs. Emma Pomphrey—Cross*

Q. Please answer the question. A. Do you want me to answer his question?

The Court: You answer that question that he asked you. Do you know of your own knowledge if your husband used it? 10

A. Yes, I have seen him go down it with his horse and wagon.

Mr. Parsons: That is all.

The Court: Just let me inquire of counsel if the property formerly owned by Mary M. Ward is the property designated on this map D-1 as the Land Company's?

Mr. Parsons: The Land & Loan Company, that is correct. 20

The Court: In my opinion of the matter it appears the right-of-way as shown on one of them is not shown on the other. What I was trying to determine was whether it could by any possibility have been intended that the right-of-way was to the west of this Ward line, but I see that is an impossible proposition. This deed from Parmly to Emery describes property adjoining the Ward land. I think I understand the situation. Do you want to examine Mr. Randolph, Mr. Parsons? 30

Mr. Parsons: If there is any question as to the location of this line in your Honor's mind. I have worked on it, in checking all these maps up. They are all uniform to this extent that the distance to the westerly line of the Parmly tract from that tract to the westerly line of the Parmly tract in 40

*Discussion*

all of the maps is 355 feet. In other words, it is 355 feet to the westerly line of the right-of-way instead of the easterly line.

10 The Court: I think it clearly appears that what the actual situation was about that map of 1901 was certainly very confusing, and anyone looking at that map would think that the 355 feet went to the easterly edge of the 33-foot right-of-way; but this deed from Parmly to Emery would indicate that it does not, because the deed goes to the Ward line, but it is subject to the right-of-way, and if the right-of-way were the other side of the Ward line, of course it could not be subject to it.

20 Mr. Parsons: The only testimony I desire to introduce at all is that of Mr. Randolph to satisfy your Honor completely as to this right-of-way.

The Court: Well, you may submit it if you want to. I think it has been clearly shown where it is now. In other words, there is no dispute as to the location.

30 Mr. Parsons: Is there any dispute on that?

The Court: There isn't. There is no testimony contradicting your testimony.

Mr. Parsons: I think we will rest our case then without calling Mr. Randolph.

40 The Court: Well, we had better have this record transcribed and you both submit me a memorandum on it. I take it that the real issue is on the counterclaim and therefore the defendant's counsel should submit

*Exhibit C-1*

his memorandum to the plaintiff's counsel. I will take the files with me and the exhibits you may keep and send to me when you send your memoranda, ten days after you get the transcript.

10

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**EXHIBIT C-1.**

KNOW ALL MEN BY THESE PRESENTS:

That WE,

JOHN HANSEN and HULDA S. HANSEN

of the Borough of Fair Haven in the County of Monmouth and State of New Jersey are held and firmly bound unto

20

IRA D. EMERY

in the sum of TWELVE THOUSAND TWO HUNDRED DOLLARS lawful money of the United States of America to be paid to the said

30

IRA D. EMERY

or to his certain Attorney, Executors, Administrators or Assigns; To which payment well and truly to be made, we bind ourselves, our Heirs, Executors and Administrators, jointly and severally firmly by these presents. Sealed with our seals and Dated the Twenty-seventh day of November in the year of our Lord One Thousand Nine Hundred and Twenty-five

40

*Exhibit C-1*

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the above bounden JOHN HANSEN and HULDA S. HANSEN, their Heirs, Executors and Administrators, shall well and truly pay, or cause to be paid, unto the above named

10

IRA D. EMERY, his

Executors, Administrators or Assigns, the just and full sum of SIXTY-ONE HUNDRED DOLLARS to be paid at the rate of at least \$150. each six months, the first payment beginning June 1st, 1926, together with interest at the rate of six per cent per annum, to be computed and paid semi-annually in addition to the above instalments.

20

It is understood that when the principal sum hereof shall have been reduced to FORTY-SIX HUNDRED DOLLARS this bond and accompanying mortgage shall be and become due and payable in one year from such date.....with interest at the rate of six per cent per annum, payable semi-annually.

without any fraud or other delay, then the above obligation to be void, otherwise to remain in full  
30 force and virtue.

AND IT IS HEREBY EXPRESSLY AGREED, That should any default be made in the payment of the said interest, or any part thereof, on any day whereon the same is made payable, as herein before expressed: And should the same remain unpaid and in arrear for the space of thirty days, then and from thenceforth, that is to say, after the lapse of the said thirty days, the aforesaid  
40 principal sum of money, with all arrearage of interest thereon, shall at the option of the said

*Exhibit C-1*

IRA D. EMERY, his

Executors, Administrators or Assigns, become and be due and payable immediately thereafter, although the time above limited for the payment thereof may not then have expired, anything here- 10  
in before contained to the contrary thereof in anywise notwithstanding.

JOHN HANSEN (L. S.)  
MRS. HULDA S. HANSEN (L. S.)

Signed, Sealed and Delivered  
in the Presence of  
H. S. Higginson

20

(Note: At this point there is a heading "Memorandum of Payments." There are no entries thereunder.)

*(Endorsed on back):*

## BOND

JOHN HANSEN and HULDA S.  
HANSEN, his wife

30

to

IRA D. EMERY

Amount, \$6100.

Date November 27th, 1925

Due, In Instalments

Interest payable 6%

40

**EXHIBIT C-2.**

THIS INDENTURE, made the twenty-seventh day of November, in the year of our lord One Thousand Nine Hundred and Twenty five,

10 BETWEEN JOHN HANSEN and HULDA S. HANSEN, his wife, of the Borough of Fair Haven, in the County of Monmouth and State of New Jersey, party of the first part;

AND IRA D. EMERY, of the Borough of Rumson in the County of Monmouth and State of New Jersey, party of the second part;

20 WITNESSETH, That the said party of the first part, for and in consideration of SIXTY-ONE HUNDRED DOLLARS lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said  
30 party of the second part, and to his heirs and assigns, forever,

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Rumson, in the County of Monmouth and State of New Jersey,

40 BEGINNING at a point in the northeasterly line of the Oceanic Road, said point being distant twenty-seven feet southeasterly from the south-

*Exhibit C-2*

east corner of formerly the Mary M. Ward property; thence (1) northeasterly at right angles with the Oceanic Road, one hundred fifty feet to a point; thence (2) southeasterly, parallel with the Oceanic Road, thirty seven feet to a point; thence (3) southwesterly, parallel with the first course, one hundred fifty feet to a point in the northeasterly line of the Oceanic Road; thence (4) northwesterly, along the northeasterly line of Oceanic Road, thirty-seven feet, to the point or place of beginning. 10

Intended to be the same land and premises this day conveyed to the said parties of the first part by Ira D. Emery and Mary A. Emery, his wife, this mortgage being given to secure a portion of the purchase price of the above described premises. 20

Together with the use in common with others of a passageway on the west side of within described premises from the main road to the water.

Together with all and singular the profits, privileges, and advantages, with the appurtenances to the same belonging, or in anywise appertaining. Also, all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and of, in and to every part and parcel thereof; 30

To HAVE AND TO HOLD all and singular the above described tract or lot of land and Premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. 40

*Exhibit C-2*

PROVIDED ALWAYS, and it is agreed by and between the parties to these presents, that if the said parties of the first part, their heirs, executors and administrators, do and shall well and truly pay, or cause to be paid, to the said party  
10 of the second part, or to his certain attorney or attorneys, heirs, executors, administrators or assigns, the sum of SIXTY-ONE HUNDRED DOLLARS in instalments, with lawful interest for the same, at the rate of six per centum per annum, payable semi-annually, according to the condition of a certain bond bearing even date herewith, in the penal sum of TWELVE THOUSAND TWO HUNDRED DOLLARS, without any deduction or defalcation for  
20 taxes, assessments, or any other imposition whatsoever; then, and from thenceforth, these presents and said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained to the contrary in any wise notwithstanding.

AND the said party of the first part, their heirs, executors and administrators, do covenant and grant to and with the said party of the second  
30 part, his heirs and assigns, that the said party of the first part their heirs and assigns, shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof; and that the said  
40 party of the second part, his heirs and assigns, shall and may from time to time, and at all times after default shall be made in the performance

*Exhibit C-2*

of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, their heirs or assigns, or of any other person or persons whatsoever. 10

AND it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies, to an amount not less than Sixty-One Hundred Dollars, and assign the policy and certificate thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the second part, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents and payable on demand with legal interest. All covenants herein shall bind the heirs and assigns of the respective parties hereto. 20 30

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

JOHN HANSEN (L. S.)  
MRS. HULDA S. HANSEN (L. S.) 40

Signed, sealed and delivered  
in the presence of  
H. S. Higginson

*Exhibit C-2*

State of New Jersey }  
 County of Monmouth } ss:

BE IT REMEMBERED, That on this Twenty-seventh day of November, in the year of our Lord  
 10 One Thousand Nine hundred and Twenty-five, before me the subscriber, a Master in Chancery of New Jersey, personally appeared JOHN HANSEN and HULDA S. HANSEN, his wife, who, I am satisfied, are the mortgagors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and  
 20 purposes therein expressed.

M. S. HIGGINSON  
 M. C. C. of N. J.

*(Endorsed on back):*

## MORTGAGE

JOHN HANSEN and HULDA S.  
 HANSEN, his wife,

to

30 IRA D. EMERY

Dated Nov. 27th 1925

Received in the Clerk's Office  
 of the County of Monmouth,  
 N. J., on the 28th day of Nov.  
 A. D. 1925 at 8 o'clock in the  
 forenoon, and Recorded in Book  
 755 of Mortgages for said  
 40 County, on page 294 &c.

JOSEPH McDERMOTT,  
 Clerk

**EXHIBIT D-2.**

## WARRANTY DEED

EHRICK PARMLY (widower)	Dated Oct. 18, 1901	
	Ackgd. Oct. 18, 1901	
to	Rec'd. Nov. 14, 1901	
	Book 679 page 279	10
EDWARD J. BRUCE	Cons. \$1.00.	

## CONVEYS:

A tract of land at Rumson.

## RECITES:

Together with a right of way to the North Shrewsbury River, on land of the party of the first part, as located on map entitled "Map of Waterway, made by George D. Cooper, C. E., on the 30th day of August, 1901" filed September 16th, 1901, in the office of the Clerk of Monmouth County. 20

**EXHIBIT D-3.**

## WARRANTY DEED

10 EHRICK PARMLY Dated June 3, 1902  
 to Ackgd. June 3, 1902  
 Rec'd. June 21, 1902  
 20 THERESA COCHRANE *ux* of Book 694 page 89  
 Chas. Cons. \$1.00.

## CONVEYS:

A tract of land in the Borough of Rumson.

## RECITES:

20 Together with a right of way to the North  
 Shrewsbury River, on land of the party of the  
 first part, as located on Map entitled "Map of  
 Waterway, made by George D. Cooper, C. E. on  
 the 30th day of August 1901, filed the sixth day  
 of September 1901 in the office of the Clerk of  
 Monmouth County.

**EXHIBIT D-4.**

30 WARRANTY DEED

EHRICK PARMLY (widower) Dated July 11, 1903  
 Ackgd. July 11, 1903  
 to Rec'd. July 17, 1903  
 BENJAMIN F. JOHNSON and Book 714 page 74  
 JESSIE, his *ux* Cons. \$1.00.

## 40 CONVEYS:

A tract of land at Rumson, N. J.

*Exhibit D-5*

## RECITES:

Together with a right of way to the North Shrewsbury River, on land of party of the first part, as located on Map entitled "Map of Waterway, made by George D. Cooper, C. E., on the 30th day of August, 1891, filed the 6th day of September, 1901, in the office of the Clerk of Monmouth County."

**EXHIBIT D-5.****WARRANTY DEED**

20

EHRICK PARMLY

Dated Dec. 16, 1903  
Ackgd. Dec. 16, 1903  
Rec'd. Jan. 5, 1904  
Book 722 page 223  
Cons. \$1.00.

to

CLARENCE A. FORD

## CONVEYS:

A tract of land at Rumson.

## RECITES:

30

Together with a right of way to the North Shrewsbury River on land of party of the first part, as located on Map entitled "Map of Waterway, made by George D. Cooper, C. E., on the 30th day of August 1891, filed on the 6th day of September 1901, in the office of the Clerk of Monmouth County.

40



*Exhibit D-8*

## RECITES :

Together with a right of way to the North Shrewsbury River, on land of party of the first part, as located on map entitled "Map of Waterway made by George D. Cooper, C. E. on the 30th day of August, 1891, filed the 6th day of September 1901, in the Office of the Clerk of Monmouth County." 10

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**EXHIBIT D-8.**

## WARRANTY DEED

EHRICK PARMLY Dated Apr. 14, 1905  
 to Ackgd. Apr. 14, 1905  
 Rec'd. Apr. 25, 1905  
 Book 750 page 337 20  
 EMMA ELIZABETH POMPHREY Cons. \$1.00.

## CONVEYS :

A tract of land at Rumson.

RECITES : 30

Together with a right of way to the North Shrewsbury River on land of party of the first part, as located on map entitled "Map of Waterway made by George D. Cooper, C. E. on the thirteenth day of August 1891, filed the 6th day of September 1901, in the office of the Clerk of Monmouth County." 40

**EXHIBIT D-9.**

## WARRANTY DEED

EHRICK PARMLY (widower) Dated June 21, 1906  
 Ackgd. June 21, 1906  
 to Rec'd. June 22, 1906  
 10 Book 778 page 167  
 MARY BOYCE, *et al.* Cons. \$1.00.

## CONVEYS:

A tract of land at Rumson.

## RECITES:

20 Together with a right of way to the North  
 Shrewsbury River, on land of the said party of  
 the first part, as located on Map entitled "Map  
 of Waterway, made by Geo. D. Cooper, C. E., on  
 the thirteenth day of August 1891, filed the fifth  
 day of "September 1901 in the office of the Clerk  
 of Monmouth County."

EXHIBIT 21

WARRANTY DEED

Know all men that I, John A. ...  
do hereby certify that the above is a true and correct copy of the original as the same appears in the records of the County of ... State of ...

Witness my hand and seal of office this ... day of ... A.D. 19...  
John A. ...  
County Clerk

Subscribed and sworn to before me this ... day of ... A.D. 19...  
at ... County of ... State of ...  
John A. ...  
County Clerk

EXHIBIT 22

WARRANTY DEED

Know all men that I, John A. ...  
do hereby certify that the above is a true and correct copy of the original as the same appears in the records of the County of ... State of ...

Witness my hand and seal of office this ... day of ... A.D. 19...  
John A. ...  
County Clerk

**EXHIBIT D-11.****WARRANTY DEED**

DALTON PARMLY and LIL- Dated Apr. 29, 1925  
 LIAN E. PARMLY, his  
 wife, Rec'd. Apr. 30, 1925  
 10 to Book 1296 page 164 &  
 IRA D. EMERY Cons. \$1.00.

**CONVEYS:**

A tract in the Borough of Rumson.

**RECITES:**

Subject, however, to a right of way to the North  
 20 Shrewsbury River granted by Ehrick Parmly and  
 latterly by Dalton Parmly and Lillian E. Parmly  
 to various parties who have as a rule purchased  
 land or lots from the said Ehrick, Dalton and  
 Lillian E. Parmly.

**EXHIBIT D-12.****WARRANTY DEED**

30

**THIS INDENTURE**

Made the Twenty seventh day of November in  
 the year of our Lord One Thousand Nine Hun-  
 dred and Twenty five,

**BETWEEN**

IRA D. EMERY and MARY A. EMERY, his wife  
 of the Borough of Rumson in the County of Mon-

40

*Exhibit D-12*

mouth and State of New Jersey, party of the first part,

AND

JOHN HANSEN and HULDA S. HANSEN, husband and wife, of the Borough of Fair Haven, 10 in the County of Monmouth and State of New Jersey, party of the second part.

WITNESSETH, That the said party of the first part, for and in consideration of

ONE DOLLAR and other good and valuable considerations, lawful money of the United States of America to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened and released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to their heirs and assigns, forever, ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Rumson, in the County of Monmouth and State of New Jersey. 20 30

BEGINNING at a point in the northeasterly line of the Oceanic Road, said point being distant twenty seven feet southeasterly from the southeast corner of formerly the Mary M. Ward property; thence (1) northeasterly at right angles 40

*Exhibit D-12*

with the Oceanic Road, one hundred fifty feet to a point; thence (2) southeasterly parallel with the Oceanic Road, thirty seven feet to a point; thence (3) southwesterly, parallel with the first course, one hundred fifty feet to a point in the  
10 northeasterly line of the Oceanic Road; thence (4) northwesterly, along the northeasterly line of Oceanic Road, thirty seven feet to the point or place of beginning.

Being a portion of the property conveyed to the said Ira D. Emery by Dalton Parmly and wife, dated April 29th, 1925 and recorded in the Monmouth County Clerk's Office in Book 1296 of Deeds, pages 164.  
20

Together with the use in common with others of a passageway on the west side of within described premises from the main road to the water.

This conveyance is made and taken subject to the restriction that within described premises shall be used for residential purposes only.

Together with all and singular, the houses,  
30 buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining.

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

To HAVE AND TO HOLD, all and singular the  
40 above described land and premises, with the appurtenances, unto the said party of the second

*Exhibit D-12*

part, their heirs and assigns, to the only proper use, benefit, and behoof of the said party of the second part, their heirs and assigns forever:

AND the said parties of the first part, do for themselves, their heirs, executors and administrators covenant and agree to and with the said party of the second part, their heirs and assigns, that they the said parties of the first part, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever; Except as aforesaid. 10 20

AND ALSO that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid; 30

AND ALSO, that the said Ira D. Emery will WARRANT, secure, and forever defend the said land and premises unto the said JOHN HANSEN and HULDA S. HANSEN, their heirs, and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever. Except as aforesaid. 40



# New Jersey Court of Errors and Appeals

Between

IRA D. EMERY,

Plaintiff-Respondent,

and

JOHN HANSEN and HULDA S.

HANSEN,

Defendants-Appellants.

On Appeal  
from  
Chancery.

## BRIEF OF THE APPELLANTS.

This is an appeal from a decree of the Court of Chancery, ordering foreclosure of a purchase money mortgage and dismissing a counterclaim.

The facts are simple and undisputed.

Ira D. Emery, on November 27, 1925, conveyed by warranty deed a house and lot to John Hansen and his wife. This deed contained the following covenant:

“And that the said lands and premises or any part thereof at the time of the sealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part hereby made or intended to be made for the above de-

scribed land and premises can or may be charged, changed, altered or defeated in any way whatsoever."

As part of the purchase price John Hansen and his wife delivered a purchase money mortgage to Emery, in the sum of \$6,100.

After taking title to the premises, Hansen discovered that a right of way ran over his premises and, in fact, through his house and garage. A survey disclosed that his house and garage were built within this right of way. Thereafter a bill, foreclosing the purchase money mortgage was filed by Emery. Hansen filed an answer, and also a counterclaim. By this counterclaim Hansen prayed that the purchase money mortgage should be reduced in an amount equivalent to the amount of depreciation in the value of the property caused by the right of way. The facts were practically all admitted at the hearing, and evidence was taken to show the amount of damage done by the existence of the encumbrance. The Vice-Chancellor dismissed the counterclaim because there had been no eviction and held that the counterclaim to the purchase money mortgage would not lie unless there had been either an eviction or fraud. The important points involved are as follows:

1. The deed from Emery to Hansen contained a covenant against encumbrances.
2. The mortgage under foreclosure was a purchase money mortgage, and represented a portion of the purchase price of the premises.
3. The encumbrance is an easement of record and lots have been conveyed to third parties who

have been granted the use of the easement, which is a right of way to the river.

4. This easement is open of record and none of the lot owners have released their rights in the easement.

5. The house and garage upon the premises covered by the purchase money mortgage are within the lines of the easement and right of way.

6. No suit has been brought against the mortgagor to evict him from the premises.

7. Actual damage to the value of the premises has been proven.

The question to be determined is briefly:

Can a grantee who has received a deed to lands with a covenant against encumbrances, offset against his purchase money mortgage unliquidated damages sustained by him through the existence of a right of way across the premises covered by the covenant against encumbrances?

#### REVIEW OF TESTIMONY.

The review of testimony will be merely a brief statement of the facts. No essential fact was disputed. Emery conveyed the premises covered by the mortgage to Hansen by a deed containing the usual covenants (Exhibit D-12, p. 88). Among these covenants was a covenant against encumbrances as follows:

“and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are

not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever;" (Page 91, lines 17 to 26.)

In return, Hansen gave back to Emery a purchase money mortgage in the sum of \$6,100 (Exhibit C-2, p. 74). The premises in question were a part of a tract of land purchased by Emery from one Dalton Parmly (Exhibit D-11, p. 88). The premises, when conveyed to Emery, were in fact subject to a right of way which is recited as follows:

"Subject, however, to a right of way to the North Shrewsbury River granted by Ehrick Parmly and latterly by Dalton Parmly and Lillian E. Parmly, to various parties who have as a rule purchased land or lots from the said Ehrick, Dalton and Lillian E. Parmly."

Parmly had made prior to this eight conveyances (Exhibit D-2 to Exhibit D-9; page 81 to page 86, inclusive) of lands from the same tract, all of which conveyances granted the purchasers a right of way to the North Shrewsbury River by reference to a map "Map of Waterway made by George D. Cooper, C. E." This map of waterway is Exhibit D-16 (p. 96). Upon a search and survey being made, it was found that the property purchased by Hansen consisted of a portion of this right of way. The survey clearly showed that this right of way included a portion of the house and garage and half of the lot purchased by Hansen. This is shown on Exhibit D-1 (p. 80).

Practically all of the testimony offered by both complainant and defendant bore upon the question of damages or abandonment of this right of way, though finally the complainant in turn abandoned his defense of abandonment and the case at the close of the hearing consisted simply of the defense by the complainant to the counterclaim of neither eviction nor fraud. The proof offered by the defendant of the damage to the property by reason of the right of way was given by three different witnesses. One expert testified that the damage done was \$7,900, another \$6,500, and another \$4,100. No evidence in opposition to these figures was given by the complainant.

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### ARGUMENT.

#### I.

#### THE DEFENDANTS PROPERLY FILED THIS COUNTERCLAIM.

The counterclaim was filed under the provisions of the Chancery Act. Appellants claim this right by virtue of Section 3 of the Chancery Act of 1915.

“The Chancellor by rules may regulate and determine all questions relating to the subject of parties to all suits and proceedings brought before the Chancellor or in the Court of Chancery. All pleadings in such suits and proceedings shall be in accordance to rules.”

In accordance with this enactment of the Legislature, the Chancellor promulgated Rule 28 which reads as follows:

29 (28) Subject to the provisions of other rules herein contained, a defendant may counterclaim or set-off any cause of action against the complainant. He may, and when required by the Court, shall, issue subpoena against any third party necessary to be brought in; but in the discretion of the court, separate hearings may be ordered; or if the counterclaim cannot be conveniently disposed of in the pending action, the Court may strike it out."

29 Section 3 of the Chancery Act read in connection with Rule 29 of the Chancery Rules gives clear and explicit authority to the defendants to file this counterclaim. Of course, discretion was given to the Court to refuse to hear the counterclaim if the Court found it could not be conveniently heard with the bill of complaint. The Court did not exercise this discretion, however, but permitted the hearing to proceed both upon bill and counterclaim. The complainant did not strike out or move to strike out the counterclaim. There was then, clear authority for the filing of the counterclaim; and for the Court to proceed with the hearing of the same, and to determine the rights of the parties. Of course, the counterclaim is for unliquidated damages. Under the terms of these two sections, however, it would seem that no distinction can be made between a counterclaim for unliquidated damages and one for liquidated damages.

In *Kuhnen v. Parker*, 56 N. J. E. 286, such a counterclaim was filed. The counterclaim was

practically identical with the counterclaim filed by the appellant in this case. Foreclosure of a purchase money mortgage was instituted and the grantee counterclaimed because of the existence of a right of way for a pipe line. Vice-Chancellor Stevens says, at page 288:

“These cases seem to demonstrate that where a purchase money mortgage is being foreclosed, the defendant is not debarred from claiming a reduction merely because his claim is, at the time he makes it, unliquidated.

“Then counsel suggests a distinction between liens which may be wiped out by tendering a definite sum of money and outstanding titles or encumbrances which in their nature are permanent, and which, he says, it is not in the power of the mortgagee to wipe out by simply tendering the amount due. A rule based on such a distinction is equally irreconcilable with the cases to which I have just referred.

“Why does the Court allow a reduction or offset in foreclosure cases? One reason is to prevent circuitry of action. ‘There can be no good reason assigned,’ says Chancellor Vroom, in *Shannon v. Marselis*, *supra*, ‘why there should be this circuitry, but a very good one why there should not, which is that the money might be lost to Carrick (the vendee in that case) altogether, he having no security but the covenant.’

“Another reason is that the mortgagee is, in these cases, equitably entitled to a part only of the amount appearing to be due on the face of his security.

“I think that the true principle of the decision goes at least to this extent: *If*

*the mortgagee foreclose a purchase money mortgage against the mortgagor, and the mortgagor shows that the covenant against encumbrances has been broken in such manner as to give him a claim to substantial damages, he may reduce the mortgagee's demand to the extent of those damages."*

In *Peterson v. Reid*, 76 N. J. E. 377, a counterclaim was filed to the foreclosure of a purchase money mortgage. The counterclaim recited a breach of an agreement to fill up low land. Vice-Chancellor Stevenson says:

"The cases cited show beyond question that the mere fact that the damage sought to be set up as an abatement of the mortgage debt, are unliquidated is a circumstance which gives the court no difficulty. The damages may be ascertained or assessed by a jury in a law court, by a master, or under our present system by testimony of witnesses taken in open court."

In *Curtis-Warner Corporation v. Thirkettle*, 99 N. J. E. 806, Vice-Chancellor Berry says, at page 815:

"The mere fact that the damages sought to be set up as an abatement of a mortgage in a suit to foreclose a mortgage, are unliquidated does not prevent equity from granting the abatement."

In the instant case the counterclaim filed asked for unliquidated damages. It asks for damages directly connected with the transaction. The Vice-Chancellor who heard the case did not strike out the counterclaim on the ground it could not conveniently be heard with the bill of complaint, but permitted the case to proceed to a hearing

upon both bill and counterclaim. Testimony was given as to the existence of the right of way, the breach of the covenant against encumbrances and the resulting damages. It is therefore respectfully submitted that the appellants properly filed their counterclaim.

## II.

**THE EXISTENCE OF AN EASEMENT IS AN ENCUMBRANCE, AND THE COVENANT AGAINST ENCUMBRANCES WHERE AN EASEMENT EXISTS IS BREACHED AS SOON AS MADE. THE COMPLAINANT ADMITS THE EXISTENCE OF THE RIGHT OF WAY.**

It is to be remembered throughout the consideration of this case, that the breach of the covenant in question is a breach of a covenant against encumbrances. Appellants relied upon no other covenant, but solely upon the covenant against encumbrances. If there has been a breach of this covenant against encumbrances this breach took place at the time of the delivery of the deed. It did not require an eviction to bring it into being. It did not require a suit to bring it into being. The mere delivery of the deed with covenant against encumbrances and the existence of the encumbrances, created the right of action. An easement is such an encumbrance.

In *Carter v. Denman*, 23 N. J. L. 260, the Supreme Court held:

“That a covenant against encumbrances shall begin as soon as made, and where

there is an existing encumbrance, a cause of action arises from the date of the covenant and the Statute of Limitations begins to run therefrom."

This rule finds recent approval by the Court of Errors and Appeals in *Smith v. Smith*, 90 N. J. L. 282:

"In cases from our courts in actions for breach of covenant against encumbrances, it is said the general rule is, *the right of action on the covenant against encumbrance arises upon the existence of the encumbrance*, irrespective of any knowledge upon the part of the grantee or of any eviction of him or of any actual injury it has occasioned him so that if he has paid off or bought in the encumbrance, he is entitled at least to nominal damages.  
\* \* \* *An actual eviction or disturbance of possession, unlike a suit for breach of covenant of warranty, is not necessary, as a condition precedent, to maintaining an action for the breach of a covenant against encumbrances.*"

This is the general rule. In 7 R. C. L. 1163, it is said:

"According to the great weight of authority, the covenant against encumbrances is a covenant as to things existing at the time it is made. *If broken at all it is broken at the moment it is made*, and a cause of action then exists which does not pass by force of any conveyances purporting to grant the premises, to entitle a vendee to relief against payment of the purchase money on the ground of encumbrance, and actual eviction need not be shown, but it is sufficient that eviction may take place."

At page 1164 it is said:

“It is the general rule, well established by the weight of authority, that a covenant against encumbrances is broken by an outstanding easement of any kind in the land conveyed, and it has been held that knowledge by the grantee of the existence of the easement at the time of the conveyance makes no difference in the application of the rule.”

The existence of this right of way over the property conveyed and covered by the purchase money mortgage is admitted. The covenant against encumbrance in the deed does not except this right of way. The deed contained a covenant against encumbrances, and the right of way existing, there then was a breach of the covenant upon the delivery of the deed, and the grantees, Hansen, then and there had a right of action against Emery, the grantor. This right of action, existing, it was properly set up in a counterclaim against the foreclosure of the mortgage.

### III.

**THE EXISTENCE OF THIS EASEMENT HAS INFLICTED ACTUAL DAMAGE UPON THE PURCHASER, WHO IS ENTITLED TO HAVE THE PURCHASE MONEY MORTGAGE ABATED BY REASON OF THE DAMAGE INFLICTED UPON HIM THROUGH THE BREACH OF THE COVENANT AGAINST ENCUMBRANCE.**

There certainly can be no dispute of the proposition that Hansen, in purchasing this property encumbered by an easement, has suffered actual damage. No lawyer would pass upon this

title. No title company would insure it. Hansen cannot sell the property for a fair price. He cannot raise a mortgage upon it. He has suffered real and actual damage. The proofs of real estate experts show that the value of the property has been diminished and decreased by the existence of this easement. These damages have been considered by the courts of this state before, and a definite rule has been laid down as to the measure of damages where there has been a breach of the covenant against encumbrances.

In *Fagan v. Cadmus*, 46 N. J. L. 441, a grantee instituted suit against his grantor for a breach of the covenant against encumbrances. The Court said, at page 445:

“The remaining question is, what is the measure of plaintiff’s right to recover damages? The measure of damages in action for a breach of the covenant against encumbrances differs in three classes of cases. First, where the encumbrance is a debt which has been paid by the covenantee; second, where it might have been, but has not been, so paid; and third, where the encumbrance is such that it cannot be discharged, as a servitude or unmatured mortgage. In the first class of cases the covenantee recovers what he has paid; in the second class he recovers nominal damages only, and *in the third class he recovers an amount estimated as a compensation for the depreciated value of the land resulting from the existence of the encumbrance* (Sedg. on Damages 179).”

The Court of Errors and Appeals in reviewing *Curtis-Warner Corporation v. Thirkettle*, 137 Atl. 408, laid down the rule as to damages:

“The rule in such a case in this State is that the purchaser is entitled to recover his actual loss, and this loss is measured by the *difference between the price paid and the actual value of the property received*. Whatever of variance there may be in other states from the rule above stated, there has been no departure in our own.”

This seems to be the general rule in all jurisdictions.

15 C. J. 1328.

“Where a covenant against encumbrance is breached, by the existence of an *OUTSTANDING* (existing) easement in the land, the actual *(USUAL)* measure of damage is the diminution in value of the land by reason of the easement. This relative value is to be ascertained as of the time of the conveyance, and not as of the time of trial.”

In 7 R. C. L. 1183.

“The decrease in the market value of the land may usually be taken as a proper criterion by which to measure the damages caused by the existence of an easement.”

*Thompson on Real Property*, Vol. 4, Sec. 3587, says:

“If the encumbrance is practically inextinguishable, as in the case of a permanent easement, the measure of damage is the difference in the value of the land without and with the encumbrances.”

In the present case, there has, therefore, been real damage done to Hansen. He purchased the land with a covenant that it was free and clear of encumbrances. He finds that a right of way exists across the land and through his very home.

A cause of action then arises upon delivery of deed with this covenant against encumbrances. The cause of action carries real damage. The measure is the difference in value without the easement and the value with the easement. This was proven. This damage was real, actual, and ascertainable.

#### IV.

**NEITHER FRAUD NOR EVICTION IS A PRE-REQUISITE TO THE RIGHT TO MAINTAIN A COUNTERCLAIM OR AN ACTION FOR ABATEMENT OF A PURCHASE MONEY MORTGAGE BY VIRTUE OF A BREACH OF A COVENANT AGAINST ENCUMBRANCES CONTAINED IN THE DEED.**

The deed in the instant case contained a covenant against encumbrances. As has been pointed out heretofore in this brief, a covenant against encumbrances unlike the other covenants of warranty, is breached as soon as made where an encumbrance exists. Eviction is not required. Fraud is not required. The covenant itself when broken, gives right to the cause of action, and it is broken by the existence of an easement. This has all been pointed out heretofore. Much loose thinking and loose writing has been caused by the failure to distinguish between the various forms of covenants in deeds. Once the various cases are separated and distinguished and reliance is made solely upon the covenants against encumbrances, this seeming difficulty and contradiction disappears. The mere statement of the proposition seems self-supporting; if a deed is

given and the consideration passes, part of which is in the form of a purchase money mortgage, and the grantee later finds out that his property is encumbered, in all equity he should have the right of being relieved from payment of the principal, and the mortgage should be abated by an amount equal to the damage caused. To permit the grantor, who has breached his covenant against encumbrances, to recover the full amount of his purchase money mortgage, would be to invest the grantor with the power to obtain money for which he had given no consideration.

Neither fraud nor eviction is necessary to vest the grantee with the right of setting up his damage. As has been pointed out heretofore, no distinction has been found between a liquidated and unliquidated claim. Fraud and eviction has not been a necessary element in numerous cases where the encumbrance has consisted of a liquidated amount. Why there should be an added requisite of fraud or eviction where the amount is unliquidated is an unsolved riddle. It is submitted that, all that is necessary, is to prove the covenant and its breach, to entitle the grantee to have the purchase money mortgage abated.

This question first arose under a liquidated encumbrance in *Van Riper v. Williams*, 2 N. J. E. 407. A purchase money mortgage was being foreclosed. The deed had contained a covenant against encumbrances. The encumbrance was an outstanding mortgage. It did not appear that any proceedings had been taken under the existing mortgage, no eviction had been taken under it, nor any suit started. It did not appear that the amount upon the mortgage was liquidated.

The answer simply set forth that the mortgage was still outstanding, unsatisfied and uncanceled. The entire opinion of Chancellor Pennington follows:

“As the mortgage sought to be foreclosed in this case, was given to secure the purchase money on land sold by the mortgagees, with covenants of seizin and against encumbrances, and it turns out that there was at the time of the conveyance an outstanding mortgage which still remains an encumbrance upon the premises, that mortgage must be first removed before a decree for foreclosure and sale can in equity be ordered; or, so much of the proceeds of the sale as may be necessary for that purpose, must by the decree be directed to be applied to pay off and satisfy that encumbrance, and the amount so applied deducted from the mortgage debt due the complainant.”

The next case was *White v. Stretch*, 22 N. J. E. 76. A bill of foreclosure had been brought upon a purchase money mortgage. The deed for the premises contained a covenant that the premises were free from all encumbrances. A cross-bill was filed setting up that there were assessments due but no proof was given that there had been any eviction, any tax sale, or any suit brought upon the assessments. Nevertheless, the court held that there should be deducted from the mortgage the amount of the assessments.

In *Dayton v. Dusenbury*, 25 N. J. E. 110, a purchase money mortgage was being foreclosed. The deed contained a covenant against encumbrances. The defense was a breach of the covenant against encumbrances, because the premises

were subject to the lien of certain judgments. There was no proof that there had been any sales under the judgments, or any proceedings taken under the judgments. The court, however, refused a decree, and said:

“Under the circumstances a decree cannot be made for the complainant directing a deduction of the amount due on the judgments from the amount due on the mortgage. *This suit must therefore be stayed until the premises shall have been released from the lien of the judgments.*”

In *Union National Bank v. Pinner*, 25 N. J. E. 495, purchase money mortgages were foreclosed. The deed conveying the premises contained covenants against encumbrance. Tax liens were outstanding at the time. The court said:

“The rule of law is established in this State by the case of *White v. Stretch*, 7 C. E. Green, 76, and the previous decisions in Chancery therein referred to, that in a suit to foreclose a purchase money mortgage, the mortgagor, a grantee in the conveyance, *can claim deductions for encumbrances covenanted against in the deed from the mortgagee.* ~~It~~ *is altogether an equitable and reasonable rule and must be enforced in the present case.*”

In this case no proof was given that any action of eviction had been started, or that there was any fraud. The court simply decided that there had been a breach of the covenant against encumbrances.

In *Stiger v. Bacon*, 29 N. J. E. 442, a purchase money mortgage was under foreclosure. The deed contained the usual covenant against encumbrances. A prior mortgage covered the prem-

ises in question, and contained a release clause. No proof was offered that any steps had been taken to foreclose this mortgage, nor had there been any eviction. The court held, however:

“He cannot, in equity, under the circumstances, be required to pay either the principal or interest on the mortgage given by him, until the property shall have been released from the Smalley mortgage.

“The suit therefore must be stayed to afford Mrs. Stiger an opportunity to obtain a release of the land from the mortgage.”

In *Baudendistel v. Zabriskie's Exrs.*, 50 N. J. E. 453, a purchase money mortgage was under foreclosure. Defendants claimed, however, taxes and assessments should be deducted. The deed of conveyance contained no covenant against encumbrances. Chief Justice Beasley, speaking for the Court of Errors and Appeals, said:

<sup>SPECIAL</sup>  
“The master who sat in this case in the Court of Chancery decided that the deduction claimed for the taxes and assessments just indicated could not be permitted by force of either of the three covenants thus specified. With respect to the covenants for quiet enjoyment and of warranty, it was deemed that, inasmuch as they were not broken until an eviction has occurred, they were to be discriminated from a covenant against encumbrances, which, if it had been present on this occasion, would, according to a train of decisions that were cited, have established the right set up by the mortgagor. *When a grantor has stipulated that there are no encumbrances upon the premises conveyed, such covenant, if infringed at all, is vio-*

lated by the act of conveyance, and it is the established practice of our courts to compel the mortgagee who seeks to foreclose for the purchase money, to submit, in some form, to an ascertainment of the damage that must necessarily arise from the existing breach of his covenant, and to reduce to that extent the claim pressed by him."

These cases firmly settled the doctrine that where there is a covenant against encumbrances, and where an encumbrance existed on the foreclosure of a purchase money mortgage given in return for a deed containing a covenant against encumbrances, the foreclosure upon the purchase money mortgage required either a deduction of the encumbrances or a stay of the suit until the encumbrance had been lifted. It is true that all of these encumbrances had been liquidated in their amount. Logically, however, there appeared no reason why there should not be permitted a deduction for an unliquidated encumbrance, where the damage is ascertainable than for one where the amount is liquidated. The court followed out this reasoning in *Kuhnen v. Parker*.

In *Kuhnen v. Parker*, 56 N. J. E. 286, Vice Chancellor Stevens sustained a counterclaim. The head note succinctly states the proposition, which proposition in every way warrants the appellant in this suit in prosecuting his counterclaim.

"If the mortgagee foreclosed a purchase money mortgage against the mortgagor, and the mortgagor shows that the covenant against the encumbrances has been broken in such manner as to give him a claim to substantial damages, he may re-

duce the mortgagee's demand to the extent of those damages."

The complainant had filed his bill to foreclose a mortgage. Defendant answered setting forth that the complainant had conveyed the farm by a deed containing covenant against encumbrances, and that the farm was encumbered by right-of-way created by recorded instrument giving rights to construct pipe line across the land, and that the pipe line had actually been laid. No allegation of eviction was shown, nor any charge of fraud. Upon a motion to dismiss the answer, Vice Chancellor Stevens held that the answer was properly filed. Vice Chancellor Stevens states the question in the opinion as follows:

"An easement is an encumbrance within the meaning of the covenant against encumbrances. *Rawle Cov. Tit.* (1st ed.) 115. *As the easement set up in the answer existed at the time of the conveyance by complainant to defendants, the covenant in defendants' deed was broken as soon as made, and the breach was of such a nature as to give rise to substantial damages. The question in dispute is, therefore, whether, under the principle to be extracted from the above mentioned decisions, the defendants are entitled in this suit to have their damages ascertained and deducted from the amount of the mortgage."*

The court then further said:

*"It is well known that the covenant against encumbrances, unlike the covenant of warranty, is broken as soon as made."*

Vice Chancellor Stevens in *Kuhnen v. Parker*, having decided that a counterclaim could be filed

for unliquidated damages, the court continued to follow his decision.

In *Bergman v. Fortesque*, 74 N. J. E. 266, a bill was filed to foreclose a purchase money mortgage. A cross-bill was filed for damages sustained by reason of a breach of the covenant. It appeared at the trial that the defendant had also instituted an action at law. The damages were unliquidated. Vice Chancellor Leaming says:

“Touching the relief sought by way of cross-bill, it may be said that if defendant was, contrary to the covenant in her deed, kept out of possession of a portion of the premises by reason of a title paramount emanating from the Columbia Real Estate Company, she is clearly entitled to be relieved against the mortgage to the amount of damages sustained by her by reason of the breach of covenant in the deed.”

The rule is again affirmed in *Redrow v. Sparks*, 76 N. J. E. 133.

In *Peterson v. Reid*, 76 N. J. E. 377, the court permitted a cross-bill to be filed against a foreclosure of a purchase money mortgage for the breach of an agreement contained in the deed to fill up certain low land. The cross-bill charged a breach of this agreement. The complainant argued that the cross-bill set up no equity which could be enforced against a purchase money mortgage. Vice Chancellor Stevenson held otherwise, and bases his decision upon *Kuhnen v. Parker*. In this case the breach of the covenant contained in the deed, was a breach which arose by virtue of a failure to do a future act. There was neither eviction nor fraud alleged. The charge was a simple breach of a covenant. The damages were

unliquidated. Vice Chancellor Stevenson, at page 382, says:

“As between the original parties to this transaction it seems to me that we have a perfectly plain case where the damages of the mortgagor from the failure of the mortgagee to perform its covenant constitute a proper abatement of the mortgage debt in the foreclosure suit. If a man conveys a parcel of unimproved land and at the same time covenants to erect a valuable building upon it, and takes back a purchase money mortgage based on the valuation of the land with the building on it, and then completely defaults in his covenant to erect the building, is it possible that under any system of jurisprudence in a civilized state he would be permitted to foreclose his purchase money mortgage for the entire amount, while the unfortunate mortgagor would be left to an action at law for his damages which he might never be able to collect..”

The reasoning of Vice Chancellor Stevenson was not challenged on this point when this case was reversed in the Court of Errors and Appeals. The reversal was on the ground that the covenant was not an assignable covenant.

Justice Swayze, speaking for the Court of Errors and Appeals in 80 N. J. E. at page 455, says:

“One reason that courts allow a deduction from the amount of a purchase money mortgage *aside from the cases where fraud justifies rescission and cancellation*, is that thereby circuity of action is avoided. *Shannon v. Marselis*, 1 N. J. E. (Saxt) 413. Before such a defense can prevail there must be a right of action in the mortgagor and damages must have been sus-

tained. *This right of action depends, as counsel for the defendants argue, upon a failure of consideration, and it is because the abatement from the face of the mortgage, in a case like the present, depends upon a failure of the consideration therefor, that the right is limited to purchase money mortgages, where there are covenants against encumbrances, of warranty, or the like, or cases of fraud or mistake.*"

Justice Swayze specifically states that the courts will allow a deduction aside from cases where fraud justifies rescission, and says that the right is limited to purchase money mortgages where there are covenants against encumbrances.

In *Curtis-Warner Corporation v. Thirkettle*, 99 N. J. E. 806, a purchase money mortgage was foreclosed and an answer and counterclaim filed, setting up fraud. The damages were unliquidated. Vice Chancellor Berry there quotes with approval Vice Chancellor Stevenson's opinion in *Peterson v. Reid*, and also from Chief Justice Depue's opinion, in *Norton v. Sinkhorn*, 63 N. J. E. 313, as follows:

"The principle that lies at the foundation of this doctrine is that the amount which the plaintiff is entitled to recover shall be abated or reduced by reason of his own failure to perform obligations which, by the same contract, devolved upon him, whereby the defendant has sustained damages.

"In substance and effect it may be likened to the reduction of the amount recoverable upon a contract because of a failure of consideration."

In *Security Trust and Savings Bank v. Reed*, 101 N. J. E. 53, Vice Chancellor Leaming pithily

and concisely states the limits of this doctrine. A purchase money mortgage was being foreclosed. The deed of conveyance contained no covenants. No fraud was alleged. The defense set up was lack of consideration. Vice Chancellor Leaming says:

*“In the absence of fraud or mistake, defenses of this nature are wholly dependent upon the covenants contained in the deed of conveyance. When the deed from complainant to defendant contains a covenant against encumbrances the mortgagor will be entitled to a deduction for prior encumbrances. This is because in such circumstances that covenant may be deemed already broken when made and this court may appropriately determine an issue of that nature.”*

In the instance case there is a covenant against encumbrances. It is upon this covenant that the appellants charge their damages and ask for relief.

In *Brownback v. Spangler*, 101 N. J. E. 388, a bill was filed to foreclose a purchase money mortgage. *The deed contained no covenant against encumbrances.* Vice Chancellor Leaming says:

*“The dedication of these streets may be said to have created easements of way over the land, and easements are held to be encumbrances within the meaning of a covenant against encumbrances. *Kuhnen v. Parker*, 56 N. J. E. (at page 287. But, as already stated, the deed to defendant contains no covenant against encumbrances; without that covenant, the existence of encumbrances affords no defense to the foreclosure of the purchase money mortgage, in the absence of fraud.”*

The doctrine is again reaffirmed, but because of the fact that there was no covenant against encumbrances, no relief was granted.

The result of an examination of this extensive line of cases supports the assertion that where a deed contains a covenant against encumbrances and an encumbrance exists, there is then a breach of the covenant and a right of action upon the delivery of the deed. If, in the same transaction there is a purchase money mortgage given and foreclosure of this mortgage is instituted, the grantee may defend a counterclaim by reason of the breach of the covenant against encumbrances. No discrimination is made between a right of action arising because of a liquidated or unliquidated encumbrance. There need be no eviction. The mere existence of the covenant and the existence of the encumbrance gives rise to the cause of action. The appellants' affirmative case may then be summed up in a sequence of logical propositions:

1. A purchase money mortgage is under foreclosure.
2. The deed contained a covenant against encumbrances.
3. A counterclaim was filed under the authority of the Chancery Act and the Rules of the Chancery Court.
4. An encumbrance existed at the time of the conveyance.
5. This encumbrance decreased the value of the property conveyed.

6. The decrease in value was an unliquidated amount.

7. The grantee and mortgagor thereby became entitled to demand an abatement from the mortgage for the amount of unliquidated damages suffered by him by reason of the breach of the covenant of encumbrance from the existence of the right-of-way.

## V.

### COMMENT UPON THE OPINION OF THE COURT BELOW.

The opinion of the court below will be found at page 18 of the State of Case. Appellants do not in any way challenge any of the facts set forth in the opinion. Appellants challenge vigorously, however, the accuracy of the law set forth in the opinion. The opinion denies relief to the appellants because there was no proof of fraud or actual or constructive eviction, and says:

“The mortgagor will not be permitted to set up a breach of covenant of title, or against encumbrances, in abatement of the amount due, but will be left to his remedy at law by action on the covenant.” (p. 20, ll. 32 to 36).

For this proposition numerous cases are cited. Each one of these cases will be reviewed. It is submitted, however, that the learned Vice Chancellor erred in his statement of the law that either fraud or eviction must exist to permit an action for abatement by reason of a breach of the covenant against encumbrances. The Court of Er-

rors and Appeals have repeatedly decided that where there is a breach of the covenant against encumbrances, neither eviction nor fraud is necessary. The right of action arises upon the delivery of a deed which in itself breaches the covenant where an encumbrance exists. This proposition from an examination of the cases, would seem to be clear. Notwithstanding this the learned Vice Chancellor has confused a breach of the covenant against encumbrances, with a breach of a covenant of title. Numerous cases are cited by the Vice Chancellor as authority for this decision. Each of these will be distinguished in the order cited in the opinion.

*Shannon v. Marselis*, 1 N. J. E. 413. This case involves the satisfaction of mortgages and the doctrine of contribution. The deed contained covenants of warranty. The court cited with approval as follows:

“In *Jourvil v. Narish*, 3 P. Wms. 306, it was held, that when a man purchases an estate and pays part, and gives bond for the residue, *notice of an equitable encumbrance before payment, though after the giving of the bond, was sufficient to stop payment*, and to entitle the obligor to relief in equity against the bond; and this was declared to be the rule, though the purchaser had *actual notice* of the encumbrance before the purchase.”

This case, instead of being an authority for the opinion of the court below would seem to be additional authority for the appellant.

*Van Waggoner v. McEwen*, 2 N. J. E. 412. The action in this case was not upon covenant against

encumbrances, but on the contrary, was upon a covenant of title. Nothing whatsoever appears in the opinion concerning the right of set-off for a breach of the covenant against encumbrances.

*Glenn's Admr. v. Whipple*, 12 N. J. E. 50. In this case also the answer set up an outstanding title. There had been no eviction through the outstanding title, and the dower right was not found to be an encumbrance.

*Hulfish v. O'Brien*, 20 N. J. E. 230. The defense in this case also was a defect in title. No breach of the covenants against encumbrances was asserted. Because there had been no eviction the foreclosure was not stayed. There is no statement in the case at all about the effect of a breach of the covenant against encumbrances.

*Price's Exrs. v. Lawton*, 27 N. J. E. 325. In this foreclosure of a purchase money mortgage the defense was a breach of a covenant of warranty of title. There was no allegation of a breach of the covenant against encumbrances, nor of eviction. The foreclosure was not stayed.

*French v. McConnell*, 38 Atl. Rep. 687. In this case the answer prayed a stay of the foreclosure suit until certain mineral grants had been cleared of record. No counterclaim was filed asking an abatement of the purchase money by reason of the existence of the encumbrance. The case was clearly decided upon the theory that there was a breach of the covenants of warranty, and that there had been no abatement asked. The only relief asked was a stay of the proceeding until the leases were removed. No counterclaim was filed.

*Ratkewicz v. Kara*, 89 N. J. E. 203. This was upon a rule to reopen a foreclosure decree taken by default. Defendants claimed that an adjoining building encroached upon the land. The opinion does not recite any breach of the covenant against encumbrances, nor does it touch upon this point.

*Hawthorne v. Odenson*, 94 N. J. E. 588. This case, instead of being an authority for the opinion, it is respectfully submitted is a strong authority for the appellant. Vice Chancellor Leaming cites with approval *Kuhnen v. Parker*. Vice Chancellor Leaming says (p. 591):

“It will be observed that all of these restricted defenses available to a mortgagor in a foreclosure suit of a purchase money mortgage (save that relating to deficiency of acreage of land) have reference to and are dependent upon the covenants of the mortgagor in his deed of conveyance to the mortgagee; a breach of covenants of title being considered as sufficiently established when there has been an eviction through a title paramount, AND A BREACH OF A COVENANT AGAINST ENCUMBRANCES BEING CONSIDERED AS SUFFICIENTLY ESTABLISHED BY THE EXISTENCE OF A PRIOR ENCUMBRANCE.”

It will be noted that the statement of the law by Vice Chancellor Leaming is direct authority for the proposition of the appellants.

*Mills v. Brunetto*, 143 Atl. 832. This opinion is by the court below. The encumbrance set up was a restrictive covenant. If the restrictive covenant were an enforceable encumbrance then the opinion in *Mills v. Brunetto* is authority for

opinion by the court below. It, however is an opinion by the same court and its reasoning is contrary to the opinions of this court cited heretofore. However, the court below also gives a further reason for its opinion as follows:

“The insufficiency of the defense here interposed is quite apparent, also, from the improbability of equitable interference by injunction, and the fact that the defendants are not liable in damage for the violation of the restrictive covenant pleaded as a defense. *Zelman v. Kaufherr*, 76 N. J. E. 52, 73 A. 1048; *Slater v. Beatty* (N. J. Ch.) 137 A. 848. The restrictive covenant was not broken by them but by their predecessors in title.”

The opinion below then further says that the case of *Kuhnen v. Parker*, and *Peterson v. Reid*, cited *supra* are not opposed to the doctrine cited above, on the ground that they were each on answers alleging fraud. A most careful examination of the opinion in the two cases shows that both cases were definitely decided upon a breach of the covenant, and in neither case did the decision rest upon fraud. To sustain the opinion of the court below it must be necessary for this court to reverse its opinion in *Baudendistel v. Zabriskie*, and *Peterson v. Reid*, in both of which cases this court has laid down the rule in a breach of covenant against encumbrances the right of counterclaim arises upon the breach of the covenant. It is submitted that there has been an evident confusion between the cases involving a breach of a covenant of title and the covenant against encumbrances. The instant case is based solely upon breach of the covenant against encumbrances.

## VI.

**IN THE EVENT THAT THE DECREE BELOW SHOULD BE AFFIRMED, IT SHOULD BE ALTERED SO AS TO RESTRAIN THE FORECLOSURE UNTIL THE APPELLANTS CAN BRING A SUIT AT LAW FOR THE BREACH OF THE COVENANT.**

The breach of this covenant, as has been pointed out repeatedly, has damaged the appellants severely. To permit the foreclosure sale to be pressed to a conclusion will leave these appellants in a dangerous position. The complainant has demanded the principal of the purchase money mortgage. This principal represents a substantial portion of the purchase price, an amount equal to more than two-thirds of the purchase price. For the consideration paid by the appellants both in cash and by this purchase money mortgage, the complainant has on his side delivered a patently defective title. In other words, the complainant has failed to deliver good consideration for that which he is now demanding. To allow the completion of the decree will be to enforce full payment by the appellants when the complainant himself has not fully complied with the terms of his deed. Heretofore it has been the practice in this jurisdiction, where such a situation has arisen, to stay the foreclosure until the grantor does make good his covenant. This procedure is fair, equitable and just. If Emery in the present suit, should be permitted to recover the full amount of his purchase money mortgage, the appellants are left to a suit upon the covenant against encumbrances, and to the uncertainty of ever being able to collect such judg-

ment as they may recover. In the meantime the grantor has already recovered his money.

In *Dayton v. Dusenbury*, 25 N. J. E. 110, the headnote reads as follows:

“A suit to foreclose a purchase money mortgage on lands conveyed to the mortgagor by deed with covenant against encumbrances, which were at the date of the deed, and at the commencement of the suit, subject to judgments, the amount due on the judgments exceeding that due on the mortgage, so that no deduction could be made from the mortgage debt, *stayed until the premises should be released from the lien of the judgments.*”

The opinion of Chancellor Runyon concludes:

“Under the circumstances a decree cannot be made for the complainant directing a deduction of the amount due on the judgments from the amount due on the mortgage. *This suit must therefore be stayed until the premises shall have been released from the lien of the judgments.*”

In *Stiger v. Bacon*, 29 N. J. E. 442, there was a prior mortgage upon the premises. The purchase money mortgage contained a clause providing for release from the prior mortgage upon the payment of certain sums. The court said:

“*The suit therefore must be stayed to afford Mrs. Stiger (complainant) an opportunity to obtain a release of the land from the mortgage.*”

In *Bergman v. Fortesque*, 74 N. J. E. 266, a counter suit had been instituted by the mortgagor for a breach of a covenant in the deed. There had already been instituted at law a suit for these damages. The court says:

“Under these circumstances and in view of the fact that an action of law is now pending for the recovery of damages for the alleged breach of covenant, it seems manifest that the appropriate action of this court is to stay the foreclosure decree until a judgment can be rendered in the pending action at law.”

In the present case there has been no action at law instituted for a breach of the covenant against encumbrances. To avoid circuitry of action and believing their position warranted and supported by the authorities heretofore cited, the appellants instituted the action by a counterclaim in the present suit. In the event this court determines that the appellants have been erroneous in so doing, it is respectfully submitted that the foreclosure should be restrained until the appellants can, in appropriate proceedings in the courts of law, obtain a judgment in this cause. The equity of such a proceeding is obvious. The lands are encumbered. There has been a breach of the covenant against encumbrances. The appellants did not receive that for which they bargained. They cannot sell or mortgage their premises. Irreparable damage will be done unless such a course is followed.

It is therefore respectfully submitted that in the event this court decides that the appellants have no cause of action in a court of equity for a breach of a covenant against encumbrances by reason of the existence of the right-of-way, then the proceedings should be restrained and stayed until the appellants can obtain the rendition of a judgment in a court of law.

## VII

## CONCLUSION.

The present action is one peculiarly appropriate to the courts of equity. Here an innocent purchaser buys his home. As appears from the evidence, it is a modest home. He pays only \$8,500 for it. It represents his savings and earnings throughout his life. He embellishes it and improves it. He adds adornment to it. It becomes to him a sacred thing. He finds that the very deed by which his title was warranted, and by which he understood that he was receiving an unencumbered piece of property, has been broken. He finds that running through his home in a right-of-way. He knows that he cannot sell; that he cannot mortgage the land. If this mortgage is foreclosed he is without recourse. No one else will lend money upon this land with the existing right-of-way. At any time he may be compelled to remove his home. The solemn covenant against encumbrances was broken at the time the deed was delivered to him.

The grantor himself then begins foreclosure upon the purchase money mortgage. He comes into a court of equity and demands payment of the \$6,100 representing the balance of the purchase price. This \$6,100 represents the fair value of this home unencumbered, free and clear as the deed recited. He now asks this court to award him the sum of \$6,100 when he has not given value for this sum. Appellants stand willing and ready to pay, and have from the outset and inception of this suit, been ready and willing to pay every dollar and penny of principal and interest to the complainant, when the complainant obtains a re-

lease of the right-of-way. Until that time the complainant is not entitled to his money. The defendants on the other hand, are entitled to a reduction of the amount of the mortgage equal to the depreciation in the value of the land. Should this court determine that they have no defense to the bill of foreclosure, they then lose their property, their investment and their right to the suit at law upon the covenant. They are compelled by the decree of the court to pay the amount due or the property will be sold.

By the very act of the respondent, the appellants cannot raise a mortgage upon their land to satisfy this decree. If they are forced and compelled to bring suit at law the respondent may at that time be worth nothing. Not only does equity and good conscience dictate that the appellants have a just and righteous counterclaim, but also sound logic and the settled opinions of this jurisdiction agree. Here is a purchase money mortgage. Here is a covenant against encumbrances. Here is a breach of the covenant. Here is proof of real and substantial damage suffered. As Vice Chancellor Stevenson said in *Peterson v. Reid*, 76 N. J. E. 377 at p. 383:

“Is it possible that under any system of jurisdiction in a civilized state he would be permitted to foreclose his purchase money mortgage for the entire amount while the unfortunate mortgagor would be left to an action at law for his damages, which he might never be able to collect?”

Respectfully submitted,

THEODORE D. PARSONS,  
Of counsel.

QUINN, PARSONS & DOREMUS,  
Solicitors of the Appellants.

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## New Jersey Court of Errors and Appeals.

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IRA D. EMERY,

*Complainant-Respondent,*

*vs.*

JOHN HANSEN and HULDA S.

HANSEN,

*Defendants-Appellants.*

---

*On Appeal*

*From*

*Court of*

*Chancery.*

---

### BRIEF OF RESPONDENT.

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#### NATURE OF THE CASE.

Ira D. Emery, complainant-respondent, on final hearing was awarded a Decree for the foreclosure of a purchase money mortgage executed by appellants. In the same Decree a Counterclaim filed by appellants was dismissed. In the Counterclaim they alleged the presence of a right of way over the mortgaged premises, the existence of which they claimed caused a depreciation in the value of the premises in excess of the amount due upon the mortgage. This right of way, according to appellants, was created by an old map (Exhibit D-16, p. 96), which depicts a right of way somewhat wider than a later map (Exhibit C-3, p. 79), the difference in width constituting the extent of the encroachment complained of.

Ever since their purchase, appellants have used not only the entire area covered by the deed, but

also the land to the west thereof, comprising the narrower right of way delineated on the later map. They have treated this right of way to the west of their premises as if they owned it, by planting grass, (p. 63), trees, and laying walks thereon, and using the driveway as the means of access to their garage. It has actually become their side and back yard where they house a police dog, whose kennel is erected some 15 or 20 feet from the westerly side of the mortgaged premises. (See Photograph, Exhibit D-14, p. 94).

Undoubtedly fearing that the long non-user could obliterate every physical sign of the right of way appearing on the old map, which appellants now deem such a peril, they have taken particular pains each year to cut a path to the river, (p. 64). About three times a week Hansen hauled on his boots and marched through marshes to the water's edge. He claims he did all this to 'look at the river' (p. 64).

The only other evidence of any user is found in the testimony of Mrs. Pomphrey, (p. 68). She walked over the way that now lies to the west of the mortgaged premises only once in twenty-three years, and on occasions had seen her husband go over it with his horse and wagon.

The learned Vice Chancellor's concluding comment on the factual situation is as follows:

'There is neither allegation nor proof of fraud in this transaction; nor is there any suit pending which challenges the right of the defendants to occupy the overlapping portion of the passageway, or to use the driveway in its present location; *nor are these rights questioned in any way by anyone but the defendants themselves.*' (Writer's Italics).

**Summary of Appellants' Arguments and Respondent's  
Answers Thereto.**

*Appellants' contentions are as follows:*

(1) That the Map of 1901, being prior, established a way a few feet wider than the existent unobstructed way adjoining appellants' premises.

(2) That the building on the mortgaged premises encroaches on part of the right of way as delineated on the older map.

(3) That this encroachment is due to the way, and constitutes a breach of the covenant against encumbrances.

(4) That being a breach of the character claimed, and not one of seizin or title or quiet enjoyment, abatement should have been decreed even in the absence of fraud or actual or constructive eviction or the pendency of an action at law; notwithstanding as the Vice Chancellor said, their rights under the deed are not questioned, 'in any way by anyone but the defendants themselves'.

*The Respondent's reply:*

(1) That the Map of 1901 did not establish such a way as appellants claim.

(2) That if it did, the way has been abandoned and the possibility of any interference is remote.

(3) That if not abandoned, the existence of the way does not constitute a breach of the covenant against encumbrances.

(4) But assuming it does constitute a breach of the covenant against encumbrances, the breach is not such as should prompt abatement under the decisions of this State.

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**POINT ONE.**

**That in the Absence of Fraud or Eviction, a Breach of Covenant of Title or Against Encumbrances, Cannot be Set Up in Abatement of the Amount Due Upon a Purchase Money Mortgage.**

Vice Chancellor Berry's opinion is attacked by appellants chiefly because in it an alleged breach

of covenant against encumbrances is placed on a parity with a breach of covenant of title.

Appellants would make a distinction between the two covenants. They concede that abatement should be denied when a covenant of title has been breached and the mortgagee fails to show fraud or an actual or constructive eviction; but they deny that fraud or eviction or even the pendency of an action are essential where the breach claimed is one against encumbrances. In other words, if the fee to a way is not included, a purchaser, in the absence of fraud or eviction, is not entitled to abatement; but if the fee is conveyed and there exists dominant tenants, abatement should be decreed, although there has been no user or claim asserted by the tenants. Why there should be this startling distinction appellants seek to explain. They argue that a breach of covenant against encumbrances takes place as soon as the covenant is made, whereas a breach of covenant of title occurs not when made but some other time.

If there be a distinction between the two covenants it is an academic distinction whose observance seems generally unnecessary, and in this case quite improper.

The Vice Chancellor in denying relief on the counterclaim reached a conclusion both natural and fair. A contrary rule would often invite a person, with knowledge, to purchase property containing a long-forgotten way, and then set up the paper existence of that way as a defense to a foreclosure action. Requiring eviction or fraud affords adequate safeguard to the rights of both parties, and particularly to deserving defendants who face a real and not an imaginary or self-created peril.

The first case in New Jersey dealing with this question is *Shannon v. Marselis*, 1 N. J. Eq. 413 at page 426, in which the Chancellor, making no distinction between title or encumbrance, said:

‘Where there is a mere allegation upon

an outstanding title or incumbrance, the court will not interfere, but leave the party to his remedy on the covenant; but where there is an eviction, or even an ejectment brought, it will interpose'.

Eight years later the next case is reported. It is *VanRiper v. Williams*, 2 *N. J. Eq.* 407. In it the *Shannon* case is ignored and no other authority is substituted. The doctrine of this case, if it has one, is by name repudiated in *Hamill v. Inventors' Manufacturing Co.*, 55 *N. J. Eq.* 649 at 652 and 653, where appears a quotation from the *Shannon* case, characterized as the leading case on the subject.

In the *Hamill* case is also cited *Glenn v. Whipple*, 12 *N. J. Eq.* 50, from which the following quotation is taken :

'And in *Shannon v. Marselis et al.*, *Saxton* 426, the Chancellor says, where there is a mere allegation of an outstanding title or encumbrance, the court will not interfere, but leave the party to his remedy on the covenant, but where there is an eviction, or even an ejectment brought, it will interpose'.

The following cases cited by appellants are rejected by Vice Chancellor Reed in the *Hamill v. Inventors' Co.*, *supra*; *White v. Stretch*, 22 *N. J. Eq.* 76 (both bill and cross bill dismissed); *Dayton v. Dusenbury* 25 *N. J. Eq.* 110 (relies on *White v. Stretch*); *The Union National Bank of Rahway v. Pinner*, 25 *N. J. Eq.* 495 (relies on *White v. Stretch*);

In *Baudendistel v. Zabriskie's Exrs.*, 50 *N. J. Eq.* 453, cited by appellants, there was no covenant against encumbrances and the Court of Errors and Appeals was very careful to say that it expressed no opinion on what relief, if any, would be granted if the alleged encumbrances of taxes and assessments had been enforced by a demand for payment,

and that in any event an enforcement of such a lien would be tantamount to an eviction.

*Kuhnen v. Parker*, 56 *N. J. Eq.* 286 (cited by appellants), was on demurrer to an answer which alleged fraud. Demurrer overruled. The absence of fraud in the present case as pointed out by Vice Chancellor Berry rendered the decision of no binding force. It will further be observed that in *Kuhnen v. Parker*, the owner of the pipe line running across the mortgaged premises was in full and continuous enjoyment of the pipe line. Not so with the alleged dominant tenement in the case at bar.

In *Bergman v. Fortescue*, 74 *N. J. Eq.* 266, (cited by appellants), an action at law was pending.

*Redrow v. Sparks*, 76 *N. J. Eq.* 134, (cited by appellants), was a case involving fraud, and on the proofs none was established. Complainant was awarded a decree for the full amount of his mortgage.

In *Peterson v. Reid*, 76 *N. J. Eq.* 377, a demurrer to an answer alleging fraud was overruled. This case was reversed in 80 *N. J. Eq.* 450, the Court of Errors and Appeals saying (p. 455) :

‘There is no equity to a deduction from the face of the mortgage until the mortgagor has a right of action and has been in fact damaged, *since it would be manifestly unjust to make a deduction where there might eventually be no loss*’. (Writer’s italics).

*Hawthorne v. Odenson*, 94 *N. J. Eq.* 588, (cited by appellants), was a case where fraud was alleged and proved.

In *Curtis-Warner Corporation v. Thirkettle*, 99 *N. J. Eq.* 806, (cited by appellants), Vice-Chancellor Berry found fraud and decreed an abatement.

*Frenche v. McConnell*, 38 *Atl.* 687, cited by Vice Chancellor Berry in support of his conclusions, is attacked by appellants because the mortgagor in

that case set up outstanding encumbrances in his answer, whereas appellants have chosen to set up the same 'defense' in a counterclaim. Why the breach of covenant should be entitled to more weight when appearing in a counterclaim than when set up in an answer, appellants do not explain.

In the case two leases had been recognized in several deeds making up the mortgagor's chain of title. The Court of Errors and Appeals affirmed the decree on foreclosure notwithstanding the two leases were found to be, 'a cloud upon the title or encumbrance upon the premises'.

The defense was rejected because neither fraud nor eviction was alleged or shown and no action was pending. *Shannon v. Marselis, supra*, and *Glenn v. Whipple, supra*, are among the authorities cited in support of the affirmance.

*Mills v. Brunetto*, 143 Atl. 832 appears to be the most recent pronouncement on the subject. The opinion is by Vice Chancellor Berry and completely answers appellants' contention that neither fraud nor eviction need be proven. The learned Court said:

'In the absence of legal or equitable fraud, and in the absence of actual or constructive eviction, on foreclosure of a purchase-money mortgage, the mortgagor will be left to his remedy at law for breach of covenant of title or against incumbrances, and will not be permitted to set up such defense in abatement of the amount due on his mortgage'.

To affirm the present decree, no decision of this State need be initially overruled, but a reversal would have to surmount the formidable barriers of *Shannon v. Marselis, supra*, *Glenn v. Whipple, supra*, *Frenche v. McConnell, supra*, *Hamill v. Inventors' Manufacturing Co., supra*, *Mills v. Bru-*

*netto, supra*, as well as the other authorities cited by Vice Chancellor Berry in his opinion.

Neither appellants' brief nor an exhaustive examination of the Equity Reports reveals a single case in which abatement in the absence of fraud has been decreed because of an alleged easement.

The nearest approach is *Kuhnen v. Parker, supra*, which, as Vice Chancellor Berry observed, involved allegations of fraud; and moreover concerned a pipe line whose use was fully and continuously enjoyed at and after the conveyance.

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#### POINT TWO.

**That by Virtue of the Conveyance Act 2 C. S. 1570 as Well as by the Language of the Deed, the Alleged Breach, if Anything, is a Breach of the Covenant of Title.**

Throughout this case appellants have confidently assumed that the alleged way, in overlapping a portion of the mortgaged premises, worked a breach of the covenant against encumbrances contained in their deed. Is this assumption entirely justified? If any covenant is thereby breached, is it not the covenant of title, a breach which appellants admit avails them nothing in the absence of eviction or fraud? This suggestion is given much color both by the language of the deed and the Conveyance Act, 2 C. S. 1570. The instrument is printed in full on page 88 of the Record. By it were granted premises described by meets and bounds (p. 90):

‘Together with all and singular, the houses, buildings, trees, *ways*, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining’. (*Writer's italics*).

The deed is in effect the statutory deed of the *Conveyance Act*, the foregoing quotation expressly embodying substantially the following statutory

language and under Sec. 99 the deed becomes in fact the statutory deed, it being (to the same effect):

'101. *Buildings, improvements, etc., included in conveyance.*—Sec. 3. Every such deed conveying land shall, unless an exception shall be made therein, be construed to include all and singular the buildings, improvements, ways, woods, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof. (P. L. 1899, p. 531).'

Likewise does the covenant against encumbrances contained in the deed follow substantially the statutory language of paragraph 109, which reads as follows:

' \* \* \* if to such covenant there be added "free from all incumbrances," these words shall have as much effect as the words "and that the said premises are free and clear, and freely and clearly acquitted and discharged of and from all former mortgages, judgments, executions, and of and from all other incumbrances whatever". (P. L. 1899, p. 533).'

The covenant conveying all *ways*, appurtenances, etc., necessarily embodied and included all rights incident or appertaining thereto. It cannot be argued that under such language any existant rights of dominant tenants of the way would be impliedly excepted. The existence of such rights would be repugnant to the grant of *all* rights appurtenant to the way. The existence of such rights would violate the covenant to convey, a covenant of title and not one against encumbrances.

This interpretation gives full effect to the covenant against encumbrances appearing later in the

deed. The deed and statute specifically describe certain encumbrances, i. e., mortgages, judgments, etc. Then follows in each a general reference to all other encumbrances.

It would seem a bit unusual that the specific reference to ways, waterways, etc., in the covenant of title, should render a breach of that covenant a breach also of the covenant against encumbrances. This latter covenant makes reference to specific encumbrances, but does not include a way. Nor does there appear any warrant for including ways within the general language of other encumbrances.

There is justification for including within, 'other encumbrances', those encumbrances not specifically mentioned but neither the dictates of logic nor the canons of statutory construction lend any force to the possible contention that 'other encumbrances' should embrace any or all of the hereditaments expressly mentioned in another covenant of the deed.

In both the statute and the deed, buildings, waters, privileges and appurtenances to the same belonging, etc., appear in the same covenant with ways. When buildings have encroached beyond premises covered by warranty deeds, the breach has been held to be *not* a breach of the covenant against encumbrances. *Dorfman v. Lieb*, 141 *Atl.* 581 at 582. Of water ways the same has been held. In *Stanfield v. Schneidewind*, 96 *N. J. L.* 428 at 430, Mr. Justice Black held that the presence of a stream upon land did not constitute a breach of the covenant against encumbrances, because the Conveyance Act heretofore referred to provides, 'that a deed conveying lands, unless an exception shall be made therein, shall be construed to include all \* \* \* "waters, water courses, right," etc'. There appears no good reason why this analogy should be destroyed by arbitrarily removing the word 'ways' from the statutory and deed classification in which it is found.

In the concluding portion of their brief, appellants advance the naive suggestion that if the alleged breach is not a defense, then equity on some nebulous principle should restrain further proceedings on the foreclosure decree until an action at law for damages is begun and terminated. The fallacy of this contention lies in asking for an equitable remedy in the face of a denial of an equitable right.

In the cases properly recognizing rights to which a mortgagor may be entitled, at least three different remedies have been decreed:

- (1) Staying the foreclosure suit until a mortgage or the like is cancelled of record.
- (2) Deducting straightway an amount from that due on the mortgage under foreclosure.
- (3) Staying the foreclosure suit pending the termination of an action at law.

How can any of these remedies be decreed in the absence of an equitable right first being established?

If such a remedy be given appellants, then by the same token should a similar remedy be accorded those mortgagors who claim a breach of the covenant of title but show no fraud or eviction.

Appellants either have an equitable cause of action or they have not. If they have not, then a remedy [injunctive relief] incident to their having a cause of action, should be withheld.

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It is respectfully urged that the decree of the Court of Chancery be affirmed.

Respectfully submitted,

APPLEGATE, STEVENS, FOSTER  
& REUSSILLE,

*Solicitors of Complainant-Respondent.*

LESTER C. LEONARD,  
*Of Counsel.*





