

New Jersey Court of Errors and Appeals

Bill of Complaint

(Filed Sept. 22, 1916)

IN CHANCERY OF NEW JERSEY

IGNITZ RATKEWICZ and AMELIA,
his Wife,

Complainants,

and

FRAMISCZK and CAROLINA KARO,
his Wife,

Defendants.

On Bill to
Foreclose, etc. 20

To the Honorable EDWIN ROBERT WALKER, Chan-
cellor of the State of New Jersey :

The complainants Ignits Ratkewicz and Amelia
Ratkewicz, his wife, of the City of Passaic, County 30
of Passaic, and State of New Jersey, respectfully
shows that :

1. On or about the 24th day of July, 1914,
Framisczk Kara and Carolina Kara, his wife, of
the City of Passaic, in the County of Passaic, and
State of New Jersey, being indebted to Ignits
Ratkewicz and Amelia Ratkewicz, his wife, of the
same place, in the sum of Three Hundred (\$300.

40

Bill of Complaint

00) Dollars executed to them a bond of that date to secure that sum, payable on the 24th day of July, which will be in the year One Thousand Nine Hundred and Sixteen, with interest at the rate of six per centum per annum payable semi-
 10 annually, from the date of the bond.

2. To secure payment of the bond, said Framieszk Kara and Carolina Kara, his wife, executed to said Ignits Ratkewicz and Amelia Ratkewicz, his wife a mortgage of even date with the bond; and thereby conveyed to them 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
 20 bond. Which mortgage, having been first duly acknowledged and the certificate thereof duly indorsed thereon was recorded in the Register's Office of Passaic County, in Book V-9 of Mortgages page 7.

3. The mortgaged premises are described as follows; All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Passaic, in the County of Passaic and State of New Jersey, and described as follows;

30 Beginning at a point on the easterly side of Ninth Street, distant south from Passaic Street one hundred and fifty (150) feet and running thence (1) easterly and parallel with Passaic Street one hundred and twelve feet and five tenths (112.5) of a foot; thence (2) southerly and parallel with Ninth Street twenty-five (25) feet; thence (3) westerly and parallel with the first
 40 course one hundred and twelve feet and five tenths (112.5) of a foot to the said easterly side

Bill of Complaint

of Ninth Street and thence (4) northerly, following the said easterly side of Ninth Street twenty-five (25) feet to the point or place of beginning.

Being the same premises conveyed to the said parties of the first part by the said parties of the second part by deed bearing even date herewith and to be herewith recorded, this mortgage being given to secure a part of the purchase money of said conveyance. 10

Subject to mortgage in the sum of four hundred dollars (\$400.00) now covering said premises, held by Robert J. Gillen.

4. And your orators further show that on the 2nd day of February, Nineteen Hundred and Sixteen, Frank Kara and Karolina Kara, his wife, executed a mortgage on the said premises to Alexander Nosal and Tekla, his wife, to secure the sum of \$600.00 or some other sum which said mortgage was registered in the Register's office of the County of Passaic on the 4th day of February, 1916 in Book D-10 of Mortgages for said County on page 586, by virtue of which mortgage the said Alexander Nosal and Tekla, his wife, claim to have some lien upon the said mortgaged premises, but your orator charges that the last mentioned mortgage was executed and recorded subsequently to your orator's said mortgage and with full notice thereof, and if an encumbrance at all upon the said premises, it is subsequent to the mortgage of your orators. 30

5. Said Framiszek Kara and Carolina Kara, his wife, have always been in possession of the mortgaged premises.

Bill of Complaint

6. Of the principal sum, three hundred dollars with interest thereon, from July 24th, 1914, is due upon the complainants' bond and mortgage.

Complainants are without adequate remedy in the courts of law and therefore prays—

10 1. That Framiszek Kara and Carolina Kara, his wife, and Alexander Nosal and Tekla, his wife, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made;

2. That an account may be taken of the amount due on complainants' mortgage.

3. That the defendants, or one of them, may be decreed to pay complainants the amount so found due, with interests and costs, by a short day, to
20 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

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainants the amount so found due on their mortgage, with interest and costs;

5. That a writ of subpoena may issue, commanding said defendants to answer this bill of com-
30 plaint and to abide by such decree as this court may make in the premises.

A. D. SULLIVAN,

Solicitor of Complainants.

LOUIS A. COWLEY,

Of Counsel with Complainants.

A true copy.

Robert H. McAdams,

Clerk.

5

Final Decree

(Filed February 16, 1917)

IN CHANCERY OF NEW JERSEY

10

| | | |
|--|---|---------------------------------------|
| Between IGNITS RATHEWICZ and AMELIA, his wife, Complainants, and FRAMISCZH KARA and CAROLINA KARA, his wife, Defts. | } | No. 2 On Bill to foreclose, &c. |
|--|---|---------------------------------------|

20

This cause coming on to be heard in the presence of Adrian D. Sullivan, solicitor and of counsel with the complainants and it appearing that the complainants' bill having been heretofore taken as confessed against Framisczk Kara and Carolina Kara, his wife, and Alexander Nosal and Hekla, his wife, the defendants whereupon, and upon reading a report on file, made by Albert K. Condit, Esquire, one of the Masters of this Court bearing date, on the fourteenth day of February in the year of Our Lord One Thousand

30

Nine Hundred Seventeen by which it appears that there was due to the complainants on day of making of the said report, for principal and interest on said mortgage, the sum of three hundred forty-six and 05/100 dollars, that the same premises are comprised in the mortgage of the complainants Ignitz Katkewicz

Final Decree

and Amelia, his wife, and that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and pay the money so due as aforesaid; and no cause being shown or appearing to the contrary.

- 10 It is thereupon, on this 16th day of February, in the year of Our Lord One Thousand Nine Hundred and Seventeen by Edwin R. Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree that the said report, and all the matters and things therein contained, do stand ratified, and confirmed, and that the said mortgaged
- 20 premises be sold to raise and satisfy the several sums of money due to the said complainants, that is to say, to the said complainants the aforesaid sum of three hundred forty-six dollars and five cents (\$346.05) and interest thereon, to be computed from the fourteenth day of February, in the year of Our Lord One Thousand Nine Hundred and Seventeen being the date of the Master's Report, with the costs in this cause to be taxed; and to the complainants a counsel fee of
- 30 3.46 dollars, and that a writ of *feri facias* do issue for that purpose out of this Court, directed to the Sheriff of the County of Passaic commanding him to mak a sale, according to law, of the said mortgaged premises, and that out of the money arising from such sale, he pay, to the complainants or to their solicitor, said debt, interest and costs; and in case more money should be raised by the said sale than shall be sufficient

Amended Petition

to answer such several payments, that sum surplus be brought into this Court, to abide the further order of the Court, unless otherwise previously disposed of by the order of this Court; and that the said Sheriff make return without delay of his proceedings by virtue of the said writ. 10

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.

E. R. WALKER,
C.

Amended Petition 20

(Filed March 12, 1917.)

Read and used on argument of rule to show cause

IN CHANCERY OF NEW JERSEY

Between
IGNITS RATKEWICZ and AMELIA 30
RATKEWICZ, his wife,
Complainants, No.3
vs. On bill &c.
FRAMSCZK KARA and CAROLINA
KARA, his wife, et als.,
Defendants.

County of Hudson, }
State of New Jersey, } ss- 40

Amended Petition

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

The amended petition of Framszk Kara and upon which relief is sought in the form and nature of an affidavit, upon the oath of the said Framszk Kara respectfully shows: -

10 1. I am one of the defendants in the above entitled cause of action, and am a resident of the City of Passaic, County of Passaic, State of New Jersey.

2. On or about the 24th day of July, 1914, I purchased from the complainants in this cause, by warranty deed, property known as Lot 13 in Block One Hundred (100) on "Map of Dundee Company," and also known by street number 150
20 Ninth Street, City and County aforesaid, with a frame building thereon, for the sum or purchase price of \$1712.50, assuming the obligation to pay, as a part of the said purchase price, a mortgage of \$400.00, then a valid and subsisting lien or encumbrance of record upon the said premises, and held by one Robert J. Gillen.

3. At the time of the purchase aforesaid, I actually paid to the said complainants herein, as a part of the said purchase price, the sum of
30 \$1012.50; and gave to them a purchase money mortgage of \$300.00, together with my bond, as security for the unpaid part of the said purchase price, to wit \$300.00, as the records of the said Passaic County will more fully show.

4. Since the purchase of the premises aforesaid, and in the manner as aforesaid, I have fully paid and caused to be discharged of record, the
40 said mortgage debt of \$400.00, held by the said

Amende Petition

Robert J. Gillen, as a first mortgage or encumbrance upon the said property and premises.

5. The said premises conveyed to and mortgaged as above set forth are more particularly described as follows:

Beginning at a point on the easterly side of Ninth Street, distant south from Passaic Street one hundred and fifty (150) feet and running thence (1) easterly and parallel with Passaic Street one hundred and twelve feet and five tenths (112.5) of a foot; thence (2) southerly and parallel with Ninth Street (25) feet; thence (3) westerly and parallel with the first course one hundred and twelve feet and five-tenths (112.5) of a foot to the said easterly side of Ninth Street and thence (4) northerly, following the said easterly side of Ninth Street twenty-five (25) feet to the point or place of beginning.

6. At the time that I purchased the premises as aforesaid and prior thereto, I believed and relied upon the representations of the said complainants herein made to me, that the said land and premises so conveyed were actually seized, and occupied and possessed by them without any claim, encroachment or occupation by any person, persons or adjacent land owners; and was without knowledge of the true condition of affairs.

7. These representations were false and fraudulent and made for the purpose of deceiving me, and did deceive, as will hereinafter appear.

8. After I had given to the said complainants herein, the purchase money mortgage for \$300.00, and had gone into possession of the said premises, I was, on or about August 1st, 1915, in-

Amended Petition

formed of encroachments on the said land and premises and by adjacent land owners, to wit Mike Majowicz, sometimes called Michal Majowicz and Eva Majowicz, his wife, Peter Sudolwicz, Adam Sut and John Sweet; I thereupon on August 5th, 1915, caused a map or survey to be made of the said land and premises, so pretended to have been seized and possessed by the said complainants as aforesaid, by Anton Petterson, a Surveyor and Civil Engineer of Passaic, New Jersey; at the suggestion of Adrian D. Sullivan, Esquire, of New Jersey, and did then and there for the first time discover that my said land and premises were encroached upon by the foundations and buildings of the said adjacent land owners.

20 9. These encroachments and infringements upon the said land and premises existed at the time of my said purchase and prior thereto: and during the occupancy of the said complainants, and to the knowledge of the said complainants; and were by stealth, cheat, fraud and false representations kept secret from me at the time of the said conveyance for the purpose of inducing me to purchase the said land and premises and at the price aforesaid.

30 10. After I had discovered the encroachments as aforesaid, I apprised the said complainants of these conditions and demanded that they clear my land of the encroachments. This they refused to do, claiming they had nothing further to do with the property.

40 11. Subsequently and on the 19th day of August, 1915, I retained Adrian D. Sullivan, Esquire, a lawyer of New Jersey, to bring suit against the said complainants for breach of warranty or

Amended Petition

false sale of the said premises. No suit was ever instituted by the said Adrian D. Sullivan against these complainants, although I was led to believe for about five months that proper proceedings had been instituted against them; and only discovered the truth when I caused a search to be made of the Court records in Passaic County. 10

12. On March 31st, 1916, and after I had made frequent demands upon the complainants for redress as above set forth, I caused a suit to be instituted in the Passaic County Circuit Court against the aforementioned encroachers for a recovery of the land infringed upon. On June 26th, 1916, I obtained a judgment in the said Court for the possession of the land infringed and encroached upon. Certified copies of the complaint and the rule for final judgment in the said action are annexed to this affidavit and made a part thereof. 20

13. The land and premises actually encroached upon, and of which I have been wrongfully dispossessed and deprived, as shown by the Court records of the said Passaic Circuit Court, annexed to this affidavit, under my purchase as aforesaid, is as follows:

Beginning at a point on the easterly side of Ninth Street distant one hundred and seventy-five feet southerly from the southeast corner of Ninth Street and Passaic Street and running thence (1) easterly at right angles to Ninth Street one hundred and twelve feet and five tenths of a foot; thence (2) northerly, and parallel with Ninth Street, seventy-five hundredths of a foot; thence (3) westerly and parallel with the first course 30

Amended Petition

one hundred and twelve feet and five tenths of a foot to the said easterly side of Ninth Street; thence (4) southerly along the same seventy five hundredths of a foot to the point or place of beginning.

10 14. The encroachments still remain upon my land, although I have caused execution to issue upon the judgment as aforesaid and thereafter appealed to the said complainants for aid, who still refused to assist or aid me in any way, but insisted on enforcing the said mortgage contract which I had given them to secure the \$300.00 owed by me to them in the manner as above set forth.

20 15. On or about the 22nd day of September, 1916, the said complainants herein, through their solicitor, the said Adrian D. Sullivan, Esquire, filed a bill in the Chancery Court of New Jersey, to foreclose the said purchase money mortgage, given as aforesaid, as the records of the said Chancery Court will more fully show.

30 16. After I had been served with a summons to answer in the said foreclosure suit, I exercised, as I believe, due diligence to defend the said suit. I immediately thereafter went to the office of the said Adrian D. Sullivan, Esquire, in respect to the said foreclosure suit and after I had again explained to him about the encroachments aforesaid, and about my judgment aforesaid, was advised by him to put up the said \$300.00 mortgage debt and that he would find out all about the said foreclosure suit and straighten out the whole matter. I thereupon went to the Prosecutor of Passaic County, after having re-

Amended Petition

fused to to put up the money for the purchase money mortgage as aforesaid, and explained to him my case, giving to him my subpoena to answer which has been served upon me. He retained the same for about four or five weeks and afterward, on November 27th, 1916, sent me to the office of Thomas F. McCran, Esquire, in Paterson, N. J., whom I retained in this matter I wanted him to defend the said foreclosure suit, and offered to pay over to him the said mortgage debt of \$300.00 as aforesaid; but he advised me afterwards to go over to see the said Adrian D. Sullivan, Esquire, saying that the said Adrian D. Sullivan would fix the matter up. This I refused to do.

17. No answer or any other pleadings were filed by me in the said foreclosure suit within the time fixed by law or at any other time although I was and am anxious and willing to defend the said suit and to seek a redress against the said complainants herein for the false and fraudulent sale, as above set forth.

18. I have been put to considerable expense and burthened with a large outlay of money in respect to the said judgment of the said Passaic Circuit Court and attempting to clear my property of the said encumbrances. I have never been able to obtain possession of my deed to the said land and premises which was in the possession of one James A. Sullivan, Esquire, attorney for the said complainants at the time of the conveyance, and a brother and law associate then of the said Adrian D. Sullivan, although I have made repeated attempts to gain possession of the same.

Amended Petition

19. On or about the 16th day of February, 1917, a final decree was entered against me in the said foreclosure suit for \$346.05, as the records of this Court will more fully appear.

20. The said warranty deed, given me as aforesaid and now of record, contains covenants of "Seizin," "quiet enjoyment," and that the grantors therein would "execute such further assurances of the said land as may be requisite."

21. Wherefore petitioner prays that execution may be stayed in the final decree in this matter as aforesaid, that the final decree may be opened up, that he be permitted to answer and defend the said bill of foreclosure filed herein, that he be permitted to pay into Court an amount of money sufficient to cover the amount of the decree, or to give a suitable bond as security for the same, that the said complainants herein might be caused in this suit, by proper proceedings, to redress petitioner's wrongs as complained of, and that the said parties herein might be compelled to do anything else as might be legally and equitably decreed by this Honorable Court.

And petitioner will ever pray, etc.

30 Sworn and subscribed to this } FRANK KARA
5th day of March, 1917, }
before me.

William Simmons,
Comm. Deeds,
Hudson Co. N. J.

County Circuit Court Action

Annexed to Amended Petition

PASSAIC COUNTY CIRCUIT COURT

FRAMSCZK KARA and CAROLINA
KARA, his wife,

Plaintiffs,

vs.

MIKE MAJOWICZ, sometimes
called Michal Majowicz, and
EVA MAJOWICZ, his wife, and
PETER SUDOLWICZ, ADAM SUT
and JOHN SWEET,

Defendants.

10

20

Plaintiffs, Framszek Kara and Carolina Kara, his wife, residing at Number 150 Ninth Street in the City of Passaic in the County of Passaic and State of New Jersey, say:

1. That on July 24th, 1914, the plaintiffs became the owners of the following described tract of land and premises lying and being in the City of Passaic, County of Passaic and State of New Jersey, 30

Beginning at a point on the easterly side of Ninth Street distant one hundred and seventy five feet southerly from the southeast corner of Ninth Street and Passaic Street and running thence (1) easterly at right angles to Ninth Street one hundred and twelve feet and five tenths of a foot; thence (2) northerly, and

40

Amended Petition—County Circuit Court Action

parallel with Ninth Street, seventy five hundredths of a foot; thence (3) westerly and parallel with the first course one hundred and twelve feet and five tenths of a foot to the said easterly side of Ninth Street; thence (4) southerly along
 10 the same seventy-five hundredths of a foot to the point or place of beginning.

2. Defendants ever since said July 24th, 1914, wrongfully deprived the plaintiffs of possession of said premises and said defendants since that day have dispossessed plaintiffs and still keep them out of possession of said premises.

3. The plaintiffs' right to the possession of said land accrued on July 24th, 1914.

20 Plaintiffs demand judgment for possession of said premises and one thousand dollars damages.

FRANK SMIT,
 Attorney for Plaintiffs.

A true copy.

Dated March 1st, A. D. 1917.

(County Seal) John J. Water,
 Clerk.

22798.

**Rule for Final Judgment in Passaic
County Circuit Court Action**

Annexed to Amended Petition

PASSAIC COUNTY CIRCUIT COURT

10

FRAMSCZK KARA and CAROLINA
KARA, his wife,
Plaintiffs.

vs.

MIKE MAJOWICZ, sometimes
called Michal Majowicz and
EVA MAJOWICZ, his wife and
PETER SUDOLWICZ, ADAM SUT
and JOHN SWEET,
Defendants.

20

The summons and complaints in this cause having been duly served upon the defendants, on March 29th, 1916, and defendants having filed their answer or answers thereto, this action having been brought to trial before Judge George S. Silzer without, a jury, and the counsel for the defendants having admitted the allegations of the complaint and having consented to judgment against the defendants on June 13th, 1916, and the said judge on that day having given judgment in favor of the complainants for six cents damages and possession of the premises described in the complaint:

30

It is ordered that judgment final be entered in favor of the complainants and against the defen-

Deed of Conveyance

dants for the sum of six cents and that the plaintiffs do recover against the defendants the possession of the premises described in the complaint and the plaintiffs cost to be taxed.

Rule actually entered this twenty-sixth day of
10 June, 1916.

On motion of

FRANK SMIT.

Attorney of Plaintiffs:

A true copy.

Dated, March 1st, A. D. 1917.

(County Seal) John J. Water, Clerk.

22799

20

Deed of Conveyance

*Referred to by Amended Petition and Answering
Affidavits*

IGNITS RATKEWICZ, *et ux.*, }
to
FRAMSCZK KARA, *et ux.* }

30 This deed, made the 24th day of July, 1914,
Between Ignits Ratkewicz and Amelia Ratkewicz, his wife, of the City of Passaic, in the County of Passaic, and State of New Jersey (hereinafter known as the grantors.)

And Framsczk Kara and Carolina Kara, his wife, of the City of Passaic, in the County of Passaic and State of New Jersey (hereinafter known as the grantees.)

40

Deed of Conveyance

Witnesseth, That in consideration of one dollar and other valuable consideration the said grantors do grant, bargain, sell and convey, unto the said grantees, their heirs and assigns,

All that certain tract of land and premises situate, in the City of Passaic, in the County of Passaic and State of New Jersey, and described as follows: 10

Beginning at a point on the easterly side of Ninth Street distant one hundred and fifty (150) feet south of the southeasterly corner of Ninth and Passaic Streets, and running thence (1) easterly and parallel with Passaic Street one hundred and twelve and five-tenths (112.5) of a foot; thence (2) southerly and parallel with Ninth Street twenty-five (25) feet thence (3) westerly and parallel with the first course one hundred and twelve feet and five-tenths (112.5) of a foot to the said easterly side of Ninth Street, and thence (4) northerly, following the point or place of beginning. 20

Being the same premises conveyed to the said parties of the first part by two certain deeds, one executed by Andrew Ling and wife, dated August 16th, 1914, and recorded in the Register's Office of the County of Passaic in Book Q-16 of Deeds for said County, pages 292, &c., and the other executed by the Dundee Water Power and Land Company, a corporation, by deed bearing date July 23rd, 1914, and to be herewith recorded. 30

This conveyance is made subject to a mortgage in the sum of four hundred dollars (\$400) now covering said premises, held by Robert J. Gillen which said mortgage the said parties of the sec-

Deed of Conveyance

ond part hereby assume and agree to pay as a part of the consideration of this conveyance.

This conveyance is made subject to restriction, if any, contained in former deeds.

10 To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said grantees, their heirs and assigns forever.

And the said Ignits Ratkewicz and Amelia Ratkewicz covenant with the said grantees as follows:

(1) That they are lawfully seized of said land.

(2) That they have the right to convey the said land to grantees.

20 (3) That the grantees shall have quiet possession of the said land and that the same are free from all incumbrances, except as herein stated.

(4) That they will execute such further assurances of the said land as may be requisite.

(5) That they have done no act to encumber the said land.

(6) That they will warrant generally the property hereby conveyed.

30 In Witness Whereof, the said grantors have hereunto set their hands and seals the day and year above written.

His

IGNITS X RATKEWICZ (L. S.)

Mark

Her

AMELIA X RATKEWICZ (L. S.)

Mark

40 Signed, Sealed
and Delivered
in the presence
of Jas. A. Sullivan.

Deed of Conveyance

State of New Jersey, ss:
County of Passaic.

Be it remembered, that on this 25th day of July, in the year of our Lord One Thousand Nine Hundred and Fourteen, before me, a Master in Chancery of New Jersey, personally appeared Ignits Ratkewicz and Amelia Ratkewicz, his wife, who I am satisfied are the grantors in the within deed of Conveyance named; and I, having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: 10

And the said Amelia Ratkewicz, wife as aforesaid, being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely without fear, threats, or compulsion of her said husband. 20

JAMES A. SULLIVAN,
Master in Chancery of New Jersey.

(Recorded in the office of Register of Deeds and Mortgages of Passaic County on July 27, A. 30 D., 1914.)

(In Book No. 24 of Deeds, on pages 214, etc.)

Order to Show Cause

(*Filed Feb. 21, 1917*)

IN CHANCERY OF NEW JERSEY

10

Between

IGNITS RATKEWICZ and AMELIA

RATKEWICZ, his wife,

Complainants,

vs.

On Bill, Etc.

FRAMISZK KARA and CAROLINA

KARA, his wife, *et als.*,

Defendants.

20

This matter coming on to be heard upon the verified petition of Framiszck Kara, one of the defendants in the above-entitled cause:

And it appearing that a bill of foreclosure was filed by the complainants herein in this cause on September 22nd, 1916, and that no answering pleadings were filed by the said defendant, within the time allowed by law, to the said foreclosure bill;

30

And it appearing that no decree of this Court has been entered on record against the said Framiszck Kara in the said foreclosure suit, and sufficient reasons appearing, therefor;

It is on this 21st day of February, 1917, on motion of Robert S. Hartgrove, of counsel for the said defendant, ORDERED, that the said complainants herein show cause before this Court at the

40

Order to Show Cause

Chancery Chambers in Jersey City, on the 26th day of February, 1917, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why the defendant, Framisczk Kara, should not be allowed to answer the bill filed in this cause as of time;

10

And it is further ORDERED, that in the meantime, and until the further order of this Court in the premises, the said complainants herein, their attorneys, agents and assigns be restrained from further action in this cause;

And it is further ORDERED, that the said complainants or their solicitor be served with an exact copy of this order, together with an exact copy of the verified petition upon which it is founded, certified by counsel, on the day of the date of this order.

20

EDWIN ROBERT WALKER,

C.

Respectfully advised,
John Griffin,
V. C.

Affidavit of Adrian D. Sullivan*Read on Order to Show Cause**(Filed March 12, 1917.)*

10

IN CHANCERY IN NEW JERSEY

Between

IGNITS RATKEWICZ and AMELIA
RATKEWICZ, his wife,

Complainants,

and

On Bill, etc.

FRAMISCZK KARA and CAROLINA
KARA, his wife, *et als.*

20

Defendants.

State of New Jersey, }
County of Passaic, } ss:

30

Adrian D. Sullivan, of full age, being duly sworn on his oath according to law, deposes and says: that he is an Attorney at Law and Solicitor in Chancery of the State of New Jersey and engaged in the practice of law in the City of Passaic; that he is a solicitor for complainants in the above entitled matter; that on or about the 19th day of August, 1915, Framisczk Kara the defendant in the above entitled cause, retained deponent to institute appropriate legal proceedings against Mike Majowicz, *et als.*, on account of an alleged encroachment of an adjoining building. The said Framisczk Kara inform-

40

Adrian D. Sullivan

ed deponent that there was a substantial encroachment of the adjoining building owned by the said Mike Majowicz, *et als.*, upon his property. Deponent, after several conferences with the said Framisczk Kara requested him to have a survey made giving the exact location of the building, in order to determine the exact encroachment, if any, of the building of Mike Majowicz on property of Framisczk Kara. 10

Deponent further says that he thereafter obtained from the said Frank Kara a survey showing location of lot and encroachment of adjoining building, made by Anton L. Pettersen, Civil Engineer, which survey is now in deponent's possession and which he begs leave to submit herewith, from all of which it appeared that the encroachment complained of was entirely under the surface of the ground and that it was irregular and extended from nothing up to about $8\frac{1}{4}$ inches; that the encroachment was the result of the mason contractor who constructed the cellar using rough stone and permitting the rough edges of the stone to extend over the line on to the property of said Framisczk Kara. 20

Deponent further says in order to determine as nearly as possible the extent of the damage, if any, deponent had two competent builders make excavations along the encroaching walls to determine the exact extent of the encroachment and what damage, if any, the same might be to the said Framisczk Kara in the event of building a building flush with the side line of his lot where the encroachment was and as the result of this investigation deponent was informed that the encroachment was of a character that could in no 30 40

Adrian D. Sullivan

way materially injure the said Framisczk Kara in the event of the erection of such a building as the foundation wall of any structure that might be erected on said plot could be securely and compactly tied or built into the adjoining wall and
10 that the cost of the erection of the building would not be increased or the safety of the building lessened as the result thereof.

Deponent thereupon informed the said Framisczk Kara that he would institute a suit for damages or ejection to obtain possession of the property; that he did not believe the damages were of such a character as to warrant him in instituting suit.

Deponent further says that he advised the said
20 Framisczk Kara to accept a small amount of money and enter into a lease or a party wall agreement which would permit the encroachment to continue during the life of the encroaching building. The said Framisczk Kara at first seemed to be satisfied and deponent sent for the owner and suggested the payment of Fifty Dollars, out of which the expenses were to be paid. This, however, the said Framisczk Kara refused to accept and demanded not less than Two Hundred
30 Dollars.

Deponent further says, being satisfied that he would be unable to bring the parties together and that the facts in the case did not justify the institution of suit, returned the retainer fee to said Framisczk Kara.

Deponent further says that it is not true as stated in the affidavit of Framisczk Kara that for a period of five months he was led to believe, by
40 deponent, that a suit had been instituted and was

Adrian D. Sullivan

pending and the fact is that within a period of thirty days the survey was made and the facts obtained which led deponent to decline to institute suit and this information was brought to his attention **immediately.**

Deponent further says that the statements made in paragraph 18 of petitioner's affidavit are not borne out by the facts in the case. The following are the facts to best of deponent's recollection: Some time after the death of deponent's late brother, James A. Sullivan, Framiszczk Kara called at the office of deponent to ascertain if the deed for the lot in question was in the office. I caused a search to be made of my late brother's papers and found a bond and mortgage, abstract of title, insurance policy, etc., in connection with the loan of Robert J. Gillen but the deed was not among the papers. From the abstract, it appeared that the deed was a warranty deed. I suggested to Framiszczk Kara that he might get a certified copy of the deed from the Register's office in Paterson, at a cost of about two dollars.

Deponent further says that he never heard anything further about the mislaid deed and that deponent's late brother, James A. Sullivan, was never a law partner or associated with deponent in the practice of law.

Deponent further says that he had no further knowledge concerning the encroachment or the action taken thereon until the complainants left their mortgage papers with deponent with instructions to institute foreclosure proceedings. That in due time foreclosure proceedings were instituted and deponent then learned from Senator Thomas F. McCran that he had been retained

Adrian D. Sullivan

to interpose a defense to the foreclosure proceedings and requested an extension of time.

Deponent further says that he twice extended the time for filing of the answer, by request of Lawyer McCran, as will appear by his letters which are annexed hereto and marked Schedules 10 1 and 2 respectively; that deponent had assurance from Lawyer McCran that the mortgage would be paid off and after waiting several months without result deponent on the 16th day of February, A. D., 1917, entered an Interlocutory Decree.

Deponent further says that thereafter he held the proceedings in abeyance by request of Eugene L. Hart, an Attorney at Law, of the City of Passaic, who gave deponent assurance that Framiszek Kara would pay the mortgage without further delay. No part of the mortgage has been paid and the matter has been greatly delayed in deference to the wishes of the various attorneys representing the said Framiszek Kara.

ADRAIN D. SULLIVAN.

Sworn and Subscribed to
before me this 10th
day of March, A. D., 1917.

30 Samuel Weinberger,
Notary Public,
State of New Jersey.

**Schedule Annexed to Affidavit of
Sullivan**

Schedule 1

October 17, 1916. 10

Dear Sir:

Mr. Framisczk Kara has handed to me a subpoena which has been served on him in a suit instituted by you on behalf of Mr. Ratkewicz. As I will be very busy for the next two weeks or so and have not been able to go into the details of the case with my client, may I kindly ask that you sign the enclosed stipulation granting me until November 15th, within which to prepare an answer on behalf of my clients as I understand from them that they have some defense to the action. 20

Thanking you in advance for any courtesy you may extend to me in this matter, I remain,

Respectfully yours,

(Signed) THOMAS F. McCran,

JP/MHW. P.

Mr. Adrian D. Sullivan,
243 Main Avenue,
Passaic, N. J.

30

Schedule 2

November 27th, 1916.

Mr. A. D. Sullivan,
Counsellor at Law,
Main Avenue,
Passaic, N. J.

40

Schedule Annexed to Affidavit of Sullivan

Re: Ratkewicz vs. Kara, et al.

Dear Mr. Sullivan:

10 My client, Mr. Kara, called at my office this morning, and after going over with him, in detail, the subject of his claim under the above foreclosure proceedings, I advised him to make some arrangements about satisfying the claim of your claims under the mortgage held by him. Mr. Kara informed me, however, that it will be impossible for him to raise the money at once, but said that if given about one month's time, he was certain he could obtain another loan on his property so as to pay off your client's mortgage.

20 To that end, may I ask whether or not your client would be willing to grant Mr. Kara an extension of time for one month within which to raise the money to pay off the mortgage now under process of foreclosure?

I shall very much appreciate any courtesy you may extend along the lines above suggested and I will await your further advise in the matter.

Respectfully yours,
(Signed) THOMAS F. McCRRAN,
P.

Affidavit of Anton L. Pettersen*Read on order to show cause*

IN CHANCERY OF NEW JERSEY

Between

IGNITS RATKEWICZ and AMELIA

RATKEWICZ, his wife,

Complainants,

and

FRAMISZK KARA and CAROLINA

KARA, his wife, *et als.*,

Defendants.

On Bill, etc.,
Affidavit.

10

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

20

Anton L. Pettersen, of full age, being duly sworn on his oath according to law deposes and says, that he is a civil engineer and engaged in business in the City of Passaic; that on or about May 9th, 1916, one Framiszcz (or Frank) Kara engaged him to make a survey of a plot of land on the east side of Ninth Street, 150 feet south from Passaic Street, Passaic, New Jersey, owned by the said Frank Kara, in order to locate the building thereon erected and to determine if there was an encroachment and if so to what extent.

30

Deponent further says he completed the said work and turned over the survey to the said Frank Kara showing the exact location of the building as requested, for which the said Frank

40

Anton L. Pettersen

P.

Kara was to pay him Ten Dollars; that up to the present time said amount has not been paid to deponent although several bills have been tendered to said Frank Kara.

10 Deponent further says that he found that the encroachment was entirely under the surface of the ground and consisted chiefly in the projection of the rough irregular edges of the foundation stones of the building erected on the southerly side of the property in question, extending over the lines on to the land of the said Frank Kara.

20 Deponent further says that the encroachment was very irregular as determined from several excavations made in the ground along the southerly side of the property in question. In some places there was no encroachment and at other points, portions of the rough stone extended over as much as eight and a quarter inches; that as the result, no uniform line of encroachment could be established.

Deponent further says that in his experience of thirty years as an engineer, he has found many such encroachments but is of the opinion that considering the character of the encroachment, it could not result in actual damage to the said Frank Kara.

30 Deponent further says that during the month of June, 1916, his assistant Raymond Parks, was called as a witness and testified in a suit in the Passaic Circuit Court instituted by Framiszczk Kara and Carolina Kara, his wife against Mike Majowicz, *et als.*, in ejectment, predicated upon the encroachment in question; that judgment was given in favor of plaintiffs for six cents, damages,

Ignits Ratkewicz

Deponent further says that the allegations of fraud and deception made in paragraphs 6, 7 and 9 in petitioner's petition are absolutely untrue in fact; that deponent had no knowledge whatever of an encroachment of the adjoining building at the time of the sale of same; that no question
10 arose concerning any such encroachment; that it is untrue as stated in said paragraphs 6 and 7 of petitioner's petition that deponent knowingly made false and fraudulent statements to the said Framiszczk Kara concerning the said premises, for the purpose of deceiving him.

Deponent further says that he had no knowledge of the encroachment in question until on or about August 5th, 1915, at which time his attention was called to an alleged encroachment and he
20 thereupon had a survey made to determine the character of same.

Deponent further says that the encroachment in question existed at the time he purchased the property from Andrew Ling and Kate Ling, his wife, on August 16th, 1904.

Deponent further says that upon learning of said encroachment he called upon Framiszczk Kara and they called at the office of Adrian D. Sullivan concerning the encroachment but deponent
30 believed they were unable to bring about an amicable settlement owing to the unreasonable demands for money damages made by the said Framiszczk Kara.

Deponent further says that the said Framiszczk Kara has frequently promised to pay and satisfy his said mortgage of \$300.00, not the subject of foreclosure in this suit, and relying on said promises deponent has deferred action in the matter
40

Ignits Ratkewicz

from time to time in order to save unnecessary expenses in connection with said foreclosure but up to the present time the said petitioner, Framisczk Kara has wholly failed to comply with his said promises; that no part of said principal or interest has been paid and the whole amount of \$300.00 together with interest from July 24th, 1914, is due him. 10

Deponent further says that he has been informed and believes that Andrew Ling, the former owner of said lot offered to remove said encroachment and had made arrangements to remove said encroachment and that the said Framisczk Kara and his wife refused to permit him to enter upon the premises for that purpose and but for this refusal said encroachment would have been long since removed. 20

Deponent further says that from an examination of the property and from the reports of competent and disinterested parties, he believes that the encroachment in question is in no way damaging or hurtful to the said Framisczk Kara and that his pretended defense to this action is only a subterfuge to escape payment of all or some part of deponent's said mortgage.

Deponent therefore prays that petitioner's petition be dismissed to the end that deponent might proceed with his foreclosure and enforce payment of the money due him. 30

His
IGNATZ X RATKAWICZ.

Mark

Sworn and subscribed to before me this

10th day of March, A. D., 1917.

Witness:

Joseph Ratkowitz,

Arthur J. Sullivan,

Attorney at Law of N. J. 40

**Order Discharging Order to Show
Cause**

(Filed June 18, 1917)

10 IN CHANCERY OF NEW JERSEY

| | | |
|--|---|---------------|
| Between IGNITS RATKEWICZ and AMELIA RATKEWICZ, his wife, <div style="text-align: right;">Complainants,</div> <div style="text-align: center;">and</div> FRAMISZK KARA and CAROLINA KARA, his wife, <i>et als.</i> , <div style="text-align: right;">Defendants.</div> | } | On Bill, etc. |
|--|---|---------------|

20

This matter being open to the Court by Robert S. Hartgrove, solicitor for defendants, in the presence of Adrian D. Sullivan, solicitor for complainants, and the petition and affidavits filed in the cause and upon which a temporary restraining order has been granted, having been considered and arguments of counsel having been heard thereon.

30 It is on this 18th day of June, Nineteen Hundred and Seventeen, ordered that the order to show cause, together with restraint therein contained, be discharged with costs.

Respectfully advised,

E. R. WALKER,

C.

John Griffin,
V. C.

40

Memo of Vice-Chancellor Griffin

COURT OF CHANCERY OF NEW JERSEY

Chambers of
VICE-CHANCELLOR GRIFFIN

10

Ratkewicz vs. Kara.

Jersey City, N. J.,
April 20, 1917.

A. Brian Sullivan, Esq.,
243 Main Avenue,
Passaic, N. J.

Robert S. Hartgrove, Esq.,
576 Newark Avenue,
Jersey City, N. J.

20

Gentlemen:

I am quite at a loss to understand on what theory Mr. Hartgrove can assert any claim against the complainant. I assume that the complainant gave to the defendant a full covenant warranty deed with covenants of seisin, right to convey, peaceable possession, further assurance and warranty. The charge made is that when this conveyance was made the foundation of the building of an adjoining owner encroached on the lands conveyed some nine inches, as a consequence of which the defendant was compelled to sue in ejectment and obtained a judgment in his favor, which established the fact that the title conveyed to him to the *locus in quo* was valid. He

30

40

Memo of Vice-Chancellor Griffin

had his opportunity, in the ejectment suit, of recovering mesne profits, and may still, I assume, sue the adjoining landowner for mesne profits and damages, provided he is not precluded by his claim of a thousand dollars damages in the ejectment suit and entering judgment for six cents damages.

10 If he should recover against the complainant, the complainant could not recover against the adjoining landowner for mesne profits, that is, the sum which might be paid to the defendant because the complainant was out of possession during the period. He might possibly be subrogated to the rights of the defendant, and so sue. But this would lead to a multiplicity of suits, which
20 it is the purpose of equity to avoid. However, I am not so much concerned with this feature of the case, because the rule seems to be that the covenantee is not entitled to demand of his covenantor expenses incurred in defending a suit which sustains the title as valid, or in removing an apparent but unfounded cloud on his title. See 7 Rul. Cas. Law, Sec. 85, p. 1169.

A careful reading of the covenants usually contained in deeds with full covenants does not disclose any covenant which is broken by a mere
30 encroachment, which is in the nature of a trespass.

The order to show cause, with the restrain therein, will be discharged.

Yours truly,

JOHN GRIFFIN.

Betw
IGNI
R.

FRAN
K.

TH
mad
whol
from
title
mad
of E
caus
Da

I c
abov

Notice of Appeal

(Filed June 26, 1917)

IN CHANCERY OF NEW JERSEY

10

| | | |
|--|---|---------------|
| Between IGNITS RATKEWICZ and AMELIA RATEWICZ, his wife, <p style="text-align: center;">Complainants,</p> and FRAMISCZK KARA and CAROLINA KARA, his wife, <i>et als.</i> , <p style="text-align: center;">Defendants.</p> | } | On Bill, etc. |
|--|---|---------------|

The defendants hereby appeal from the order 20
 made on the 18th day of June, 1917, and from the
 whole and every part thereof, said order appealed
 from being made in this Court in the above en-
 titled cause, dismissing the order to show cause,
 made herein, of February 21st, 1917, to the Court
 of Errors and Appeals in the last resort in all
 causes.

Dated, June 25th, 1917.

ROBERT S. HARTGROVE, 30
 Solicitor and of
 Counsel with Defendants.

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

ROBERT S. HARTGROVE,
 of Counsel with Defendants.

40

Reasons on Appeal

(Filed July 24, 1917)

NEW JERSEY COURT OF ERRORS AND APPEALS

10

Between
IGNITS RATKEWICZ and AMELIA
RATEWICZ, his wife,
Complainants-Respondents, On Bill, etc.
and
FRAMISZK KARA and CAROLINA
KARA, his wife,
Defendants-Appellants.

20

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

The petition of Framisczk Kara and Carolina Kara, his wife, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by an order made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 18th day of June, 1917, wherein the said Framisczk Kara and Carolina Kara were defendants and Ignits Ratkewicz and Amelia Ratkewicz, his wife, were complainants, in this respect, to wit: That the said order adjudges that the order to show cause, founded on the petition of the said defendants to open up and vacate the final decree entered on the bill of complaint in said cause, and to allow the said defend-

40

Reasons on Appeal

ants to file an answer thereto, be discharged because (as stated by the Court) of a want of a meritorious defense against the said bill of complaint.

Your petitioners humbly appeal from the whole and every part of said order of the Chancellor, dated June 18, 1917, which order adjudges as aforesaid, on the ground that the same is erroneous, for that said order should have adjudged that the said petition presented a meritorious defense, and said petition should have been sustained by the order of the Chancellor and the defendants granted relief prayed for therein, and said petition should have been retained under the said order appealed from. 10

Your petitioners therefore pray that said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet. 20

ROBERT S. HARTGROVE,
Solicitor for and of
Counsel with Appellants.

Answer to Petition of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

10 Between
 IGNITS RATKEWICZ and AMELIA
 RATKEWICZ, his wife.
 Complanants-Respondents.
 and
 FRAMISZK KARA and CAROLINA
 KARA, his wife,
 Defendants-Appellants.

20 The answer of the above named respondents to the petition of appeal of the above named appellants.

30 These respondents, not acknowledging all or any of the matters, which in the said petition of appeals are contained to be true, for answer thereto, nevertheless, say and admit, that an order was on the 18th day of June, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said order is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

ADRIAN D. SULLIVAN,
 Solicitor for Respondents.

Answer to Petition of Appeal

(Endorsed)

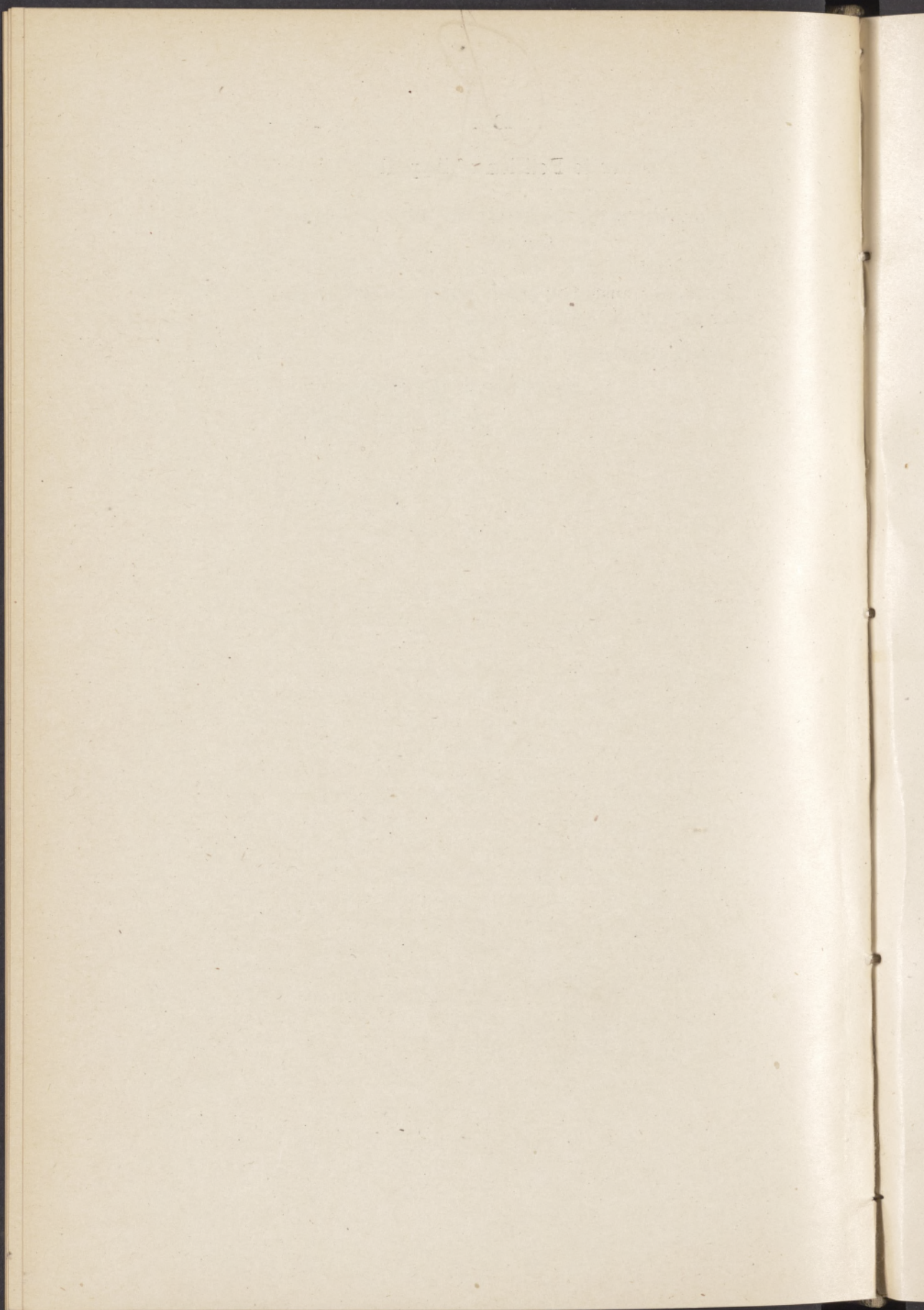
Consent

I hereby consent to the filing of the within answer as within the time required by law.

Dated, September 21, 1917.

10

ROBERT S. HARTGROVE,
Sol'r for Appellants.



R

New Jersey Court of Errors
and Appeals

| | | |
|---|---|---------------|
| IGNITS RATKEWICZ and AMELIA RATKEWICZ, his wife, Complainants-respondents, and FRAMISCZK KARA and CAROLINE KARA, his wife, <i>et al</i> , Defendant-Appellants. | } | On Bill, Etc. |
|---|---|---------------|

APPELLANTS' BRIEF

Question at Issue

The question raised by the Vice-Chancellor and argued by Counsel in the Court below, and upon which the motion on the pleadings filed herein was decided, was whether the defendants-appellants, as purchasers, had, by reason of certain encroachments upon the land purchased, a right of abatement of the purchase money mortgage, held by the complainants-respondents, and which was the subject of the foreclosure proceedings.

No question of laches of the defendants-appellants was raised, nor was the question of the right of the Chancery Court to open a final decree to let in a meritorious defense.

POINT I.

The existence of the encroachments upon the land purchased by the appellants from the respondents, by the buildings of the adjoining land owners, at the time of the delivery of the deed of conveyance, was a breach of the covenants of warranty contained in the deed of conveyance.

POINT II.

The judgment recovered by the appellants in the ejectment proceedings against the encroachers was a recovery upon a concurrent remedy which did not preclude a recovery against the conveyancers for a breach of contract.

POINT III.

The appellants are entitled to a recovery in the foreclosure proceedings against the respondents for all losses and expenses immediate and consequential upon the breach of the covenants of warranty, by reason of

- (a) Enforcement of their right to possession of the land encroached upon.
- (b) Diminution in the value of the land on account of the continuous encroachments.

ARGUMENT.**POINT I.**

The existence of the encroachments upon the land purchased by the appellants from the respondents, by the buildings of the adjoining land owners, at the time of the delivery of the deed of conveyance, was a breach of the covenants of warranty contained in the deed of conveyance.

A. In the conveyance of real estate, an encroachment, permanent in character by reason of the overlapping of the building of the adjoining land owners, is a defect in that title of the property conveyed, since

1. The purchaser obtained a title which is unmarketable.

See,

Walter vs. Mitchell, 92 Pac. 315.

Kalpan vs. Bergman, 107 N. Y. S. 719.

Reynolds vs. Wynne, 105 N. Y. S. 849.

Place vs. Dudley, 58 N. Y. S. 802.

B. There is an implied covenant in the deed of conveyance that no encroachments should exist upon appellants' land at the time of the transfer, since

1. The appellants were entitled to the actual possession of all the land and premises set forth in the deed.

2. Under a contract to purchase, the appellants could not have been compelled to accept the deed of conveyance with encroachments upon the land.

See,

Place vs. Dudley, *supra*.

Walter vs. Mitchell, *supra*.

C. The encroachments upon the land at the time of the delivery of the deed, and their continuation thereof, was not a quiet possession of the land by the appellants whereby they held, occupied, and possessed the same without any interruption of a third person.

See,

Comp Stat. Vol. II. Tit. Conveyance
p 1571, See 109.

D. The failure of the respondents, as vendors, to remove the encroachments from the appellants' land was a violation of their legal duty, under the contract, since

1. Appellants were entitled to full possession of the land.

2. Under the covenant of "further assurance," the intent and purpose is to give effect and operation to the estate and interest conveyed by the deed.

See,

Zabriskie vs. Baudenistel, (N. J.) 20, Atl. Rep. 168.

Comp. Stat. Vol. II. Tit. Conveyances p. 1571, Sec. 110.

E. The insistence of the appellants is upon respondents' lack of seizin in fact to all the land deeded at the time of the conveyances whereby appellants have been continuously disturbed in possession.

See,

Place vs. Dudley, *supra*.

F. The judgment in the ejectment proceedings is neither estoppel in *pais* or of record so as to render the appellants' title to the land marketable, since

1. The encroachments still remain upon the land even after the issuance of execution on the judgment in the ejectment proceedings.

2. Resort must be had to further judicial proceedings to give appellants undisturbed and absolute possession to the land conveyed.

See,

Rutherford Loan & Improvement Co. vs. Santrick (N. J.) 44 Atl. Rep. 938.

Hart vs. Leonard 42 N. J. E. 416.

Shatford vs. Lyons, 37 N. J. E. 94.

Hischberg vs. Flusser 101 Atl. Rep. 191.

G. The strip of land encroached upon can not be said to be inconsequential.

See,

Hirschberg vs. Flusser (N. J.) *supra*.

POINT II.

The judgment recovered by the appellants in the ejectment proceedings against the encroachers was a recovery upon a concurrent remedy which did not preclude of a recovery against the conveyancers for a breach of contract.

A. The dispute and uncertainty as to the appellants' lack of possession to the strip of land encroachment upon was set at rest by the judgment in the ejectment proceedings.

See,

Hirschberg vs. Flusser, *supra*.

B. The recovery of damages by the appellants, in the ejectment proceedings was for the tortious acts of the disseizor.

See,

15 Cyc. Tit. Ejectment, p. 208.

Kline vs. Williams (N. J.).

54 Atl. Rep. 556.

C. The recovery of judgment and damages by the appellants in the ejectment proceedings was not an election of remedies in satisfaction of injuries committed by the respondents, since

1. Mesne profits or damages for waste can be recovered only against the disseizors.

2. The appellants' right of action against the respondents arose out of their breach on contract.

3. The two actions are concurrent, consistent, and remedial of wrongs different in character. See,

Carlisle vs. Cooper, 18 N. J. E. 241.

15 Cyc. Tit. Election of Remedies, p. 252.

Patterson vs. Baker, 51 N. J. E. 49.

McMichael vs. Horay, (N. J.) 100, Atl. Rep. 205.

POINT III.

The appellants are entitled to a recovery in the foreclosure proceedings against the respondents for all losses and expenses, immediate and consequential upon the breach of covenants of warraanty, by reason of

(a) Enforcement of their right to possession of land encroached upon.

(b) Diminution in the value of the land on account of the continuous encroachments.

A. Since the encroachments upon the land conveyed were a breach of contract, damages, as an elementary proposition of law, are recoverable by the appellants.

B. A recovery against the respondents for breach of warranty would include, as consequential and immediate damages, all reasonable expenses incurred by the appellants in their prosecution of the ejectment suit, since

1. These expenses could not be recovered in the ejectment proceedings, although appellants were successful.

2. The covenant of "further assurance" imposed the obligation upon the respondents to remove the encroachments upon appellants' land.

See,

Pike vs. Daly, 54 N. J. L. 4.

Zabriskie vs. Baudenistel, *supra*.

13 Cyc. Tit. Damages, p. 82.

Dubois vs. Herminee 56 N. Y. 672.

Coolidge vs. Bingham, 5 Mete. (Mass.)

68.

L. R. Exch. 35.

C. Under the equitable rule and the Chancery Act, actions for breach of contract and for deceit can be counter claimed in a foreclosure proceeding.

See,

O'Brien vs. Hulfish 22 N. J. E. 472.

Carter vs. Executors etc. 23 N. J. E.
270.

Chancery Rules, 1916, p. 6, rule 28.

D. A Court of Chancery will indemnify the appellants for any excess over what they would have paid for the land with knowledge of the encroachments thereon, to be exacted under the foreclosure of the purchase money mortgage.

See,

O'Brien vs. Hulfish, *supra*. at p. 475.

E. Whenever a wrong has been done for which the law affords no relief, equity will afford a relief, even though no precedent can be found.

See,

Earle vs. American Sugar Co. 74 N. J.
E. 751.

Palmer vs. Palmer 84 N. J. E. 590.

CONCLUSION.

1. The judgment in the ejectment proceedings was declaratory of possessory rights, as well as of title to the strip of land involved.
2. These possessory rights are still unsatisfied.
3. The duty was and is incumbent upon the respondents as covenantors to satisfy these possessory rights.
4. Obligors are answerable for all breaches of duty.
5. The remedies against the disseizors and the covenantors are separate and distinct.
6. Equity delights in doing justice and never suffers a wrong to go without a remedy.

Respectfully submitted,
ROBERT S. HARTGROVE,
Solicitor and of Counsel
for defendants-appellants.

