

## Vendor-Purchaser--Restrictive Covenants--Marketable Title-- Specific Performance (Casriel v. King, 58 A.2d 269 (N.J. Eq. 1948))

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not appear to have been within the contemplation of the legislature. This holding appears to be sound for the Wisconsin statute does not even intimate that its purpose was other than to regulate the rights to that type of property deemed in law to be lost. Nor can there be any doubt that this money was purposely concealed for safe-keeping, or that the plaintiff has exercised complete good faith. There is little direct authority on the question of merger of treasure-trove into lost property, and generally it appears that the courts will uphold the rights of persons who can bring themselves under the established common law rule which distinguishes between treasure-trove and lost property, when they have acted in good faith, for the common law will not be lightly brushed aside by strained decisions or subtle technicalities.

H. B. E.

**VENDOR-PURCHASER—RESTRICTIVE COVENANTS—MARKETABLE TITLE—SPECIFIC PERFORMANCE.**—The vendor brought an action for specific performance of a contract for the sale of property situated in Asbury Park, N. J. The purchaser's defense was that the plaintiff was unable to convey a marketable title because of a restrictive covenant prohibiting the sale of liquor on the premises. The covenant dated back to 1875 and all the property in the vicinity was burdened with a similar provision by the common grantor. At the time of the contract liquor had been sold openly at the plaintiff's hotel for many years; also liquor was being sold by another hotel within one block, by three others within two blocks and by eight others within three blocks. *Held*, for the plaintiff. The "hazard of litigation" to which a purchaser must not be subjected depends upon the chances of successful attack as viewed by the court and does not include the remote possibility of an idle suit. *Casriel v. King*, — N. J. Eq. —, 58 A. 2d 269 (1948).

The purchaser of real property has a right to a marketable title which is reasonably safe against loss and attack.<sup>1</sup> "A marketable title is one that is free from a reasonable doubt concerning title."<sup>2</sup> This requirement must be distinguished from the objection that as a matter of fact, established by proofs, the vendor has no title at all, an objection which may be raised by either party and which will as a matter of law defeat an action of specific performance. In an action of specific performance by the vendor if there arises reasonable doubt concerning the title, the court without deciding the question regards the doubt as sufficient reason for not compelling the buyer to take the conveyance.<sup>3</sup> "... a purchaser is not to be compelled to take prop-

<sup>1</sup> *Barger v. Gery*, 64 N. J. Eq. 263, 53 Atl. 483 (Ch. 1902).

<sup>2</sup> *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195 (1890).

<sup>3</sup> POMEROY, *SPECIFIC PERFORMANCE* § 198 (3d ed. 1926).

erty, the possession of which he may be compelled to defend by litigation."<sup>4</sup> Where the buyer is willing to accept the questionable title, the vendor cannot use the doubt as a defense to specific performance.<sup>5</sup> The doubt which can arise must relate either to the law or facts of the case. Sometimes the courts will pass on a question of general law relating to the title but they are especially wary of construing instruments.<sup>6</sup> The uncertainty must be something more than mere speculation, theory or possibility. If the existence of the alleged fact or outstanding right is a very improbable or remote contingency which according to ordinary experience has no probable basis the court may compel the purchaser in such a case to complete his title.<sup>7</sup> The doubt must be as affects the value of the land or will interfere with its sale.<sup>8</sup> It would seem that a rational doubt exists when a court of law would not feel compelled to instruct a jury to find that the fact existed, on the existence of which the vendor's title depends.<sup>9</sup>

Thus in *Moser v. Cochrane*<sup>10</sup> the title was declared marketable where there was a bare possibility that it might be affected by the decedent's debts, it appearing that the estate had been regularly probated and a balance of \$10,000 left in the personal estate. Ordinarily, if a clause in a deed prohibits the erection of a building on the premises the court will grant no decree but a restriction against such a use as would amount to a nuisance is not an incumbrance on title since the restriction is no greater than that imposed by law.<sup>11</sup> The defense that the title was unmarketable was held untenable where in the chain of title the corporation had given a deed in an ultra vires transaction;<sup>12</sup> also where an outstanding mortgage was barred by the statute of limitations.<sup>13</sup>

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<sup>4</sup> See note 2 *supra*.

<sup>5</sup> *Gartrell v. Stafford*, — Neb. —, 11 N. W. 732 (1882).

<sup>6</sup> *Flemming v. Burnham*, 100 N. Y. 1, 2 N. E. 905 (1885), in which title depended on the construction of a will, whether testator's children took under an absolute fee or one determinable on their death. It was an issue of law purely arising on construction of the will and the court did not grant specific performance; *Jeffries v. Jeffries*, 117 Mass. 184 (1874); *Hunting v. Damon*, 160 Mass. 441, 35 N. E. 1064 (1894); *Cornell v. Andrews*, 35 N. J. Eq. 7 (Ch. 1882).

<sup>7</sup> *Ferry v. Sampson*, 112 N. Y. 415, 20 N. E. 387 (1889).

<sup>8</sup> See note 2 *supra*.

<sup>9</sup> *Shriner v. Shriner*, 86 N. Y. 575 (1881).

<sup>10</sup> 107 N. Y. 35, 13 N. E. 442 (1887).

<sup>11</sup> *Floyd v. Clark*, 7 Abb. N. C. 136 (N. Y. 1879), where title to city lot was restricted against use for cemetery purposes it was held marketable because such was apparently declared a nuisance by city ordinance; *cf. Dieterlen v. Miller*, 114 App. Div. 40, 99 N. Y. Supp. 699 (1st Dep't 1906) in which a restriction prohibiting "any noxious, offensive or dangerous trade or business" an incumbrance because it was not a nuisance per se.

<sup>12</sup> *Fahey v. Ottenheimer*, 219 App. Div. 668, 220 N. Y. Supp. 491 (1st Dep't 1927).

<sup>13</sup> *Ouvrier v. Mahon*, 117 App. Div. 749, 102 N. Y. Supp. 981 (2d Dep't 1907); *Paget v. Melcher*, 42 App. Div. 76, 58 N. Y. Supp. 913 (1st Dep't 1899).

The doctrine of marketability is essentially an equitable one but in New York, under the merger it has been carried over in an action at law; where the title depended on parol evidence and was therefore unmarketable, the defendants in an action of specific performance counterclaimed at law and recovered partial payments already made. The court stated that it would be an absurdity to refuse specific performance and not grant the return of the deposit.<sup>14</sup> The presumption of death after seven years' absence unless attended by corroborative evidence is not enough to make the title marketable.<sup>15</sup> In New York the presumption of death after twenty years did not make title marketable,<sup>16</sup> but after forty years' absence title has been declared free from reasonable doubt.<sup>17</sup> In Pennsylvania where the title was affected by the possibility that a seventy-year-old woman might have issue it was held "presumption of law in favor of issue notwithstanding advanced age."<sup>18</sup> The pendency of proceedings to condemn land for public use is such a defect as to excuse the buyer.<sup>19</sup> While generally the title to property restricted against the sale of liquor is held not marketable,<sup>20</sup> the principal case is distinguished in that the covenant had been openly violated for many years and was long since abandoned, and this abandonment had been acquiesced in by the successors in title, making the source of attack fanciful and not real.

G. D.

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<sup>14</sup> *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233 (1889).

<sup>15</sup> See 21 HARV. L. REV. 374 (1907-08).

<sup>16</sup> See note 2 *supra*.

<sup>17</sup> See note 7 *supra*.

<sup>18</sup> *List v. Rodney*, 83 Pa. St. 483 (1877).

<sup>19</sup> *Cavanaugh v. McLaughlin*, 38 Minn. 83, 35 N. W. 576 (1887).

<sup>20</sup> *Genska v. Jensen*, — Wis. —, 205 N. W. 548 (1925).