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INCUMBRANCES ON REALTY—TRUSTEE'S LIABILITY.—Proceedings in the *Matter of the Estate of Henrietta H. Smith*, wherein criticism of the trustee's account was made because of investment in a share in a mortgage of realty in the City of New York.

The objection on which the court disposed of the case was that the rule of deceased's will permitted the trustee to make investment in a mortgage only if the realty securing the mortgage was unincumbered. The property in question was affected by a covenant restricting for fifty years the height and location of buildings on the premises. The question was whether or not the realty upon which the loan was made was in fact unincumbered. *Held*, the objection to the account sustained. The restriction constituted an incumbrance. *Matter of Smith's Estate*, — Misc. —, 65 N. Y. S. (2d) 457 (Surr. Ct. 1946).

Though there is no statutory definition of the word "incumbrance,"¹ there are a great many cases giving us judicial definitions of the term. These definitions are, in the main, very broad. A Pennsylvania case defines an incumbrance as any right subsisting in third persons which diminishes the value of land but is consistent with conveyance of title, and includes a lien, easement, servitude, or leasehold.² A federal court states that if the right or interest of the third person is such that the owner of the servient estate has not so complete an ownership and property in his land or real estate as he would have had if the right or interest spoken of did not exist, his land is in law diminished in value, and incumbered.³ Another case defines the term to include every burden on the estate or clog on the title, such as a term for years or grant by copy of court roll.⁴ But we find that courts do not always follow these broad definitions of the term and hold what would be an incumbrance within the definitions given above not to be an incumbrance within the particular covenant or statute which they are construing. An easement of an existing drainage ditch on a farm was held not to be an incumbrance within a covenant against incumbrances of warranty deed;⁵ and an easement of burial was held not an incumbrance within the meaning of a statute allowing sale for partition free from incumbrances.⁶

The most significant statement made in the instant case is that, in relation to mortgage investments of trustees, the word "incumbrance" means the same as it does in cases of specific performance, with the exception noted in N. Y. Real Property Law § 276. Under this section a special rule is made for trust investments where the

¹ See *Matter of Smith's Estate*, — Misc. —, 65 N. Y. S. (2d) 457, 459 (Surr. Ct. 1946).

² See *In re Pusey's Estate*, 299 Pa. 325, 149 Atl. 479, 481 (1930).

³ See *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599, 606 (C. C. A. 8th 1913).

⁴ See *Seitzinger v. Weaver*, 1 Rawle 377, 382 (Pa. 1829).

⁵ *Kleinmeyer v. Willenbrock*, 202 Iowa 1049, 210 N. W. 447 (1926).

⁶ *Clarke v. Keating*, 102 Misc. 361, 169 N. Y. Supp. 24 (Sup. Ct. 1918).

property is subject to an easement in favor of a municipal corporation or a transportation corporation. Easements of that type are not deemed an incumbrance upon such real property under any law relating to investments in mortgages upon real property by trustees. This section of the Real Property Law, however, does not change the meaning of the word as used by parties to a contract.

In a case very similar to the main case except that it was an action for specific performance, the court held that a covenant constituted an incumbrance where the former owners of the land in the block in which the premises in question were situated had mutually covenanted and agreed that twelve feet of the front of the lots should not at any time be built upon but should be forever left open for court yards.⁷

In the principal case the court cites definitions of the word "incumbrance" from a New York Court of Appeals decision. The case cited was an action for specific performance in which the court, while speaking of a covenant that ran with the land, stated: "If it affects the land either in itself or in its value or in the way in which it can be enjoyed, it is an incumbrance."⁸ Citing further from the same case the court said: "Any right existing in another to use the land, or whereby the use by the owner is restricted, is an incumbrance within the legal meaning of the term."⁹ Though the court in the principal case cites these broad definitions it points out that not every type of limitation on the use of land constitutes an incumbrance on it; by way of illustration stating that a restriction no broader than an applicable zoning ordinance would not be called an incumbrance.

As applied to realty, the common use of the term by the layman, as distinguished from its legal sense, is said to relate to something that is a lien on the property which requires the payment of money to discharge; and that it is scarcely, if ever, used with reference to a restricting reservation, right of way, or other easement.¹⁰ The court in the instant case does not discuss the possibility that the word "incumbrance" as used in the will might have been used in the layman's sense as given above but explains that in the case of a mortgage investment, the purpose of an incumbered title is to furnish assurance that the real security behind the loan will, in the event of foreclosure, furnish a title which the lender can contract to sell without fear of attack.

It is submitted that, despite the fact that it has been said that the word "incumbrance" has come to have a definite and fixed meaning,¹¹ we should continue to construe the term in light of the context in which it is found.

E. P. B.

⁷ *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. 303 (1890).

⁸ *See Bull v. Burton*, 227 N. Y. 101, 111, 124 N. E. 111, 115 (1919).

⁹ *Id.* at 111, 124 N. E. at 115.

¹⁰ *See Jackson v. Snow*, 62 Cal. App. 56, 216 Pac. 60, 62 (1923).

¹¹ *See City of Dayton v. Allred*, 123 Tex. 60, 68 S. W. (2d) 172, 178 (1934).