St. John's Law Review

Volume 6
Number 2 *Volume 6, May 1932, Number 2*

Article 26

Real Property--Unmarketability of Title as Right to Cancel Contract (Junius Construction Co. v. Cohen, 257 N.Y. 393 (1931))

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REAL PROPERTY—UNMARKETABILITY OF TITLE AS RIGHT TO CANCEL CONTRACT.—Plaintiff agreed to purchase certain real property from defendant's testator, for the purpose of erecting a factory thereon. The contract provided that title should be taken subject to the possible incumbrances shown on a map; that if two streets were legally opened by the city, there would be a slight variance of the exterior boundaries. The seller failed, however, to disclose that there was the possibility of a third street being opened, which would cut the property substantially in half and thereby render it valueless for the contemplated purpose. Plaintiff rejected title on the ground that the danger of the street being opened constituted an incumbrance, the failure to disclose which amounted to a misrepresentation. *Held,* The rejection of title as unmarketable was proper despite the fact that the map was cancelled by the time of trial. *Junius Construction Co.* v. *Cohen,* 257 N. Y. 393, 178 N. E. 672 (1931).

The threatened restriction of the use to which real property can be put due to a city ordinance [1] is an incumbrance [2] rendering the title to the property unmarketable [3] and allowing vendee to be relieved of his bargain to buy the property.[4] Evidence to show altered financial conditions and loss of value because of delay is admissible to deter a court from enforcing the contract, although the defect has been eradicated subsequently.[5] In such a case, it is entirely a matter of discretion as to whether or not specific performance should be granted.[6] For misrepresentation alone, the plaintiff has a valid cause of action,[7] whether such misrepresentation was innocent or deceitful.[8] In the instant case, there may not have been a duty for the defendant to speak at all,[9] but having mentioned the

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[1] Map filed here subsequent to GENERAL CITY LAW §26 (L. 1926, c. 690), GREATER NEW YORK CHARTER §442 (amended L. 1917 c. 632), and GENERAL CITY LAW (Consol. L. c. 21 art. 3).

[2] Forster v. Scott, 136 N. Y. 577, 32 N. E. 976 (1893); Anderson v. Steinway, 178 App. Div. 507, 168 N. Y. Supp. 608 (1st Dept. 1917); 3 WASHBURN, REAL PROPERTY (4th ed., 1856) 659.

[3] Burwell v. Johnson, 9 N. Y. 535 (1854); Wetmore v. Bruce 118 N. Y. 319, 23 N. E. 303 (1890).

[4] Stokes v. Johnson, 57 N. Y. 673 (1874); Irving v. Campbell, 121 N. Y. 353, 24 N. E. 821 (1890); Holly v. Hirsch, 135 N. Y. 590, 32 N. E. 709 (1892); Heller v. Cohen, 154 N. Y. 306, 48 N. E. 527 (1897).

[5] Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298 (1894).

[6] Willard v. Tayloe, 75 Wall. 557 (U. S. 1869); Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286 (1893); McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527 (1896).

[7] Allerton v. Allerton, 50 N. Y. 670 (1872); Bloomquist v. Farson, 222 N. Y. 375, 118 N. E. 855 (1918).

[8] Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 247 N. Y. 1, 159 N. E. 700 (1928); Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931).

[9] This depends on whether or not the concealment by silence is for the purpose of cheating the other party. WALSH, EQUITY (1930) §108.

possibility of opening two streets which would not have altered the property materially, he could not in good faith conceal the incumbrance of the third street.

F. S. H.

TRUSTS—BANKS—PURCHASE OF ORDER TO BE CABLED DOES NOT GIVE RISE TO PREFERRED CLAIM ON INSOLVENCY OF BANK BEFORE PAYMENT.—Petitioner deposited a sum of money with a bank in New York to be cabled to a third party in Havana. The bank mingled the money with its own, sent a cable order to its Havana correspondent and credited the amount to the latter's agency in New York. At the request of the third party the cable order was cancelled but before the communication reached the bank the latter was taken over by the superintendent of banks for the purpose of liquidation. Petitioner sought to impress a trust for the amount so deposited. *Held,* The relation of debtor and creditor existed. There was no identification of a particular fund, hence the claim could not be preferred. *Matter of Littman,* 258 N. Y. 468, 180 N. E. 174 (1932).

Before a claim can be allowed as preferred against an insolvent bank it must be established that it is a trust fund.[1] In order to establish a trust relationship rather than one of debtor and creditor it is necessary to show that a special and not a general deposit was made. The essence of a special deposit is that the bank has custody of it for some special purpose only and no authority to use it as in a general deposit where the fund may be mingled with its own and disposed of at the will of the bank. While even in the case of a special deposit the identical money is not returned, nevertheless the bank is limited in the number of uses to which it can put the money so deposited.[2] It has been held that where a bank has issued a draft and before payment, failed, there is no preferred claim but the relation of debtor and creditor exists.[3] The money so paid becomes the bank's money and it is a transaction of purchase and sale.[4] The issuance of a certificate of deposit also creates a debtor and credi-

[1] Chetopa State Bank v. Farmers' and Merchants' State Bank, 114 Kan. 463, 218 Pac. 1000 (1923).

[2] Anderson v. Pacific Bank, 112 Cal. 598, 44 Pac. 1063 (1896); People v. California Safe Deposit and Trust Co., 23 Cal. App. 199, 137 Pac. 1111 (1913); Butcher v. Butler, 130 Mo. App. 61, 114 S. W. 564 (1908).

[3] Ligniti v. Mechanics and Metals National Bank, 230 N. Y. 415, 130 N. E. 597, 16 A. L. R. 185 (1921); Clark v. Toronto Bank, 72 Kan. 1, 82 Pac. 582 (1905); Spiroplos v. Scandinavian American Bank, 116 Wash. 491, 199 Pac. 997, 16 A. L. R. 181; see, also, Note, 16 A. L. R. 190.

[4] Ligniti v. Mechanics and Metals National Bank, *supra* note 3.