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Real Property--Marketability of Title--Reasonable Doubt--Deprivation of Easement Warrants Rejection (Monogram Development Co. v. Northern Construction Co., 253 N.Y. 320 (1930))

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and the servants of the painter were injured in the use of it, the defendant was held liable.[5] A later decision held the defendant, who was a manufacturer of coffee urns, liable to patrons of a restaurant who were injured by the explosion of an urn which he had installed.[6] These cases seem to extend the doctrine of Thomas v. Winchester[7] to objects not inherently dangerous. We submit that the extension is well made and is in accord with the popular concept of liability of the manufacturer to the prospective buyer.

A. S.

REAL PROPERTY—MARKETABILITY OF TITLE—REASONABLE DOUBT—DEPRIVATION OF EASEMENT WARRANTS REJECTION.—Plaintiff agreed, in writing, to purchase certain property in Brooklyn from defendant, and tendered the purchase price, as required by the contract, on the law day. Defendant was unable to convey the property free from certain rights conveyed by a predecessor in title, to lay water-mains, build sewers, erect lighting poles and construct an elevated railroad on the adjoining street. In an action to recover the deposit paid and to impress a lien therefor, *held,* that the rights conveyed constituted an easement, the deprivation of which rendered the property so encumbered as to justify rejection of title. Monogram Development Co. v. Northern Construction Co., 253 N. Y. 320, 171 N. E. 390 (1930).

The property contemplated in the contract did not include the fee to the highway. But even where the title to the highway is in the abutting owner, the right to construct sewers and lay water-mains does not constitute an encumbrance on his land.[1] Neither does the right to erect poles for lighting, where the owner has no fee in the highway.[2] But the owner of land abutting on the highway has an easement of light, air and access therein, even where he does not own the fee.[3] The fact that the right to build the elevated railroad might never be exercised, as claimed by the defendant, since the grant had been made in 1891, does not free the title from the encumbrance, as it is not such a remote contingency as will remove all reasonable doubt from the title. It was said by Judge Cardozo, in a recent case,[4] that, "The law assures to a buyer a title free from reasonable doubt, but not from every doubt." Whether the encumbrance complained of

[5] Devlin v. Smith, 89 N. Y. 470 (1882).
[6] Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063 (1909).
[7] *Supra* Note 3.

[1] Fossume v. Requa, 218 N. Y. 339, 113 N. E. 330 (1916).
[2] Ansorge v. Belfer, 248 N. Y. 145, 161 N. E. 450 (1928).
[3] Kane v. N. Y. El. R. R., 125 N. Y. 164, 26 N. E. 278 (1891); Story v. N. Y. El. R. R. Co., 90 N. Y. 122 (1882).
[4] Norwegian E. F. Church v. Milhauser, 252 N. Y. 186, 190, 169 N. E. 134, 137 (1929).

raises a reasonable doubt of its marketability or merely constitutes "a very improbable or remote contingency," is a matter for the discretion of the court, "to be carefully and guardedly exercised," [5] and no more rigid rule or formula can in all justice be applied.[6] Contingencies which have been held to constitute an encumbrance which will render the title unmarketable have been the possibility of the appearance of an heir after silence and search for sixty years; [7] the likelihood of a claim to be made by a dissolute young man, proved to be very ill at the time of his disappearance seventeen years before,[8] and some few others. The Court in the instant case has employed the careful discretion required of it by the rule laid down in the cases and has furnished us with yet another instance of its just application.

L. G. H.

REAL PROPERTY—RIGHT TO INJUNCTIVE RELIEF AGAINST VIOLATION OF RESTRICTIVE COVENANT.—Defendant was the owner of two lots upon which he had placed a private dwelling in which he made his home. The lots were part of a tract of land which was subjected to restrictive covenants whereby the only building to be erected on any of the lots of said tract was to be used only for private residential purposes. The covenant was to continue for a period of twenty years. Plaintiff, having knowledge of the covenant and being desirous of erecting a church edifice on the restricted tract, before purchasing its lots, upon application to the various lot owners, procured their consent to modify the covenant by permitting the church to be erected. Although the defendant refused to consent to the variance, plaintiff accepted a deed of conveyance reciting the restrictions and stating that title was conveyed subject thereto. The covenants had been in force for approximately five years at this time. Plaintiff proceeded with its plans and preliminary work. Upon defendant's repeated refusal to grant his consent, plaintiff brought this action to procure a declaratory judgment, adjudging that the aforesaid covenants were no longer in effect. The Appellate Division, affirming the decision at Special Term, held the covenants valid and subsisting and that defendant was not entitled to hinder the projected use by injunction and was limited to an action at law for damages. On appeal, *held,* reversed. Restrictive covenants will be enforced while the violation is prospective, unless the complaining owner's attitude is unconscionable or oppressive. Relief will not be withheld because the damage is unsubstantial. Evangelical Lutheran Church of the Ascension v. Sahlem, 254 N. Y. 161, 172 N. E. 455 (1930).

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[5] Cambrelleng v. Purton, 125 N. Y. 610, 616, 26 N. E. 907, 908 (1891).

[6] Ferry v. Sampson, 112 N. Y. 415, 418, 20 N. E. 387, 389 (1899).

[7] *Supra* Note 4.

[8] *Supra* Note 5.