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## Real Property--Landlord and Tenant--Measure of Damages on Breach of Covenant (Ganz v. Clark, 252 N.Y. 92 (1929))

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involving a question of title, which is properly within the jurisdiction of the state courts.<sup>7</sup>

R. L.

REAL PROPERTY—LANDLORD AND TENANT—MEASURE OF DAMAGES ON BREACH OF COVENANT.—Defendant leased premises encumbered by a mortgage to the plaintiff and expressly covenanted that the plaintiff lessee might "peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid." Subsequently, defendant conveyed the fee in the premises to another who defaulted in payment of interest on the mortgage. Plaintiff was evicted under foreclosure proceedings and now sues for breach of the covenant, claiming substantial damages. Defendant contends that no damages may be recovered unless it be the return of rent paid in advance. A verdict was directed in favor of defendant. On appeal, *held*, reversed; new trial ordered. Substantial damages measured by the value of the lease less rent reserved may be recovered. *Ganz v. Clark*, 252 N. Y. 92, 169 N. E. 100 (1929).

The law applicable to the case is apparent in a restatement of the tenets of the leading case of *Mack v. Patchin*.<sup>1</sup> Ordinarily in an action by a lessee against a lessor for breach of a covenant of quiet enjoyment, due to a defective title, recovery is limited to the amount of rent paid in advance and *mesne* profits for which the lessee is liable. The reason for the rule is that "owing to the state of the law as to real property, the undoubted owner of an estate often finds, unexpectedly, difficulty in making out title, which he cannot overcome."<sup>2</sup> Frequently, the difficulty lies in defects of title of ancient origin, and the present owner should not be unduly penalized for deficiencies in no way attributable to lack of good faith or diligence on his part. Consequently, the rule is limited in its application to those cases in which there is no fraud, inequitable conduct or failure to act when it is in his power to act.<sup>3</sup> In the instant case, there was a

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<sup>7</sup> *Nichols v. Marsh*, 61 Mich. 509, 28 N. W. 699, rehearing denied (1886), 29 N. W. 37, 62 Mich. 439 (1891), and writ of error dismissed, 140 U. S. 344, 11 Sup. Ct. Rep. 798 (1891); *New Marshal Engine Co. v. Marshall Engine Co.*, 223 U. S. 473, 32 Sup. Ct. Rep. 238 (1912), *aff'g* 199 Mass. 546, 85 N. E. 741 (1908); *Phinney v. Annan*, 107 Mass. 94 (1871); *Becher v. Contour Laboratories*, 279 U. S. 388, 49 Sup. Ct. Rep. 356 (1929), *aff'g* 29 Fed. (2nd) 31 (C. C. A. 2nd, 1928). See also *David v. Park*, 103 Mass. 501 (1870), which was an action for deceit in the sale of patent rights, wherein it was held that the state court had jurisdiction although its determination involved collaterally the question of the construction and validity of the letters patent issued by the government.

<sup>1</sup> 42 N. Y. 167 (1870). *Cf.* *Matter of Strasburger*, 132 N. Y. 128, 30 N. E. 379 (1892); and distinguish *Wagner v. Van Schaick Realty Company*, 163 App. Div. 632, 148 N. Y. Supp. 638 (1st Dept. 1914).

<sup>2</sup> *Engle v. Fitch*, 3 Law Rep. Q. B. 314, *per* Chief Judge Cockburn.

<sup>3</sup> In an action against the vendor of real property for breach of warranty the vendee can recover substantial damages "if the vendor is guilty of fraud;

failure to act, evidently born of a refusal to incur expense which would enable the covenantor to fulfil his contract. To permit mitigation of damages in such an instance would be to sanction the breach of a contractual duty, due entirely to lack of good faith or diligence. Such is not the intendment of the rule enunciated in *Mack v. Patchin* nor of any concept of the law.

E. P. W.

TRUSTS—VALIDITY OF CONVEYANCE OF REAL PROPERTY.—Decedent had been engaged in the real estate business, taking title to property in the names of dummy corporations, of which he was president and sole stockholder, or in the names of his clerks. He executed two instruments certifying that certain property which he had conveyed and property to be thereafter conveyed to one of these corporations belonged to his son; he also stated to others that he had given the property to his son. The conveyance of the property was made after the declaration of trust; the corporation received the deed upon this trust and for the purpose of carrying it out, and all the partners regarded the property as belonging to the son. There was no consideration for the conveyance, but an implied promise and understanding to execute a deed to the son for whose benefit the property was so transferred. After the father's death, the papers were found in the possession of the son and subsequently the corporation, by his direction, transferred the property and paid him the proceeds. By his will, the decedent attempted to divide his property equally between his son and daughter. On the accounting of the son as executor, he claimed the moneys which he had received as the purchase price for these properties, to which objections were filed by the daughter's children, through their guardian, and the co-executor of the estate. The Appellate Division, affirming the Surrogate, held that the money must be accounted for; that it belonged to the corporation. On appeal, *held*, reversed; the title which passed to the corporation was held for the son to whom the property belonged, and he was entitled to the proceeds thereof; the corporation was chargeable with the knowledge of its president that the conveyance was subject to a trust for the benefit of the son, and the entries in the corporate books that the properties belonged to the son were evidence of the fact that the corporation recognized the trust. *Matter of Brown*, 252 N. Y. 366, 169 N. E. 612 (1930).

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or can convey but will not, either from perverseness or to secure a better bargain; or if he has covenanted to convey, when he knew he had no power to remedy a defect in his title; or where it is in his power to remedy a defect in his title and he refuses or neglects to do so; or when he refuses to incur expenses which would enable him to fulfil his contract." *Supra* Note 1, *Mack v. Patchin*, at p. 172, *per* Chief Judge Earle.