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Property—Real Property—Restrictive Covenants

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THE COURT OF APPEALS, 1953 TERM

to prove that an easement appurtenant to the mill lot had in fact been contemplated. In that event the amount of water available to defendant would be controlled by the *quantity* which the grantor had used for the mill, the present use of water being irrelevant.¹¹

The dissenters, citing *Flora v. Carbean*¹² and *Matter of Findlay*¹³ further maintained that since both parties had agreed in the lower courts that the right in question was an easement appurtenant to the mill lot, the Court of Appeals had no right to abandon that theory which would have produced a different result.

Restrictive Covenants

A restrictive covenant provided that land could not be used for:

- (1) A commercial garage, or automobile parking lot
- (2) A public garage or public automobile filling station.
- . . .
- (5) Clubs, lodges, and social buildings in which dancing or bowling may be an incidental use; . . .

A development association attempted to enjoin the owners of a refreshment stand from using part of their land as parking area for patrons.¹⁴

The court felt that the meaning of the restriction was clear from the covenant itself. "Parking lot" considered in conjunction with commercial garage indicated that the land could not be used for the business of storing automobiles for a stipulated price. If a public parking lot were intended to be prohibited, it would have been so stated in the restriction on public garages. The court also rejected the contention that incidental parking was restricted, because the covenant expressed clarity when incidental use of the land was prohibited as in clause number five, *supra*.

The court did not rest solely on what appeared plain to them, but recognized that the spirit of our law favors the free and unobstructed use of property,¹⁵ and applied the rule that if a restrictive covenant is capable of more than one interpretation, it will be construed against the party attempting to extend it.¹⁶

11. *Comstock v. Johnson*, 46 N. Y. 615 (1871); 3 FARNHAM, WATERS AND WATER RIGHTS 2286 (1904).

12. 38 N. Y. 111 (1868).

13. 253 N. Y. 1, 170 N. E. 471 (1930).

14. *Premium Point Park Ass'n. v. Polar Bar*, 306 N. Y. 507, 119 N. E. 2d 360 (1954).

15. See *Schoonmaker v. Hecksher*, 171 App. Div. 148, 157 N. Y. Supp. 75 (1st Dep't 1916), *aff'd*, 218 N. Y. 722, 113 N. E. 1066 (1916).

16. *Ibid*; See *Buffalo Academy of the Sacred Heart v. Boehm*, 267 N. Y. 242, 196 N. E. 42 (1935).