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The Effect of an Encroachment on Municipal Property on the Marketability of Title - Sinclair v. Weber

THE EFFECT OF AN ENCROACHMENT ON MUNICIPAL PROPERTY ON THE MARKETABILITY OF TITLE

Sinclair v. Weber[1]

On November 30, 1951, the defendant entered into a contract to purchase the improved property on the northeast corner of Greenmount Avenue and Old York Road when it was put up at auction by the agent of the plaintiffs. The contract memorandum consisted of a sales agreement, part of which said:

> "I having had the same opportunity as others to examine the property, agree to pay for same and take title with all its faults and errors of description, it being understood that the Auctioneers have made no warranty or representations whatever, except that the title must be found merchantable."[2]

The defendant, a real estate broker whose business consisted of buying property for rent or resale, was given immediate possession. The defendant's attorney engaged a registered surveyor to survey the land. The surveyor's plat, dated January 8, 1952, showed an encroachment of one wall of the building beyond the building line of Greenmount Avenue from five to thirteen inches. It was shown at the trial that the encroachment had existed for at least fifty and probably one hundred years. It was also shown that the Waverly Building Association had loaned money on the property, after approval of the title by its attorney. No evidence was introduced to show that anyone had known

[1] 204 Md. 324, 104 A. 2d 561 (1954).
[2] *Ibid*, 329-330.

of the encroachment prior to the survey of January, 1952. It was testified that the average pedestrian would not notice the encroachment.

The defendant's attorney notified the plaintiffs that he considered the title to the property unmarketable due to the encroachment, and later notified them by letter, dated January 18, 1952, that he repudiated the contract and demanded return of the $1500.00 deposit made at the time of the auction. The plaintiffs refused to return the money and on June 5, 1952, instituted this suit for specific performance of the contract, in the Circuit Court of Baltimore City. The trial court held that the contract did not comply with the requirements of the Statute of Frauds and did not consider the other defenses of laches and lack of marketable title.[3] The Court of Appeals after holding the memorandum sufficient to satisfy the Statute of Frauds, remanded the case with directions to enter a decree of specific performance, holding the title marketable and the plaintiffs not guilty of laches.

This note is concerned only with the marketability of real property where the improvements encroach upon a municipal street. Marketability of title is dealt with in *Hewitt v. Parsley*[4] where this Court said:

> " 'Every purchaser of land has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying, if not successful suits, be brought against him, and probably take from him or his representatives land upon which money was invested. He should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value'."

and in a later case[5] said:

> "A title, to be marketable, need not be free from every conceivable technical criticism; objections which are merely captious, although within the range of possibility, should be disregarded by the Court."

The plaintiffs contended that the encroachment was so slight as to come under the rule of *de minimis non curat lex.*

[3] Merchantable title is synonomous with marketable title; 57 A. L. R. 1253, 1284; Horton v. Matheny, 72 Oh. App. 187, 51 N. E. 2d 41, 44 (1943).
[4] 101 Md. 206, 209, 60 A. 619 (1905).
[5] Zepp v. Darnall, 191 Md. 68, 73, 59 A. 2d 744 (1948).

However, a New York case[6] held that where a brick building encroached in a street from ⅔ of an inch to 2 inches the doctrine of *de minimis* can have no application to the removal of brick facing from a substantial building.

The plaintiffs also contended that since there were a large number of similar encroachments all over Baltimore City which the City had never disturbed, the marketability of the title had not been interfered with. They quoted this Court's holding in an earlier case, *Baldwin v. Trimble*:[7]

> "Whilst an *encroachment* on a highway is conclusively settled in Maryland to be a public nuisance which can never grow by prescription into a private right, . . . yet it may be true and in perfect harmony and accord with that doctrine, that cases, concerning public streets can arise of such a character and founded upon an actual and notorious *abandonment* of the highway by the public, that justice requires that an *equitable estoppel* shall be asserted even against the public in favor of individuals."

It is submitted however, that this earlier case was one in which several buildings had been built right on the site of an old road and the Court said:[8]

> "There is no evidence that this road was ever laid out by Municipal authorities, or that it was ever accepted by them or kept in repair at the public expense."

Plaintiffs also relied upon *United Finance Corporation v. Royal Realty Corporation*[9] where the Court said:

> "But whether the basis for the relief be called equitable estoppel, or abandonment and reverter, is a mere matter of terminology of little relative importance, except to the verbal precisian. For in any case it involves the principle that one who, having an easement of way, whether public or private, suffers his right to lie fallow and unused for a long period of time, and throughout the period suffers the owners of the servient tenement not only to use it as though no such right existed, but actually acquiesces in such use by taking taxes or other charges assessed against it or profits therefrom as though no such easement existed, or by permitting any uses of the land inconsistent with

[6] Perlman v. Stellwagon, 115 Misc. Rep. 6, 187 N. Y. S. 845, 845 (1921).
[7] 85 Md. 396, 402, 403, 37 A. 176 (1897).
[8] *Ibid.*
[9] 172 Md. 138, 147, 191 A. 81 (1937).

> the existence of the easement, may be held to have sufficiently manifested such an intention of abandoning the right as will estop him from asserting it."

The facts were that the municipality in that case had never taken the land in question for the roads mentioned. The general rule, of course, is that a city, having an easement for public use cannot grant, nor a property owner acquire, any right in the street which would interfere with the public use.[10] One Florida case[11] clearly supported the plaintiff's argument. One corner of a building overhung a public alley for "less than one foot", another corner of a different building overhung the alley more than one foot, a roof overhung the sidewalk for more than one foot and a porch extended into the alley four inches. The Florida Court said, after a review of the authorities, that to render title unmarketable the encroachment of buildings over public ways:

> ". . . must be of such a substantial nature as to interfere with the normal use of public way on or over which it encroaches and in addition thereto there must be a strong likelihood that the vendee would be subjected to litigation concerning it or be required to move it."[12]

The Court of Appeals in upholding the contention of plaintiffs distinguished the New York case of *Acme Realty Co. v. Schinasi*[13] wherein it was said that show windows, oriel windows, a portico projecting beyond the building line one foot, and a stoop projecting four feet, all subject to removal by the proper municipal authorities rendered the title to an apartment building unmarketable and subject to rejection by the prospective buyer. The Court pointed out that the New York case was not analogous, because of a recent change in New York policy, made necessary by the growing density of population and the spread of business into residential districts, of ordering the removal of similar long-standing encroachments on wide residential and business streets. In the instant case, the Assistant City Solicitor who was head of the Real Estate Division of the City Law Department testified that there were many encroachments throughout the city, but that

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[10] Jennings v. Bauman, 214 App. Div. 361, 212 N. Y. S. 334, 336 (1925).
[11] Loeffler v. Roe, 69 So. 2d 331 (Fla., 1953).
[12] *Ibid*, 339.
[13] 215 N. Y. 495, 109 N. E. 577 (1915).

the policy of the city was to let them remain if they did not materially interfere with the public use of the sidewalks.

The Court in the instant case was not referred to, and did not cite, the New Jersey case of *Vassar Holding Co. v. Wuensch,*[14] closely analogous in point of fact, in which, despite an encroachment of only an inch to an inch and a half, the court held that it rendered the title unmarketable. The New Jersey Court said:

> "The question for the court is, not the extent of the encroachment, but whether there is one in fact that makes the title unmarketable. The statement of counsel that the city has never taken steps to remove the encroachment has no bearing on the question. Nullum tempus occurrit regi. It may assert its right at any time, and should it do so the front of the . . . building would have to be altered."

Thus New Jersey advocates a more strict view, and one which would have supported the position of the defendant in the instant case. It is doubtful, however, whether the outcome would have been changed because the New Jersey view was referred to by the Court of Appeals in the *Trimble* case.[15] Moreover, in the New Jersey case there was testimony that the encroachment had made the title unmarketable in at least two prior instances, while in the instant case a member of the bar had passed the title, on the strength of which a building association had loaned money on the property. Writers on this subject have this to say:

> "Whether or not an encroachment on a public street of a building situated upon land sold by executory contract affects the marketable quality of the title depends largely upon the character and extent of the encroachment and the laws of the municipality wherein the property lies."[16]

In general there are two views, the stricter being represented by the *Vassar Holding Co. v. Wuensch,*[17] where it was held that *any* encroachment interfered with the marketability of title. This seems to be based on the right of the city to compel the removal of an encroachment at any time regardless of the extent of the encroachment or the

[14] 100 N. J. Eq. 147, 135 A. 88, 89 (1926).
[15] *Supra*, n. 7.
[16] 55 Am. Jur. 708, Vendor & Purchaser, Sec. 255, pointing out further that the policy of the municipality is to be given weight.
[17] *Supra*, n. 14, as well as the other jurisdictions cited in Baldwin v. Trimble, *supra*, n. 7, 402.

length of the period of adverse use or possession. Then there is the other view followed here and in the *Florida* case.[18] This rule may be stated thus: The marketability of a title is not interfered with unless there is a substantial encroachment that interferes with the public use of the way, or unless the city policy can be established as requiring the removal of all such encroachments. The New York and Maryland Courts differ not in the law, but in its application because of the widely different municipal policies involved as to encroachments on city streets.

[18] *Supra*, n. 11, as well as the jurisdictions cited in Baldwin v. Trimble, *supra*, n. 7.