Real Property: Contract of sale: Zoning Ordinance as an encumbrance

Willard A. Bowman

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation


This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
NOTES AND COMMENT

Real Property - Contract of sale. Zoning Ordinance as an encumbrance.—In most of the cities of the United States, there are so called Zoning Ordinances, restricting the use and establishing boundaries of resident, business and manufacturing districts. Such so called Zoning Ordinances have been held constitutional in Wisconsin,¹ and now exist as restrictions upon the use of the property affected thereby. On account of the recent dicta expressed in the case of Genske v. Jensen² the expression of the court would lead one to believe that such zoning ordinance would constitute an encumbrance within the terms of a contract for the sale of real property, “free and clear of all encumbrance.” And it is a question whether the vendor could bring an action for specific performance.

If the validity of the statute, or ordinance, was in doubt, equity would not enforce specific performance because it would be necessary to litigate the question, and the purchaser would be exposed to the chance of litigation if he were compelled to accept title.³ In other cases involving city ordinances it has also been held that even if valid the ordinance would be such as to restrict the use of the property and would constitute an encumbrance within the legal meaning of the term.⁴

It has been held that the existence of a public highway upon land contracted to be conveyed would not be such an encumbrance as would render the owner’s title unmarketable, it being presumed that in fixing the price of the existence of such an easement was considered by the parties because the defect was known and visible, the same has been held in regard to the existence of sewers, water-mains, and gas pipes in highways because they are ‘incidental to the use of the land.’ In Pennsylvania the rule has been established that an ordained street, though unopened, is an encumbrance upon property affected thereby, and the purchaser is relieved from his agreement to purchase even though the ordinance be repealed.⁵

Upon an examination of the cases, one would be lead to believe that the existence of a valid ordinance or law restricting the use of the property constituted an encumbrance within the meaning of a contract to “convey free and clear of all encumbrances.” The reason being that such laws or ordinances are encumbrances within the legal meaning of the word.

² 205 N.W. 548 at page 549.
In the case of Lincoln Trust Co. v Williams Building Corporation, an action was brought by the vendor against the vendee to procure a judgment directing specific performance or a contract for the purchase and sale of real property in the city of New York. In answer to the complaint it was alleged that the contract provided that the property was to be conveyed "free and clear of all encumbrances" and that in fact the premises were subject to an encumbrance by virtue of a resolution of the BOARD OF ESTIMATE AND APPORTIONMENT of the city of New York entitled, "A resolution regulating and limiting the height and bulk of buildings, and regulating and restricting the location of trades and industries, and the location of buildings designed for specific uses, and establishing the boundaries of districts for the said purposes." The defendant contended under this allegation that they were justified in refusing to accept title. The Appellate Division reversed the trial court and sustained the defendant's contention. Upon appeal to the Court of Appeals the decision was overruled, all judges concurring. In the Appellate Division, Clark J. wrote the dissenting opinion in which he used the following language:

In my opinion the building zone resolution is not an encumbrance within the meaning of the contract. The resolution was obviously intended as a mere police regulation of business and premises. It is a police regulation such as the Tenement House Law, or Building Codes and numerous other regulations, which are never mentioned in contracts and have never been held to be encumbrances.

In the court of appeals the court followed the line of reason laid down by the Appellate Division, in that this law was a necessary police regulation. In regard to the law being an encumbrance the court said:

The resolution in question simply regulates the use of the property in districts affected. It does not discriminate between owners. It is applicable to all alike. Therefore the well nigh universal rule should be applied, viz, that where a person agrees to purchase real estate, which is at the time restricted by laws or ordinances, he will be deemed to have entered into the contract subject to the same. He cannot thereafter be heard to object to taking the title because of such restrictions. The contract was deliberately entered into. It is not claimed that the defendant was mislead, deceived or improperly influenced in making it.

Even though the defendant did not know of the existence of the restriction, it is presumed that when a contract of this sort is entered into the parties know what they are doing, and in enforcing it the court looks to the instrument and not to the intelligence of the parties.

---

7 229 N.Y. 313, 128 N.E. 209.
10 Same.
11 229 N.Y. at 319 the court said, "The law always assumes that one contracts with intelligence, and such assumption is not overcome unless proof be offered to the contrary by an assertion of ignorance. The Courts must enforce contracts as made. It looks to the instrument and is not usually concerned with the intelligence of the parties. I am of the opinion that the resolution in question is a valid one; that it does not constitute an encumbrance upon the property which the defendant agreed to purchase, that it should be required to specifically perform the contract."
The court held that such resolution was not an encumbrance within the terms of the instrument.

It is a general rule that where there is a restriction imposed by law, a covenant restricting something that is already prohibited does not constitute an encumbrance between the vendor and purchaser, because it binds the owner no further than he could be bound by law in the absence of a covenant, but where the restriction is greater than that imposed by law, even though it does not prejudicially affect the market value of the premises, it has been held to be an encumbrance.

WILLARD A. BOWMAN

Animals

Owner not liable for injuries by animal in absence of neglect or previous notice of vicious propensities.—

Although by hide-bound tenets of philosophy man has been postulated to be “a rational animal,” by a judicial construction in the state of Wisconsin and elsewhere the former opinion is being overruled by a slow but sure growth ad majorem equi gloriam. There is grave danger that the horse will be judiciously noticed as the rational animal and man as the irrational. The apotheosis of Pegasus is upon us.

In support of the premises the writer cites you Kocha v. Union Transfer Co., in which it was held that the defendant was not liable where the plaintiff, a bicyclist, had been thrown to the pavement by reason of his bicycle having been kicked by defendant’s horse (described as of a high-strung, nervous temperament), there being no allegation that the horse had any vicious propensities or that the defendant had knowledge of them. Though ostensibly an exoneration of the Union Transfer Co., the case is a glorification of the high-bred and tactful horse—the real defendant. The learned court (which never, never sinks to levity) proceeds:

It being, therefore, a verity in this case, that the horse possessed that which, according to Iago, if in man or woman, “is the immediate jewel of their souls,” “a good name,” it must suffice for the horse and for us, that determining whether, in addition to good character and reputation, he also possessed a rare discriminating taste and intelligence of head or heels when, in his pick for his kick, he chose the insensate bicycle rather than the sensating rider, as it is claimed for him by appealing counsel by saying, he very carefully kicked the bicycle, not the man, and the bicycle in the very center of the handlebars, there leaving his mark, no claim being made that he could write.

Not as an alarmist but as one sincerely interested in preserving the status quo ante of man in the courts the writer begs to point out that unless this defection from truth and justice be curbed in limine we will have every J. P. in the land holding court in a stall. The acceptable reply to counsel’s leading questions will be “neigh, neigh, sir.” The court bible will be hoof-marked and dog-eared instead of thumbed.

1205 N. W 973 (Wis.)