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## MARKETABLE TITLE IN PENNSYLVANIA

The standard agreement of sale for real property in Pennsylvania contains the provision: "The title is to be good and marketable;" and it is a well settled rule that, in executory contracts where the stipulations as to quality of title are indefinite, there is an implied warranty on the part of the vendor to tender a "marketable title."<sup>1</sup> The problem lies, however, in defining a *marketable title*. This comment will review the Pennsylvania case law arising in equity, or in actions of an equitable nature, to determine what is required to satisfy the stipulations of a "marketable title" with respect to the rights of vendor and purchaser under an executory contract of sale.<sup>2</sup> In general, it has been said that the only title which a vendee can be required to take is one which must, like Caesar's wife, be free from suspicion.<sup>3</sup> The courts, in an attempt to crystallize a formal rule, have required a title to be free from any *reasonable doubt* both as to the law and to the facts necessary to sustain it.<sup>4</sup> It must be of such a character as not to expose the purchaser to the *hazard of litigation* by reason of defects in the title, outstanding claims, or some disputed question of fact or law which might require the purchaser to defend his possession or title.<sup>5</sup> In this respect, it is a sufficient objection if there is color of outstanding title which may prove substantial, although there is not enough evidence to enable the court to presently reach that conclusion,<sup>6</sup> or where the property is threatened with a pending action.<sup>7</sup>

It has been well and wisely settled that under a contract for the sale of real estate, the vendee has the right not merely to have conveyed to him a good but an indubitable title. Only such a title is deemed marketable; . . .<sup>8</sup>

Unless the title is free from doubts, such as would cause a *prudent man* to hesitate in accepting title, equity will not force a purchaser to accept it.<sup>9</sup>

The "prudent man" test is seen in many areas of the law, but, from experience, it has proved to be an ill-defined standard. Each case presents

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1. Hoover v. Pontz, 271 Pa. 285, 114 Atl. 522 (1921).

2. The reason for this limitation is that the rights of the parties may be subsequently different where the action is at law or where the contract has been performed.

3. SUGDEN, VENDORS AND PURCHASERS 410 (9th ed. 1836).

4. Reighard's Estate, Clouse's Appeal, 192 Pa. 108, 43 Atl. 413 (1899).

5. Speakman v. Forepaugh, 44 Pa. 363 (1863). In this case, there was an outstanding paper title and, even though evidence indicated the purchase was a bona fide purchase and would take over this title, it was held to be a sufficient threat of litigation so as to make title of the vendor unmarketable. The court said:

. . . every title is doubtful which invites or exposes the party holding it to litigation . . . If there be a colour of an outstanding title which may prove substantial though there is not enough in evidence to enable the chancellor to say that it is so a purchaser will not be held to take it, and encounter the hazard of litigation. . . . 44 Pa. at 371.

See also Moyer v. DeVincentis Constr. Co., 107 Pa. Super. 588, 164 Atl. 111 (1933); La Course v. Kiesel, 366 Pa. 385, 77 A.2d 877 (1951).

6. Speakman v. Forepaugh, 44 Pa. 363, 371 (1863).

7. Christ Reformed Church v. Clark, 47 Pa. Super. 286 (1911) (pending action of ejectment).

8. Swayne v. Lyon, 67 Pa. 436, 439 (1871). See also Herman v. Somers, 158 Pa. 424, 27 Atl. 1050 (1893).

9. Nicol v. Carr, 35 Pa. 381 (1860).

an opportunity for a distinction, and it hardly seems enough to say that the concept of marketable title is based on the judgment of the reasonable or prudent man.

Nevertheless in the following sections, an attempt will be made to present the cases in rational categories which should help to expose the characteristics of a marketable title.

## I.

### QUESTIONS OF LAW

A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact or a *doubtful question of law*, in the absence of the party in whom the disputed right was vested. . . . The cloud on the purchaser's title would remain. . . .<sup>10</sup> (Emphasis added.)

This statement exemplifies the doctrine of the courts that specific performance will not be granted if there is a reasonable ground for saying the question is not settled by previous proceedings or dicta which indicate that courts might differ as to the determination of the point involved.

For purposes of analysis, this area will be discussed by separating the cases into the questions of law dependent on legal instruments and the questions of law arising from statutes or legal procedures.

#### A. Wills

When courts are asked to interpret a title derived under a will, they apply the test of doubtfulness, and only when there is no question of the title being passed do they declare the title marketable.<sup>11</sup> When the court cannot say that the questions of law are so free from doubt that reasonable men might not hold different opinions, the devisee-vendor is held incapable of providing a marketable title, and the purchaser is permitted to recover his deposit and rescind the agreement of sale.<sup>12</sup>

In the oft-cited case of *List v. Rodney*,<sup>13</sup> the vendor had by devise taken a life-estate with a contingent remainder in surviving children which provided that if either of the children should die during the lifetime of the vendor, leaving issue, such issue would not be barred by deed of parents. The court refused to consider the improbability of issue owing to the advanced age of the parties and hence the title was unmarketable although the divesture depended upon the birth of issue to a woman nearly seventy-five years of age.

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10. *Stone v. Carter*, 48 Pa. Super. 236, 249 (1911), citing *Brokaw v. Duffy*, 165 N.Y. 391, 398-99 (1901).

11. *Grundler v. Chmielinska*, 272 Pa. 197, 116 Atl. 154 (1922); *Shornhorst v. Jacob*, 272 Pa. 223, 116 Atl. 157 (1922); *Chew v. Chew*, 266 Pa. 526, 109 Atl. 799 (1920); *Hoeueiler v. Hune*, 138 Pa. 442, 21 Atl. 15 (1891).

12. *Stone v. Carter*, 48 Pa. Super. 236 (1911); *Hensel v. Kiern*, 47 Dauph. 333 (Pa. C.P. 1939).

13. 83 Pa. 483 (1877).

The majority of the cases which involve a title acquired by a devise pivot, however, not on the question whether one not a party to the sale has a real interest under the will, but whether a sufficient question exists that the purchaser may be exposed to litigation.<sup>14</sup> This problem also arises when the question of the jurisdiction of the probate court to effectively transfer title to the vendor is presented.<sup>15</sup>

In the event a will creates a tenancy for life with power to consume, the life tenant has power to convey a marketable title since power to consume imports power to convey.<sup>16</sup> Similarly, if a testator wills property to his wife for her life with a power of appointment to the testator's heir, and each of the legal heirs of the testator conveyed his or her interest to the widow, the conveyance made by the heirs is held to extinguish the widow's power of appointment and vests in her the power to convey a marketable title.<sup>17</sup> However, where title depends upon the exercise of a power of sale and the right to exercise that power is not certain, the title is unmarketable.<sup>18</sup>

### B. *Equitable Title*

From its very nature, a title to property which will be enforced only in a court of equity does not constitute a marketable title, since it forces the purchaser to litigate in order to establish his title or to have it converted into a legal title.<sup>19</sup>

### C. *Tax Sale*

The general rule is that a tax title, when lawfully established, is good and marketable. In *Reeves v. Alter*,<sup>20</sup> the court said that when the judgment is regular, the property is sufficiently described, and the notice of

14. *Holmes v. Woods*, 168 Pa. 530, 32 Atl. 54 (1895). This case involved a will in which one person, now living, and another yet unborn, might have contingent interest in the land, which if not barred by the partition proceeding would render title unmarketable. See also *Herzberg v. Irwin*, 92 Pa. 48 (1879) (questionable interest of children of deviser under will).

15. *Hollenbaugh v. Morrison*, 9 Watts 408 (Pa. 1840).

16. *Vosburg v. Feola*, 49 Lack. Juris. 172 (Pa. C.P. 1948).

17. *In re McCawley*, 35 Luz. Leg. Reg. Rep. 57 (Pa. C.P. 1940). In *Heisey v. Hartman*, 253 Pa. 359, 98 Atl. 606 (1916), the court held that where a life tenant has power of disposition, a title based upon a conveyance by him and the devisee of the remainder is marketable. The court seems to go even further in *Grundler v. Chmielinska*, 272 Pa. 197, 116 Atl. 154 (1922), where a devise of land was to the two daughters of the testator, or their respective heirs or assigns, *forever*, with a proviso that if either of the daughters preceded the other in death, the surviving daughter should receive the entire property, subject to the limitation that after the death of both, the property, if still owned by either of them, was to go to the sons of the testator. The court held this vested the two daughters with a fee or a life estate with power of alienation. In either event they were able to convey a marketable title.

18. *Reighard's Estate, Clouse's Appeal*, 192 Pa. 108, 43 Atl. 413 (1899).

19. *Murray v. Ellis*, 112 Pa. 485, 3 Atl. 845 (1886). In this case the vendor was executor of an estate holding equitable title. The court said even though the heirs were mere naked trustees and could be compelled to convey at any time, this was not a marketable title because its validity depended on favorable court action.

20. 9 Sadler 412 (Pa. 1888); see also *Goeringer v. Ansilio*, 38 Luz. Leg. Reg. Rep. 388 (Pa. C.P. 1944). *Contra*, *Dearth v. Williamson*, 2 S.&R. 498 (Pa. 1816).

posting and advertising is made in accordance with the law, the sheriff's vendee takes a marketable title. However, such sales are viewed with suspicion, for there is a reluctance to deprive a person of his property by a tax sale.

Although there is a *prima facie* presumption of regularity in such proceedings, this has been held to be merely a "procedural expedient,"<sup>21</sup> and strict compliance with the statutory procedure is demanded.<sup>22</sup> When a question is presented, the court may require that each step in the statutory procedure under which a vendor acquired a property be proven. The court may require, for example, that evidence be produced that acknowledgement did not take place in open court.<sup>23</sup> However, failure of the vendee to point out any defect will result in a declaration of marketability since the presumption is that such sales are regular.<sup>24</sup>

#### D. *Adverse Possession*

The general rule is that a title clearly established by adverse possession is marketable, and a purchaser will be required to accept such a title unless the contract expressly requires that a title of record be conveyed.<sup>25</sup> However, where a person purchased land at a sheriff's sale and he and his successors in title held the land continuously, notoriously, and adversely for seventy-two years, the title was held marketable even though the vendor in execution had no record title.<sup>26</sup> Likewise, when a devisee went into possession of land claiming it under a devise, although this was a questionable interpretation of the will, and kept possession for the statutory period, he was held to have a title which no one could question, and which was marketable.<sup>27</sup> On this same basis, the vendor of a ground rent was

21. *Beacon v. Robison*, 157 Pa. Super. 515, 521, 43 A.2d 640, 643 (1945).

22. *Grakelow v. Nash*, 98 Pa. Super. 316 (1930). In *Smith v. Leechman*, 54 Pa. D.&C. 668 (C.P. 1945), the statute required that notice be personally served on all persons interested in property who resided in the county. The court held since the record did not disclose personal service to one party, it was impossible to declare the title marketable because this was a patent insufficiency in procedure. See also *Myers v. Mfrs. and Traders Nat'l Bank*, 332 Pa. 180, 2 A.2d 768 (1938); *Central Trust Co. v. Glass*, 53 Dauph. 3 (Pa. C.P. 1942), held title devised from a sheriff's sale was unmarketable where property had been erroneously advertised as to street number. See also *Shafer v. Hansen*, 389 Pa. 500, 133 A.2d 538 (1957); *Watson v. Ciaffoni*, 385 Pa. 16, 122 A.2d 56 (1956) (both dealing with incorrect addresses).

23. *Grakelow v. Nash*, 98 Pa. Super. 316 (1930).

24. *Reece v. Haymaker*, 164 Pa. 575, 30 Atl. 404 (1894), (based on a sale in a proceeding for the foreclosure of a mechanic's lien).

25. *Smith v. Windsor Manor Co.*, 352 Pa. 449, 43 A.2d 6 (1945). A recorded plan showed streets and alleyways but the seller had been in continuous, hostile and open possession for forty-five years and the court held that the land was not subject to any public or private easement or right of way. See also *Brown v. Baker*, 47 Lack. Juris. 99 (Pa. C.P. 1946); *Aldinger v. Messick*, 23 Dauph. 302 (Pa. C.P. 1920); *Shober v. Dutton*, 6 Phila. 185 (County Ct. Pa. 1866).

26. *Dallmeyer v. Ferguson*, 198 Pa. 288, 47 Atl. 962 (1901). The court said, although the record showed possible outstanding title, "it is a bare and remote possibility not sufficient to make a title under possession for seventy-two years so doubtful as to be unmarketable. . . ." *Id.* at 290, 47 Atl. at 963.

27. *Stewart v. Stewart*, 25 Pa. 234 (1855). See also *Westfall v. Washlagel*, 200 Pa. 181, 49 Atl. 941 (1901). Persons claimed property under a will and their successors in title had exercised continuous rights of ownership for forty-three years. The court ruled that they had acquired a marketable title against a person who had

held to have a marketable title which a purchaser could not refuse although there was no instrument of record creating the rent.<sup>28</sup> The court emphasized that the evidence established that the rent had been paid regularly to the vendor's ancestors for more than forty years without dispute as to ownership, and, therefore, would be presumed valid under the same rules by which a title, depending upon the bar of the statute of limitations, is held marketable.

However, in *Hoover v. Pontz*,<sup>29</sup> the court's language might indicate a contrary rule. The court said:

It is undoubtedly true a good title may be acquired by adverse possession, and *in exceptional cases, a marketable title*. . . . *The instances in which it may be compelled are rare however*, because proof of the fact of open, notorious, continuous, visible and hostile possession, necessarily rests in parol, and "where the title depends on existence of fact which is not a matter of record, and the fact depends for its proof entirely upon oral evidence the case must be made very clear by the vendor to warrant the court in ordering specific performance."<sup>30</sup> (Emphasis added.)

The court said that in all the previous Pennsylvania decisions where relief had been granted, the validity of title by adverse possession had been conceded by the opposing party, and that in absence of such a concession, the only safe rule to apply was that a court should never undertake to declare title to real estate marketable unless all parties in interest were present on the record.<sup>31</sup> However, it is possible that this language is only dictum, because in this case the vendor claimed title as executor of a deceased party who had entered into possession as one of a number of heirs, but the court pointed out that such possession presumptively is not adverse to other heirs. This lack of adverseness may be the true basis for the holding.

This seems to be the more rational explanation for this decision when we consider the subsequent case of *Medusa Portland Cement Co. v. Lamantina*.<sup>32</sup> Here the question involved the ownership of surface and mineral rights. The court said that if there was an outstanding title to mineral rights, such a party would have been a tenant in common with the owners of the surface title. Any subsequent conveyance purporting to convey to the purchaser a complete title of such property under which possession is taken and held for twenty-one years, would constitute an

acquired the property from the testator during his lifetime, by deed, which was not recorded until after his death, since action was barred by statute of limitation and therefore there was no reasonable cloud on the title.

28. *Huehner v. Fisher*, 61 Pa. Super. 533 (1915).

29. 271 Pa. 285, 114 Atl. 522 (1921).

30. *Id.* at 288, 114 Atl. at 524.

31. *Olweiler v. Greenblat*, 5 Pa. D.&C. 637 (C.P. 1924), citing *Hoover v. Pontz*, 271 Pa. 285, 114 Atl. 522 (1921), refused specific performance where the vendor relied on title by adverse possession because, even though the affidavit of defense admitted that the vendor's predecessors had held the land under claim of title for more than thirty-three years, yet elsewhere in the affidavit, the purchase denied the title.

32. 353 Pa. 53, 44 A.2d 244 (1945).

ouster, would amount to a denial of the rights of the tenant in common, and could ripen into a marketable title. The court stated:

It is a familiar principle of the law of real estate that a title depending on adverse possession may constitute not only a good but a marketable title which a purchaser will be compelled to accept.<sup>33</sup>

This seems to be the present rule in Pennsylvania.

## II.

### SPECIFIC DEFECTS OF TITLE

#### A. Encumbrances

Unless specifically excepted from the contract, certain encumbrances render a title unmarketable. The term encumbrance, when used in reference to quality of title, has been defined as any right to, or interest in, land subsisting in another to the diminution of its value, although consistent with the passage of the fee by conveyance.<sup>34</sup> It includes whatever charges burden, obstruct, or impair the use or value of land, such as liens, easements, restrictions or any other right to, or interest in, land which exists in a third person.<sup>35</sup> The presence of such prevents the vendor from complying with his agreement to provide a free and clear deed. If such a stipulation is not provided for in a contract and there is no provision calling for the vendee to accept subject to an encumbrance, it will, in general, be assumed the intention was that the property be conveyed free of encumbrances.<sup>36</sup>

Before the general definition of an encumbrance can be completely understood, insight into the application of the term "diminution of value" is helpful. In *Lafferty v. Mulligan*,<sup>37</sup> a statute was passed permitting an assessment to be made for the grading and paving of streets which had been completed previously. The vendor argued that since costs had not been ascertained and levied on the property, there was no encumbrance which violated the stipulation that a lot be free of all liens and encumbrances. The court pointed out that, although the levy had not been made, nevertheless, the property could not escape assessment, and consequently, there was upon it an encumbrance rendering the title unmarketable. Now, if we consider the cases of service charges for future use of sewers, in which it has been held that a charge of that nature is not an encumbrance since it will come into existence only when a dwelling is erected and a sewer connected,<sup>38</sup> we see that the courts seem to require that the encumbrance be an existing burden, which is certain even though unascertained.

33. *Id.* at 57, 44 A.2d at 246.

34. *Ritter v. Hill*, 282 Pa. 115, 127 Atl. 455 (1925). The court said that it may be such as affects the title, or only the physical condition of the property. *Accord*, *Lafferty v. Mulligan*, 165 Pa. 534, 30 Atl. 1030 (1895).

35. *Howell v. Northhampton R.R. Co.*, 211 Pa. 284, 60 Atl. 793 (1905). *Accord*, *Batley v. Foerderer*, 162 Pa. 460, 29 Atl. 868 (1894).

36. *Croskey v. Stockley*, 85 Pa. Super. 498 (1925).

37. 165 Pa. 534, 30 Atl. 1030 (1895).

38. *Gilham v. Real Estate Title Ins. & Trust Co.*, 203 Pa. 24, 52 Atl. 85 (1902); *Perkinpine v. Hogan*, 47 Pa. Super. 22 (1911).

B. *Liens*

An outstanding mortgage will undoubtedly be such an interest in a third person as will render a title unmarketable, unless its release or discharge is obtained prior to the time called for settlement.<sup>39</sup> Likewise, a lien on the property for income tax owed by the vendor,<sup>40</sup> a lien arising from judgments on personal debts,<sup>41</sup> or any unpaid taxes, water and sewer rents, school taxes, or mechanic's liens have been held to be encumbrances on title.

When the lien on property is in excess of the entire purchase price, the vendee can rescind the contract because, even if he paid the entire price into a trust company, it would be insufficient to discharge the liens and give him a title clear of all encumbrances.<sup>42</sup> It is interesting to note that under the doctrine of *lis pendens*, notice is given to a vendee that any interest he may acquire in the property may be subject to a lien resulting from a pending litigation.<sup>43</sup> Therefore, it is clear that a lien need not be ascertained, and in some cases, not even certain, to render a title unmarketable.

C. *Restrictions*

Restrictions as to the use to which the premises may be put,<sup>44</sup> or as to the location,<sup>45</sup> character, or kind of building<sup>46</sup> which may be erected upon the land will render title unmarketable. Thus, a covenant in chain of title restraining the erection of a building within five feet of the property line was held sufficient to prevent the owner's passing a marketable title.<sup>47</sup> In *Lesley v. Morris*,<sup>48</sup> the title contained a building restriction that any building erected be fronting on the south. The court said:

A perpetual prohibition of this kind fastened upon a property has a tendency not only to diminish the enjoyment of the estate but also to affect its marketable value to a considerable degree; a degree very difficult to be measured by any pecuniary allowance . . . and which makes his [the vendee's] equity incapable of accurate or reasonable

39. *Srolovity v. Margulis*, 35 Pa. Super. 252 (1908). This is true although the mortgage is not recorded, the vendee having no notice of its existence. *Boyd v. Hoffman*, 241 Pa. 421, 88 Atl. 675 (1913).

40. *Hagerman's Estate*, 318 Pa. 140, 177 Atl. 766 (1935).

41. *Myers v. Fidelity-Philadelphia Trust Co.*, 290 Pa. 283, 138 Atl. 834 (1927).

42. *Croskey v. Stockley*, 85 Pa. Super. 498 (1925).

43. *Dice v. Bender*, 383 Pa. 94, 117 A.2d 725 (1955).

44. *Batley v. Foerderer*, 162 Pa. 460, 466, 29 Atl. 868, 870 (1894). Held a restriction against the erection on the premises of a factory, brewery or distillery rendered the title unmarketable, saying: "The absolute and unqualified use incident to an unrestricted ownership in fee is thus converted unto 'one clogged with conditions and restrictions in its enjoyment'."

45. *Coues v. Hallahan*, 209 Pa. 224, 58 Atl. 158 (1904) (set back requirement).

46. *Ibid.*; see also *Andres' Estate*, 12 Phila. 45 (Pa. Orphans' Ct., 1878) (restriction prohibiting the erection of houses of less than seventeen feet in width).

47. *Coues v. Hallahan*, 209 Pa. 224, 58 Atl. 158 (1904). It is interesting to note that in this case a city ordinance forbade the erection of a building within five feet for purposes of future widening of the street. The court said that such a restriction on the vendee's title might materially affect any damages received for the taking of the property when the street was widened.

48. 9 Phila. 110 (Pa. Dist. Ct., 1873).

adjustment in money. He did not bargain for an estate fettered by a perpetual restriction . . . he ought not in equity be compelled to accept it.<sup>49</sup>

Even the requirement that state approval be acquired before a structure can be built has been held a sufficient encumbrance.<sup>50</sup>

There is some conflict in the cases whether a restriction no longer effective will render title unmarketable. In *Peoples-Pittsburgh Trust Co. v. McKinley-Gregg Auto Co.*,<sup>51</sup> the property was subject to a building restriction to help create a residential district, but use of land and zoning had changed and was now "commercial-light industrial." The court held, since the building restriction was no longer of practical utility and would prohibit the use of the land under the existing zoning ordinance, the restriction was not enforceable and would not prevent title from being marketable.

However, in *La Course v. Kiesel*,<sup>52</sup> the property was subject to a similar restriction prohibiting use of property for other than a single residence. The vendor argued that the restriction was no longer effective since it had become obsolete by reason of change in the character of the neighborhood. The court rejected this argument on the grounds that the vendor agreed to convey a marketable title and that if the vendee were forced to accept the deed subject to the restriction, he might be exposed to the hazard of a law suit. This case may be distinguished since the vendee purchased the property in reliance on the vendor's statement that the property could be used for an apartment house. It would seem the better reasoning to declare the title marketable since normally such a restriction is unenforceable.

#### D. Easements

Easements upon the land will generally prevent compliance with a contract to convey a fee simple title since the vendee is thereby precluded from full use and enjoyment of the land.<sup>53</sup> Visible easements are ordinarily presumed to be accepted when of an open and notorious nature.<sup>54</sup> However, though there is a presumption that a purchaser has knowledge of a visible easement, where a road was found to be not apparent, the presumption was rebutted and the road was found to be an encumbrance affecting the physical condition of the property and preventing a marketable title.<sup>55</sup> An express provision that premises shall be conveyed clear of all

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49. *Id.* at 112. See also *Andres' Estate*, 12 Phila. 45 (Pa. Orphans' Ct., 1878).

50. *Lewis v. Hamilton's Ex'rs*, 301 Pa. 173, 151 Atl. 812 (1930) (title had been derived from the state).

51. 353 Pa. 110, 44 A.2d 295 (1945). See also *Henry v. Eves*, 306 Pa. 250, 159 Atl. 857 (1932).

52. 366 Pa. 385, 77 A.2d 877 (1951).

53. See *Ritter v. Hill*, 282 Pa. 115, 127 Atl. 455 (1925); *Atlantic Refining Co. v. Sylvester*, 231 Pa. 491, 80 Atl. 1091 (1911); *Johnston v. Callery*, 184 Pa. 146, 39 Atl. 73 (1893); *Hays v. Stewart*, 47 Pa. Super. 440 (1911).

54. *Patterson v. Arthurs*, 9 Watts 152 (Pa. 1839).

55. *Howell v. Northhampton R.R.*, 211 Pa. 284, 60 Atl. 793 (1905). See also *Shoub v. Dunbar*, 256 Pa. 311, 100 Atl. 829 (1917).

encumbrances has been held sufficient to relieve the purchaser from a contract even if he knew of the existence of the easement.<sup>56</sup>

Public streets and highways are generally regarded as a benefit to the land and not a valid ground for objecting to the title when open, obvious and known to the vendee. However, when a contract contains a covenant to convey free from encumbrance, the vendor does not comply with the contract if encumbered with a possible street.<sup>57</sup> A plotted and recorded, but unopened, street on a city plan was held to constitute an encumbrance even though the contract contained a provision excepting restrictions and easements.<sup>58</sup> The court seemed hesitant to allow the encumbrance to be included in the exceptions, expressing a tendency to exclude any but clearly provided for exceptions. However, where an owner laid out land into lots intersected by streets and alleys, and recorded the plan, and subsequently, the vendor and his predecessors maintained actual, continuous, visible, hostile, and notorious possession preventing the public and all persons from using any easements, streets or alleys, it was held that the streets and alleys shown on the recorded plan were not an encumbrance and did not prevent passing of marketable title.<sup>59</sup> This was also true where a street was designated and never opened or accepted by a borough.<sup>60</sup>

Concurrent with this approach to easements on marketability are conclusions reached on the effect of the taking of property under eminent domain. Generally, the appropriation of property, or a portion thereof, under power of eminent domain prior to the conveyance of title, constitutes an encumbrance which renders the title unmarketable. In *Johnston v. Callery*,<sup>61</sup> prior to execution of the contract, a railroad right of way had been surveyed and located upon the land by virtue of which the company was entitled to appropriate and use such right of way. It was held such location fastened a servitude upon the land which constituted an encumbrance. Similarly, where an ordinance for widening of a street would require the taking of a ten foot strip from the property, it was found to be a violation of the agreement to sell clear of encumbrances.<sup>62</sup>

A party wall,<sup>63</sup> a drain pipe running across a portion of the premises,<sup>64</sup> quit rents,<sup>65</sup> and even conflicting surveys<sup>66</sup> are all forms of encumbrances which have been found to render title unmarketable. Conversely, where the issue was whether existence of riparian rights in owners of abutting

56. *McDermott v. Reiter*, 279 Pa. 545, 124 Atl. 187 (1924); *Nauman v. Treen Box Co.*, 280 Pa. 97, 124 Atl. 349 (1924); *Patterson v. Freihofner*, 215 Pa. 47, 64 Atl. 326 (1906); *Strong v. Brinton*, 63 Pa. Super. 267 (1916).

57. *Ritter v. Hill*, 282 Pa. 115, 127 Atl. 455 (1925).

58. *Ibid.*

59. *Smith v. Windsor Manor Co.*, 352 Pa. 449, 43 A.2d 6 (1945).

60. *Le Quatte v. Morgan*, 39 Luz. Leg. Reg. Rep. 135 (Pa. C.P. 1946).

61. 173 Pa. 129, 33 Atl. 1036 (1896); *further proceedings*, 184 Pa. 146, 39 Atl. 73 (1898).

62. *Graybill v. Ruhl*, 225 Pa. 417, 74 Atl. 239 (1909).

63. *Cohen v. Turner*, 90 Pa. Super. 255 (1926).

64. *Kearney v. Hogan*, 154 Pa. 112, 25 Atl. 1076 (1893).

65. *Gans v. Renshaw*, 2 Pa. 34 (1845).

66. *Appeal of Holt, Harris and Humes*, 98 Pa. 257 (1881).

property constituted an encumbrance, the court, referring to riparian rights as "natural rights . . . which inure to the owner of land simply by reason of ownership . . ." held their existence did not constitute an encumbrance against the property.<sup>67</sup> This seems to be an example of that group of rights such as waterways, ditches, sewers, telephone or power lines, which in part, at least, are necessary for the enjoyment of the land in question and are beneficial to it.

Although there is a virtual absence of cases in Pennsylvania dealing with encroachments either upon the land being sold or of the vendor's buildings upon adjoining premises, it would seem that the courts would follow the general rule that where substantial encroachment exists, the vendor's title will be rejected as unmarketable, whereas trivial ones will not affect the title.<sup>68</sup>

In considering encumbrances, it is vital to remember that the courts have consistently held that an express covenant against encumbrances is enforceable even though the vendee knew of the existence of the encumbrance.<sup>69</sup> Therefore, where an agreement called for certain work to be done on a property prior to transfer, and also expressly stated that good and marketable title would be conveyed, the vendor was unsuccessful on an argument that the vendee should have been estopped from objecting to the unmarketability of title by reason of possible mechanic's liens arising from the work done. The court held that knowledge of such defects did not affect the express stipulation that title be marketable and free of encumbrances.<sup>70</sup>

### III.

#### CURATIVE MATTERS

We have seen that when a contract requires a marketable title, one clear of all encumbrances, a tender of a property subject to an easement is of no avail. However, if a release of the easement is obtained and also tendered, title is held to be marketable.<sup>71</sup> This is consistent with the idea expressed in the cases which hold that a vendor may not complete his title after suit is brought<sup>72</sup> but may demand specific performance if the title was "cleared" before suit is brought.<sup>73</sup>

The effect of the insurability of title on marketability is an interesting but, as yet, unsettled area. In *Siddal v. Painter*,<sup>74</sup> the court, after defining

67. *Terminal Realty Corp. v. Doubler*, 88 Pa. D.&C. 213 (C.P. 1953). The court quoted extensively from *Kleinberg v. Ratett*, 252 N.Y. 236, 169 N.E. 289 (1929).

68. *Netherton, The Effect of Encroachments on The Marketability of Land Title*, 27 CHI.-KENT L. REV. 107 (1948); *Friedman, The Effect of Encroachments and Projections Upon The Marketability of Title*, 39 CORNELL L.Q. 237 (1953).

69. *McDermott v. Reiter*, 279 Pa. 545, 124 Atl. 187 (1924); *Patterson v. Freihofer*, 215 Pa. 47, 64 Atl. 326 (1906); *Geyer v. Walton*, 151 Pa. Super. 549, 30 A.2d 643 (1943); *Moyer v. DeVincentis Constr. Co.*, 107 Pa. Super. 588, 164 Atl. 111 (1933).

70. *Seligman v. Maund*, 2 Pa. D.&C.2d 572 (C.P. 1955).

71. *Cohen v. Shapiro*, 298 Pa. 27, 147 Atl. 838 (1929).

72. *Magaw v. Lothrop*, 4 W.&S. 316 (Pa. 1842).

73. *Moroney v. Townsend*, 5 Phila. 357 (Pa. County Ct., 1864).

74. 84 Pa. D.&C. 591 (C.P. 1933).

marketable title as one "free from all reasonable doubt, but not from all possible doubt,"<sup>75</sup> equated marketability with insurability and rejected the contention that the title could be questionable on this basis. However, in a subsequent case, a vendor argued that because a title company would insure the title, under the doctrine of *Siddal v. Painter*, the title was marketable. The court rejected this argument and said:

The *ipse dixit* of a title company cannot transform a defective title into a good and marketable title. We think defendants [vendors] have misread our opinion in *Siddal v. Painter*. . . . What we actually held there was: "the fact that the Title Abstract Company would insure this title at *regular rates* was compliance by defendant with terms of the agreement of sale and required plaintiff to accept title." (The terms of agreement of sale required title to be good and marketable.) (Emphasis added.)<sup>76</sup>

The court went on to distinguish this case on the grounds that the company never agreed to insure the title at regular rates.

But does this answer the question? Is insurability the legal equivalent of marketability? If we consider what it means when a title insurance company is willing to insure at *regular rates*, we see that a title insured at regular rates is one concerning which the company entertains no reasonable doubts. So, in effect, we have the traditional standard for marketable title being applied and, in this respect, an insurable title may be equal to a marketable title. In practice, this is often the test applied.

Unless having agreed otherwise, the purchaser may elect to accept partial performance of the sales contract when he is willing to take the defective title without an abatement in price.<sup>77</sup> The vendor will not be permitted to set up his defective title as a defense in an action for specific performance.<sup>78</sup> "It is a rule of general application that if . . . an encumbrance can be removed by the application of the purchase money, thus clearing the title to the land, the mere fact that an encumbrance exists which vendor has not removed, or even is unable to remove without application of the purchase money . . . will not prevent a decree of specific performance."<sup>79</sup> However, when an existing mortgage is greater than the price offered, the vendee may have a right to rescind the contract and demand the return of any advance payment.<sup>80</sup>

A deduction from the purchase price may be given properly when specific performance is demanded or when suit is brought to recover the sum remaining due.<sup>81</sup> This rule has been applied where the defect was an

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75. *Id.* at 595-96.

76. *Seligman v. Maund*, 2 Pa. D.&C.2d 572, 578 (C.P. 1955).

77. *Roth v. Hartl*, 365 Pa. 428, 75 A.2d 583 (1950).

78. *Ibid.*; see also *Medoff v. Vandersaal*, 271 Pa. 169, 116 Atl. 525 (1921); *Farber v. Blubaker Coal Co.*, 216 Pa. 209, 65 Atl. 551 (1907).

79. *Bloshinski v. Falaz*, 168 Pa. Super. 565, 568, 79 A.2d 798, 799-800 (1951).

80. *Schelly v. Gribbin*, 161 Pa. Super. 20, 53 A.2d 862 (1947); *Croskey v. Stockley*, 85 Pa. Super. 498 (1925).

81. *Andrien v. Hefferman*, 299 Pa. 284, 149 Atl. 184 (1930).

outstanding leasehold,<sup>82</sup> or an easement or right of way.<sup>83</sup> It is applicable though the vendor was acting in good faith, and was himself innocent of the existence of the charge on the land.<sup>84</sup> However, courts have granted the equitable remedy of specific performance with an abatement of price only where there was a deficit in the vendor's title or a deficiency in the quantity of land to be conveyed and then only if the defect was incidental and did not require such a large deduction from the purchase price as to alter materially the contract between the parties.<sup>85</sup>

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82. *Cross v. Noble*, 67 Pa. 74 (1870).

83. *Eley v. Elder*, 122 Pa. 342, 15 Atl. 423 (1888); *Wilson v. Cochran*, 46 Pa. 229 (1863); *Stehley v. Irwin*, 8 Pa. 500 (1848).

84. *Latta v. Hax*, 219 Pa. 483, 68 Atl. 1016 (1908); *Tyson v. Eyrick*, 141 Pa. 296, 21 Atl. 645 (1891); *Erwin v. Myers*, 46 Pa. 96 (1863).

85. *Merritz v. Circelli*, 361 Pa. 239, 64 A.2d 796 (1949).