The New York Law on Encroachments and Obstructions Upon Streets and Highways

John L. Finck
THE NEW YORK LAW ON ENCROACHMENTS AND OBSTRUCTIONS UPON STREETS AND HIGHWAYS

I. THE RIGHTS OF THE PUBLIC AND OF ABUTTING OWNERS IN STREETS AND HIGHWAYS.

Streets and highways were originally created for public travel and transportation, and the public is, subject to certain limitations, entitled to the unobstructed and uninterrupted use of the entire width thereof for such purposes. Any unreasonable use of, or any unlawful obstruction or encroachment thereon, constitutes a public nuisance, and may be abated by the proper authorities in the same manner as any other public nuisance.


2 Davis v. Mayor, etc. of N. Y., 14 N. Y. 506 (1856); Congreve v. Smith, 18 N. Y. 79 (1858); People v. Kerr, 27 N. Y. 188 (1863); Cook v. Harris, 61 N. Y. 448 (1875); Hume v. Mayor, 74 N. Y. 264 (1878); Driggs v. Phillips,
The ownership by the city of the fee of the land in the streets is impressed with a trust to keep the same open and for use as such. The trust is publici juris, that is for the whole People of the state, and is under the absolute control of the legislature; in which body, as representing the People, is vested power to govern and to regulate the use of the streets. 3

Whether a particular use of, or obstruction upon, a street is an unreasonable one, is a question of fact depending upon all the circumstances of the case; 4 the fact that an encroachment or obstruction is such that there is sufficient room to pass around it does not make it any the less a nuisance. 5 Any contracting or narrowing of a highway is a nuisance. 6


4 Hudson v. Caryl, 44 N. Y. 553 (1871); Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264 (1887); Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418 (1891); Murphy v. Leggett, 164 N. Y. 121, 58 N. E. 42 (1900); Sweet v. Perkins, 196 N. Y. 482, 90 N. E. 50 (1909).


6 President, etc. W. & W. T. v. People, 9 Barb. 161, 175 (N. Y. 1850).
Owners and lessees of property abutting on a street or highway are likewise entitled to have the same kept open and unobstructed at all times for the purpose of egress from, and access to, their properties, and for the proper circulation of light and air. These rights are property rights within the meaning of the constitution.

The right of the public to the free and uninterrupted use of its streets and highways and the rights of abutting owners to have the same kept open are, however, subject to the rights of abutting owners to make such reasonable use of the street in front of their premises as necessity demands, and for such purposes to encroach upon or obstruct the same, provided, however, that such use is reasonable and temporary. Such invasion of the rights of the public and abutting owners is sanctioned on the ground of necessity.

---


9 People v. Horton, 64 N. Y. 610 (1876); Story v. N. Y. El. Ry., 90 N. Y. 122 (1882); Bliss v. Johnson, 94 N. Y. 235, 241 (1883); Welsh v. Wilson,
"The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to and from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects or maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto."  


"That which would but slightly inconvenience the public in one place, might in another very seriously impede and discommodate travelers. The use by a merchant of a back street but little travelled might be reasonable and justified, while a like use of a main thoroughfare constantly crowded with passing people would become at once unreasonable and a nuisance that could not be tolerated." 11

The right to obstruct the sidewalk temporarily with skids for the purpose of removing cases of merchandise from a store to a truck has been upheld as being a reasonable use. 12 But where a merchant obstructed the sidewalk by loading and unloading merchandise on and from trucks placed in the street by means of skids forming a bridge from the stoop of his property over the sidewalk to the trucks, and the skids and trucks remained in such position over the sidewalk from four to five hours every day, it was held that this was an unreasonable use of the street. "Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation by the defendant of the sidewalk in front of his store to his private use in disregard of the public convenience. Even if in some sense such use was necessary to the convenient and profitable transaction of his business, and if the obstruction was no more and even less than it would be by any other method of doing business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place or enlarge his premises so as to accommodate it. It was incumbent on the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck, and this he could do at intervals during the day, at no time obstructing the

11 Murphy v. Leggett, 164 N. Y. 121, 126, 58 N. E. 42 (1900).
street for any considerable length of time. But there is no authority and no rule of law which would warrant such an obstruction daily for hours, or even one hour continuously." 13

The obstruction of streets by carriages in front of hotels for the convenience of patrons has been declared to be a legitimate use of the streets, it being held that carriages in front of private residences, hotels, clubs, theatres, churches and the like are necessary and do not unreasonably obstruct the street. 14 Such use of the street for carriages must not, however, become so unreasonable as to constitute a nuisance and interfere with the rights of the public in the use of the street. 15

The maintenance of a spur railroad track running from the street to the property of an abutting owner, connecting with the tracks of a street railway running through the street, and the running of express cars thereon for the conveyance of merchandise, is an unreasonable use of the street and will not be sanctioned, 16 even though the municipal authorities authorized and permitted it. 17 A glass and iron canopy projecting from a garage over the sidewalk, 18 a wooden platform, 19 an awning extending over a street, 20 permanent gaso-
line pumps at the curb, a coal hole, a bridge across a street, a water faucet projecting four inches from a wall at a distance of about six inches above the sidewalk, the storing of a wagon in the street, parking an automobile thereon, maintaining a show case on the sidewalk, a weighing machine, and even a peanut roaster and a herring stand, have been held to be nuisances. On the other hand, the erection and maintenance of a stepping stone near the edge of the curb, a pile of rubbish temporarily placed at the side of a street on “clean up” day for carting away, and gate posts which did not obstruct the main-travelled part of the street, have been held not to be nuisances.

Under the Administrative Code of the City of New York, the city is empowered to permit and to license specified obstructions, and while the legislature has the power to confer such authority upon municipalities, it is important to ascertain, in each particular case, whether such authority has, in fact, been conferred. As an illustration, the decision holding that permanent gasoline pumps at the curb were a nuisance, was based upon the fact that authority to license

23 Knox v. Mayor, etc. of City of N. Y., 55 Barb. 404 (N. Y. 1868).
25 Cohen v. Mayor, etc. of N. Y., 113 N. Y. 532, 21 N. E. 700 (1889).
32 Lyman v. Village of Potsdam, 228 N. Y. 398, 127 N. E. 312 (1920).
such pumps had not been conferred upon the city of Buffalo by its charter. In a similar case, decided two years later, it was held that the charter of the Village of Peekskill did authorize the municipal officers to license gasoline pumps at the curb and that, consequently, they were not a nuisance.

The determining factor is whether the use of the street or the obstruction thereon is reasonable, temporary and necessary, or, if the obstruction is permanent, whether such use is a public, as distinguished from a private, use. "The public right to the unobstructed use of a street in all its parts is not absolute but relative. The right may be qualified by means of permanent obstructions located at the sides of the streets, fulfilling useful public purposes consistent with, although other than, those of transportation and traffic, provided unobstructed passageways of ample width are left, and provided; further, the obstructions are not in the nature of permanent structures or encroachments upon and appropriations of the land of the street for private benefit or use. The right may be qualified also by the use, temporary and for a reasonable time, of the sidewalk and side of the street, by an abutting owner, to fulfill a reasonable necessity. This right is founded upon common usage and consent and needs no other authority. It cannot be exercised so as to interfere unreasonably with the public right. This use cannot be permanent and continuous, even if sanctioned by the unauthorized consent of the municipal authorities."  

If the authorities whose duty it is to remove unlawful obstructions or encroachments refuse or neglect to do so, mandamus will lie on behalf of a citizen to compel them to do their duty and remove the same, on the theory that a citi-
zen can enforce a right in which the general public is interested where such interest is common to the whole community, and he does not officiously intermeddle in a matter with which he has no concern.

"The right to relief by mandamus unquestionably rests in the discretion of the court", but it "is elementary law that the public is entitled to the free and unobstructed use of city streets and that any obstruction of such streets for private use interferes with the public right, constitutes a nuisance and may be removed at the suit of any interested citizen. There are certain exceptions to this general statement, as where there are temporary obstructions or obstructions which the courts have considered as not amounting to a substantial interference with traffic and as permissible and not in conflict with the purposes for which streets and highways are maintained."

Mandamus will not be granted, however, unless the obstruction is patently a public nuisance and the duty of the municipal officers to remove the same is clear and unquestionable. Where a citizen demanded that the borough president be directed to remove the poles and wires of an electric company from the streets on the ground that the electric company had no franchise to use the streets, relief was denied for the reason that "mandamus can be granted only where there is a clear, legal duty imposed upon a public officer. In every instance where the writ has been granted


40 People v. Halsey, 37 N. Y. 344, 348 (1867).


**there has been a single structure, the presence of which could not be sanctioned under the statutes and ordinances. Little analogy can be discovered between those cases and the present case, which involves a whole system of electric light poles and wires erected and maintained pursuant to franchises granted by the legislative body of the municipality under a claim of power and authority so to do.**

In an application by a citizen and taxpayer for a peremptory mandamus order to compel the removal of a stoop and a bay window which encroached upon the street, the order was denied for the reason that the encroachment was not shown to be a public nuisance, and the owner of the property was not made a party to the proceeding so that he could be heard on the question of nuisance, the court saying: "No such order can be sustained without the presence of the owner in court. The city may at all times abate a public nuisance. No decree of the court is required. But this power rests upon the fact that a public nuisance does exist. So, too, when the official is negligent, the court doubtless may by mandamus compel him to do his duty. It will not require him to interfere with private property, however, unless concededly it is a nuisance or unless the owner has an opportunity to be heard upon the subject." After stating that the city cannot alienate any part of its streets or permit permanent encroachments thereon, but that the most it can do is to give a revocable license, the court continued: "A revocable license, however, is a different matter. For many years the streets have been bounded by a so-called building line. For many years also some private use of street areas has been permitted. Stoops, steps, areaways, cellar openings, vaults, awnings, bay windows, cornices connected with adjoining buildings, and not unreasonably interfering with traffic, have all existed. As they must be removed on
demand of the city in actions for specific performance, the 
existence of many have been held to make the title to the 
adjacent building unmarketable; but their presence has not 
been supposed to create a public nuisance whose removal 
would be compelled by the courts at the instance of any 
taxpayer." 44

Although negligence actions are beyond the scope of this 
article, many of the cases involving street obstructions arise 
in actions for damages for personal injuries sustained be- 
cause of an obstruction or encroachment, and the law of neg- 
ligence—whether the obstruction was a public nuisance and 
whether it was the proximate cause of the accident—is the 
deciding factor. If the obstruction is found to be a public 
uisance, there will usually be no question as to the right of 
the injured person to recover; but even where the obstruc-
tion is not a nuisance \textit{per se}, a jury may find that the use of 
the street was unreasonable and award damages to a plaintiff. 
Hence, an iron platform two feet high and five feet wide 
wholly within the stoop line, was held not to be a nuisance 
\textit{per se}, but a person who was injured by slipping on the steps 
of the platform was held to be entitled to recover damages 
because the jury found that the use of the platform and the 
sidewalk was unreasonable.45

\section{II. Rights and Limitations of the Legislature and the 
Municipalities to Authorize Encroachments 
and Obstructions.}

The legislature has the sole and absolute control over all 
streets and highways and it is vested with the power to gov-
ern and regulate their use.46 This power is, however, limited.

\textsuperscript{44} Matter of Green v. Miller, 249 N. Y. 88, 91, 94, 162 N. E. 593 (1928); 
see People \textit{ex rel.} Neary Memorials, Inc. v. Harvey, 242 App. Div. 831 (2d 
Dept. 1934); People \textit{ex rel.} Simon v. Mayor, etc. of N. Y., 20 Misc. 189, 45 
124 (1928).

\textsuperscript{45} Murphy v. Leggett, 164 N. Y. 121, 58 N. E. 42 (1900).

\textsuperscript{46} Wager v. Troy U. R. R., 25 N. Y. 526 (1862); People v. Kerr, 27 
N. Y. 188 (1863); Milhau v. Sharp, 27 N. Y. 611 (1863); Coster v. Mayor of 
Albany, 43 N. Y. 399 (1871); Kellinger v. 42nd St., etc. R. R., 50 N. Y. 206 
(1872); Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85 (1891); Potter v. Collis, 
156 N. Y. 16, 50 N. E. 413 (1898); D. L. & W. R. R. v. City of Buffalo, 4
The legislature cannot authorize or consent to the erection and maintenance of substantial and permanent encroachments or obstructions on the streets or highways, or an unreasonable use thereof which would seriously invade the rights of the public or of abutting owners. This limitation exists by virtue of the provisions of the Constitution which prohibit the taking of private property without compensation or for other than a public purpose. As previously pointed out, the rights of owners of property abutting on a highway are property rights, and an attempt by the legislature to authorize the erection and maintenance of permanent and substantial encroachments on such highways by one person to the detriment of another, would diminish the latter's right of free access to and from his property and interfere with his easements of light and air. Such an act would constitute the taking of property without compensation and for other than a public purpose. It would also be an invasion of the public right and an appropriation of public property for a private purpose.

Although the legislature has no power to permit permanent and substantial encroachments, it may authorize such temporary and unsubstantial obstructions and encroachments


as will not seriously affect the rights of the public or of abutting owners.40 "But it is competent for the legislature to authorize a limited use of sidewalks in front of buildings in cities and villages for stoops or cellar openings, or underground vaults, for the convenience and beneficial enjoyment of the adjacent premises. While such use may restrict somewhat the free and uninterrupted use of the streets for pedestrians, the general interests are subserved by making available to the greatest extent valuable property, increasing business facilities, giving encouragement to improvements and adding to taxable values."50

The power of the legislature to govern and regulate the use of streets and highways, to permit temporary encroachments thereon, and to prevent and remove encroachments therefrom, may be delegated to the municipalities.51 Such delegation of authority will not, however, be implied, but must rest upon express legislation containing a clear and unqualified grant of power.52

The powers and the authority of the city of New York

---


50 Jorgensen v. Squires, 144 N. Y. 280, 284, 39 N. E. 373 (1895).


to govern and regulate the use of its streets are set forth in the Charter and the Administrative Code, both of which contain numerous provisions respecting the rights and the limitations of the city to regulate the use of its streets and to permit encroachments and obstructions thereon. The two most important provisions of the Charter, in the light of which all other provisions must be considered, are those relating to the inalienability of the property of the city and the right of the city to permit encroachments thereon. The first declares that "the rights of the city in and to its water front, ferries, wharf property, bridges, land under water, public landings, wharves, docks, streets, avenues, highways, parks and all other public places" are inalienable, but that "upon the closing or discontinuance of any street, avenue, park or other public place the property may be sold or otherwise disposed of as may be provided by law, and leases of land under water, wharf property, wharves, docks and piers may be made as may be provided by law"; the right to grant franchises, permits and licenses in respect to inalienable property is not, however, prevented.\textsuperscript{53} The other provision states that the council "shall not pass any local law authorizing the placing or continuing of any encroachment or obstruction upon any street or sidewalk excepting temporary occupation thereof during and for the purpose of the erection, repairing or demolition of a building on a lot abutting thereon under revocable licenses therefor, and excepting the erection of booths, stands or displays or the maintenance of sidewalk cafes under licenses to be granted only with the consent of the owner of the premises if the same shall be located in whole or in part within stoop lines."\textsuperscript{54}

Other sections of the Charter relate to the issuance of permits for renewing the pavement of streets,\textsuperscript{55} the construction of pipes, conduits and tunnels under railroad tracks upon and connecting bridges over streets,\textsuperscript{56} the authority of the commissioner of parks to regulate the use of and the projections on streets in parks and public places and within

\begin{itemize}
\item \textsuperscript{53} N. Y. City Charter § 383.
\item \textsuperscript{54} Id. § 42, subd. b.
\item \textsuperscript{55} Id. § 83.
\item \textsuperscript{56} Id. § 374.
\end{itemize}
three hundred fifty feet therefrom, and empower the borough presidents to remove incumbrances, to license vaults under sidewalks, and to regulate the use or opening of streets.

Under the Charter and the Administrative Code, the city may also authorize such minor encroachments as columns, pillars, ornamental projections, areaways, cellar doors, stoops, awnings, signs and the like, and also permit the temporary deposit of building material in the streets. While under the common law rules such encroachments were considered nuisances, they are nevertheless permitted in the city for the reason that they are necessary and convenient and do not materially interfere with the rights of the public. They are permissible only and until such time as the necessities of the public require their removal, and the city authorities may at any time revoke the permits or licenses theretofore issued to maintain them.

"There can be no doubt that municipal authorities having the care and control of the streets in a city may authorize their temporary use by private parties for private purposes to a limited extent. The precise limits beyond which that power cannot be exercised have not been very specifically or accurately defined and perhaps cannot be. The governing body in a city may permit private parties to deposit building materials in the streets, to construct and use coal holes, cellarways, areas, vaults under sidewalks, awnings

---

57 Id. § 532.
58 Id. § 82.
above, and the like. But all these and similar uses of the public streets for private use are either expressly authorized by statute or sanctioned by the courts as being exceptions to the general rule born of necessity and justified by public convenience and custom." 60

The powers of the city under the new Charter and the Administrative Code with respect to the licensing of vaults and cellars under the streets, are similar to those contained in the old Charter. The courts have held that under the old Charter the city had the right to authorize the maintenance of vaults and cellars under the streets, as such use did not impair the right of the public to the use of the surface of the streets.61 "I think it to be fairly clear that there is a distinction between the right to permit the use of the subsoil of a city street by an abutting owner and the right to permit a permanent encroachment upon the street, by which the absolute right of the People to the uninterrupted use thereof may be diminished." 62 Such private use is, however, subject and subordinate to the rights of the public, and a permit for the maintenance of a vault may be revoked whenever the public interest demands it.63 "Whenever the existence of a


Parish v. Baird, 160 N. Y. 302, 54 N. E. 724 (1899) and Lahr v. Met. El. Ry., 104 N. Y. 268, 10 N. E. 528 (1887) are distinguished in Lincoln Safe Deposit Co. v. City of N. Y., 210 N. Y. 34, 103 N. E. 758 (1913), where the court said: "Reliance is placed by the plaintiff on a statement made in Parish v. Baird (160 N. Y. 302, 54 N. E. 724 (1899)) that the right to maintain vaults is an easement. Whether an easement or not, the right is in some respects similar to an easement and is property right as against any third party who may
vault would interfere with the public use of the street, the right to maintain it must be held to terminate, as the right of individuals under such permits must be regarded as subordinate to the necessities or requirements of the public.”

“A permit for the construction of a vault in a public highway, for the use of the abutting owner, is in the nature of a revocable private easement. It may be revoked when the space is required for municipal or other public purposes, but until revoked it may be fully enjoyed. * * * The municipal authorities were expressly authorized by the Legislature to grant the right to the abutting owner to construct these vaults and it has often been decided by the courts that the construction of such vaults in a public street is a proper use of the street and that the owner’s rights therein will be protected while the permit stands unrevoked.”

An abutting owner, as such, has no inherent right to build and maintain a vault under the street without first obtaining a permit from the city and paying the license fee therefor. “Maintaining the vaults without a permit is a violation of the ordinance and constitutes a public nuisance which the plaintiffs could be required to abate. * * * The city owes a duty to the travelling public and to those law-

---

violate it. That was all the case presented. It did not involve the duration of the privilege as against the public. Also attention is called to a statement found in the opinion in the case of Lahr v. Metropolitan Elevated R. Co. (104 N. Y. 268, 10 N. E. 528 (1887)) that the right which the city of New York acquired in the streets is limited to their use for street purposes. The opinion did not receive the approval of a majority of the court and the excerpt quoted is an inaccurate statement of the law.”

64 Deshong v. City of N. Y., 176 N. Y. 475, 480, 68 N. E. 880 (1903).
fully in occupation of any part of the subsurface of the streets to exercise reasonable care to maintain the streets in a safe condition. That duty requires the city to supervise the construction of vaults, and to inspect the same from time to time, and to require that they be safely constructed and maintained; and regardless of whether the city does or does not own the fee of the street, in permitting an abutting owner to construct a vault under a street, the city has a right to exact a reasonable fee to cover the expenses to which it will be subjected in supervising the construction of the vaults and in inspecting them, and in seeing that they are properly constructed and safely maintained. 67

The authority of municipalities to authorize the erection and maintenance of encroachments and obstructions such as a storm door, 68 an iron awning extending to the curb and supported by posts at the curb line, 69 a newsstand under the steps of an elevated railroad station, 70 and other like encroachments, have heretofore been sustained by the courts. An ordinance was held valid which permitted the use of five feet on each side of a street for courtyards and their enclosure by an iron fence, but the erection of a wall around the courtyards was disapproved. 71 In another case, an ordinance permitting fifteen feet of a street to be fenced in and maintained as a courtyard was also held valid, 72 although the earlier cases held that no such power resided in a municipality. 73

An act of the legislature widening a street twenty feet on each side and authorizing the abutting owners to fence in the twenty-foot strip as and for courtyards was held constitutional, the court saying: "It is not necessary that every

73 Lawrence v. Mayor, etc. of N. Y., 2 Barb. 577 (N. Y. 1848); People ex rel. O'Reilly v. Mayor, 59 How. Pr. 277 (N. Y. 1880); Ely v. Campbell, 59 How. Pr. 333 (N. Y. 1879).
part of all highways should be used for the passage of vehicles and pedestrians; it is proper that some regard should be had for the aesthetic tastes, the comfort, health and convenience of the public, and, if the Legislature had enacted that Clinton Avenue should be increased in width to the extent provided in this act, and had provided that a strip in the centre of the highway, forty feet wide, should be devoted to trees and flowers, as is done in many of our cities, it would hardly have been questioned that this constituted a public use in the same sense that a park preserve is generally recognized as a public use." 

This decision was affirmed by the Court of Appeals in 1901 without opinion.

Permanent encroachments which fulfil a useful public purpose have been declared permissible, but permanent encroachments which were erected for private benefit or use have been generally held to be illegal. An abutting owner has no right to erect and maintain substantial encroachments which seriously interfere with the rights of the public; but the courts will uphold his right, under authorized ordinances permitting him to do so, to maintain minor and unsubstantial encroachments, such as awnings "which have been held to be within the power of the city authorities to authorize", the legislature having "classified them with signs, horse troughs, telegraph posts and such like purposes, as legitimate street uses. They are within common law rules, encroachments and obstructions; but the most that could be said is that, if the legislature has stretched its powers in delegating to the governing body of the municipality the right to authorize the erection of awnings, such an encroachment is of too unsubstantial a nature to be seriously considered as a public nuisance." 

No right being vested in an adjoining owner to erect and maintain encroachments in the streets except by permis-

---

75 Matter of Clinton Ave., 167 N. Y. 624, 60 N. E. 1108 (1901).
sion of the municipal authorities, he must, when permitted to do so, construct and maintain the same in conformity with the city ordinances. If a space occupied by a vault is in excess of that allowed under the permit, it constitutes a nuisance per se and renders the owner liable to the city. And where a permit had been issued to maintain a vault, the maintenance of an open area is not a compliance with the permit, but is a nuisance which the city may enjoin. If a permit for the construction of vaults had previously been granted, the licensee may thereafter construct new vaults in the space occupied by the old vaults without applying for another permit. In the absence of an ordinance regulating the construction of any permissible encroachment, the licensee must construct the same in a careful manner so as to protect the public against danger and the municipality against liability.

In an action between an abutting owner and a third person, it will generally be presumed that a minor encroachment, which was within the power of the municipal authorities to permit and which has existed for a long time without objection, was legally built under a permit. Where a

---


cellar door had existed for twenty years without objection, a coal hole had been maintained for eighteen years, and a vault had been built nine years ago; it was held that there was a presumption that the encroachments were erected with the consent of the municipal authorities. While no such consent will be presumed in an action between the city and an abutting owner, it has been held that where a vault had been built before the enactment of statutes and ordinances requiring permits for their construction, the failure to find any record of a permit did not raise a presumption that the vault was not sanctioned or consented to by the city.

III. HISTORY AND EVOLUTION OF THE LAW; A REVERSAL OF PREVIOUS CONCEPTS.

In examining the history of the law on street encroachments and the powers of municipalities generally to license the erection and maintenance of encroachments on streets, we find that it was formerly the accepted theory that municipalities had the power to permit abutting owners to construct substantial, permanent encroachments for their private benefit. Such was the law as late as 1900.

In Wormser v. Brown, decided in 1896, it was held that bay windows could be built six feet beyond the street line, provided they were within the stoop line, the court saying: "The legislature, by virtue of its general control over public streets and highways, has power to authorize struc-
tures in the streets which, without such authority and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation."

In 1900 the Court of Appeals affirmed, without opinion, a decision of the Appellate Division which held that a bay window encroaching seven and one-half inches and a stoop which encroached between six and seven feet were permissible encroachments which the municipality had power to license. Van Brunt, P.J., dissented from this decision, saying: "The power to regulate areas gives no power to devote the same to other purposes than those of an area, such as filling up, in whole or in part, by permanent building. Such a rule would enable the common council to authorize the extension of all buildings into the street."

A few years later the Court of Appeals effected a complete reversal of the law, and the dissenting opinion of Van Brunt, P.J., became the law of the state. Commenting upon this reversal, the Appellate Division said: "It may perhaps be relevant to point out that Presiding Justice Van Brunt, in a dissenting memorandum in Broadbelt v. Loew (15 App. Div. 343), accurately foretold the event." 92

Beginning with Ackerman v. True 93 in 1903, which reversed the previous conception of the law, and the line of decisions since that date, it is now the law that municipalities have no right to license the erection of permanent and substantial encroachments for private benefit. As no power is vested in the legislature to permit such encroachments, it naturally follows that it cannot confer such power upon the municipalities. Under the Charter provisions, the city has, at various times, assumed such power and enacted ordinances permitting abutting owners to erect permanent and substantial encroachments in the streets, but such an assumption of authority, as is not even possessed by the legislature, has been repeatedly condemned, and it is now universally recognized that no such power exists. 94

---

93 175 N. Y. 353, 67 N. E. 629 (1903).
94 Gould v. H. R. R., 6 N. Y. 522 (1852); St. Vincent Orphan Asylum v.
There is no right in the city to use its property therein, as it might corporate property, nor otherwise than as the legislature may authorize for some public use or benefit. * * * It follows, from the nature of its title, that the city cannot dispose of the streets for, nor divert them to, private uses. Whatever the power of control, or of regulation, possessed by the legislature, it is restricted in the direction of what may be deemed to be a public use, having in view, of course, the demands of a progressive civilization. * * * The streets were opened for the unrestricted use of the public and the assessments for the costs were levied upon the properties benefited, and were paid, upon the implied promise that they should be maintained, in all their integrity, as public highways. Any erection of permanent and substantial structures thereon, not for public use, would constitute an encroachment, or obstruction, and would, therefore, be a public nuisance.”

Municipalities may invoke the aid of a court of equity to prevent the erection, or to compel the removal, of an en-
croachment from a street, and this remedy may be pursued irrespective of the fact that the city had issued a permit authorizing the encroachment. That a city ordinance prescribes a penalty for the maintenance of an encroachment or obstruction will not relegate the city to an action at law to recover the penalty. The fact that the encroachment is ornamental, or that it was built within the stoop lines, will not make it any the less illegal. And where the city has issued a permit to encroach upon a street, a demand by the city for the removal of the encroachment is sufficient notice of the revocation of the permit.

Encroachments, such as an ornamental masonry wall extending from six to seven feet into the street but within the stoop line, an areaway with a coping and a flight of stone steps extending about fourteen feet beyond the building line, a porch which projected more than thirteen feet into the street, a building encroaching ten feet upon the street and a portico which encroached sixteen feet beyond


100 City of N. Y. v. Rice, 198 N. Y. 124, 91 N. E. 283 (1910).

101 Ibid.

102 Ibid.


the building line,\textsuperscript{106} were held to be illegal encroachments and ordered removed. While such encroachments were serious and substantial, the same rules of law are also applicable to less extensive encroachments. Whenever the municipal authorities decide that the public interest requires the full and unobstructed width of any particular street, they can compel the removal of all encroachments therefrom and require the abutting owners to cut back to the building line.

If a street or a highway has been created by prescription or user and there is no record of its boundaries, a building standing for a long period of time and practically monumenting one side of the highway, cannot be said to encroach thereon,\textsuperscript{107} for the reason that the public use of the highway defines the extent of the public easement therein.\textsuperscript{108} Hence, where a building fifty years old apparently encroached upon a highway from seventy-seven one-hundredths feet to ninety-four one-hundredths feet and there was no record of the boundary lines of the highway, it was held that there was no encroachment. In that case it was said: "It, doubtless, is a highway created by prescription, * * * and if so, its extent must be limited to the portion actually used. * * * There is no evidence that it was ever used westwardly of the east wall of the plaintiffs' building and the other buildings in line with it. * * * While it is true that an abutting owner cannot acquire title to any portion of a highway by a long, continued encroachment, * * * it is equally true that the public, except by deed, dedication, condemnation or adverse user for public travel, for such length of time as will raise a presumption of a grant, cannot acquire the right to use the abutting owners' premises as a street."\textsuperscript{109}


\textsuperscript{108} Walker v. Caywood, 31 N. Y. 51, 63 (1855); People v. Sutherland, 252 N. Y. 86, 90, 168 N. E. 538 (1929).

Whether or not a lessee will be required to remove encroachments at his own expense, in the event that the city demands their removal, depends upon the provisions contained in the lease. In one case, a sub-lessee, who had covenanted to perform and comply with all orders of the city authorities, was required to pay the cost of removing an encroaching show window when ordered to do so by the city.\textsuperscript{110} That decision was based upon the ground that the tenant had rebuilt the show window and he should, therefore, pay for the cost of removing it, although the reconstruction and alteration of the window did not increase the extent of the original encroachment.

In commenting upon this decision in a subsequent action (not involving street encroachments), where a similar covenant was construed differently, the court said: “It is true this court held * * * that tenants were obliged, under clauses in leases somewhat similar to this, to remove show windows which encroached upon the street, but in those cases the windows were public nuisances and had been erected either by tenants or for their benefit.”\textsuperscript{111}

Two years later the Court of Appeals reversed a similar ruling of the Appellate Division in the case of \textit{Herald Square Realty Co. v. Saks & Co.}\textsuperscript{112} on the ground that the language of the covenant in the lease was not sufficiently inclusive to require the tenant to remove encroachments, and on the further ground that the changed attitude of the city with respect to encroachments could not have been in the contemplation of the parties when they executed the lease. The court said: “Had it been the purpose of the parties to guard against the extraordinary contingency that some later municipal administration might require the removal of such structural encroachments as show windows, they could easily have expressed that important consideration in terms too definite.

\textsuperscript{112} 215 N. Y. 427, 109 N. E. 545 (1915).
to be misunderstood.” Other decisions have likewise construed such a covenant in favor of the tenant.\textsuperscript{113}

In 1923, a like covenant in a long term lease, requiring the tenant to comply with all orders, rules and regulations of the municipality, was construed to impose upon the tenant the obligation of removing street encroachments whenever the municipality required their removal, on the ground that such changes were not extraordinary and unforeseen.\textsuperscript{114} The court predicated its decision upon the ground that in the instant case there had not been an unforeseen change in the policy of the municipality with respect to street encroachments since the execution of the lease, and that, therefore, the removal of encroachments must have been within the contemplation of the parties; that the decision in the \textit{Herald Square Realty Co.} case was based upon the fact that when that lease was executed it was unforeseeable that the municipal policy would be changed in that respect, and that, therefore, such a change was not in the minds of the parties when they signed the lease.

Several obvious conclusions may be drawn from these decisions. First, in the \textit{Herald Square Realty Co.} case, the court did say that the changed policy of the municipality could not have been anticipated or prophesied. Second, it is now generally known that the policy of the city has changed and is more stringent than in the past, and such knowledge will be chargeable to a lessee who attempts to plead surprise. Third, a lease can be drawn with a covenant sufficiently all-inclusive to require a tenant to remove street encroachments at his own expense.

As it is the universal custom to incorporate various forms of this covenant in long-term leases, it is incumbent upon the lessee, for his own protection, to ascertain the nature of the street encroachments, if any, before executing a lease, or else to limit the effect of the covenant so as to exclude the possibility of his being compelled to remove them.


Otherwise he may be confronted with a costly undertaking in the event that the city should require him to remove substantial encroachments.

IV. REMOVAL OF HIGHWAY ENCROACHMENTS BY MUNICIPALITIES—LAPSE OF TIME OR ACQUIESCENCE DOES NOT CONSTITUTE AN ESTOPPEL.

The maxim, "nullum tempus, occurrit regi", is not restricted in its application to sovereignty, but applies also to municipal corporations as trustees of the rights of the public. No matter how long a nuisance or an encroachment upon a highway may have existed, a prescriptive right to maintain or to continue the same cannot arise as against a municipality. The public cannot be barred by the neglect of municipal officers to do their duty, and no title by adverse possession—


The case of Varick v. Mayor, etc. of N. Y., 4 Johns. Ch. 53 (N. Y. 1819), holding that an encroachment by a greenhouse of from two feet eight inches to ten feet six inches for twenty-five years ripened into a good title as against the city, has not been followed or approved. Town of Brookhaven v. Dyett S. L. Brick Co., 75 Misc. 310, 135 N. Y. Supp. 165 (1912); Finch, Pruyn & Co., Inc. v. State of N. Y., 122 Misc. 404, 409, 203 N. Y. Supp. 165 (1924); Parsons v. Village of Rye, 140 N. Y. Supp. 961 (1921).
sion can ever be acquired against a municipality no matter how long an encroachment or obstruction may have existed.¹¹⁶

“The Erie Canal is a great public highway, and no individual, according to well established principles, can gain for himself an easement on a highway by prescription, or in any way make a valid encroachment upon the public right. It is not necessary to affirm that an individual cannot enclose public land and gain title to it by a long continued adverse possession. It has been held in a number of cases that this can be done without reference to the statute of limitations, and that a grant may be presumed. * * * This, however, is a very different case from that where an individual seeks to limit the right of the public to use their public works, and perhaps to impair their efficiency for his own private benefit. In that case, no user for any length of time will affect the public right. This rule was laid down as to an encroachment upon a public highway, in Gerring v. Barfield (16 C. B. [N.S.], 597). It is there stated that the fact that a piece of ground, part of a public highway, has for twenty years been used by an innkeeper for the standing of vehicles belonging to his guests, is no answer to a complaint for an obstruction of the highway. Byles, J. said: ‘As regards private rights, twenty years’ user is important. There may be a presumption creating or extinguishing a right by user or non-user; but once a highway always a highway’. (P. 604.) So it was held in Morton v. Moore (15 Gray, 573), that a right to deposit sawlogs within the limits of a highway cannot be maintained by evidence that the owner of a saw-mill in the vicinity has been accustomed to deposit them there for more than twenty years. The line of argument in that case was, that the right of the public to a highway is paramount and controlling. The right extends to the entire territory within its limits, and consequently no one can be de-

prived of the enjoyment of such an easement by any adverse or unlawful use or occupation of the way by an individual for his private purposes. An obstruction to it, however long continued, is unlawful, and no right can be acquired by persisting in the maintenance of it. * * * The Supreme Court of Pennsylvania has had frequent occasion to consider this subject in its application to public works, and has regularly and emphatically repudiated the notion that the doctrines of prescription can be extended to encroachments upon them by individuals. * * * It was said in those cases that no lapse of time furnishes a defence to an encroachment on a public right, and that a presumption of a grant cannot be made to support such an encroachment, and also that no private occupancy, for whatever time, and whether adverse or by permission, can vest a title inconsistent with the public rights.”

Where a dock was erected over a street, the rights of the public were held not to have been extinguished, as the dock took the place of the street and the public had the same right on the dock as it formerly had in the street. Similarly, the laying of a plank road on a street by a plank road company was held not to have changed the character of the thoroughfare, as it still continued as a street. The public, in consideration of the payment of tolls, was relieved from keeping it in repair and the public authorities were not divested of jurisdiction over it.

After a municipality has acquiesced in the maintenance of an illegal obstruction in a street, it may not thereafter recover damages for trespass or for the illegal use and occupation of the street. Hence, in an action by a city against a railroad company to recover damages on the ground that the railroad company had illegally maintained tracks in the streets between 1921 and 1935 without the consent of the

city, it was held that the acquiescence by the city of such an illegal occupation of the streets without any effort to prevent it, precluded the city from claiming damages.120

V. SIX YEARS NON-USER TERMINATES HIGHWAY.

The New York Highway Law121 declares that every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to public use or laid out, shall cease to be a highway, and that every highway that shall not have been travelled or used as such for six years, shall cease to be a highway.122 This provision has been held not to be applicable where the fee is owned by the municipality, but only where the municipality has an easement for street or highway purposes.123

After a highway has once been established, however, it does not cease to be a highway unless it can be shown that its use as a highway has been abandoned or discontinued,124 and the burden of proof is upon the one who claims that there has been an abandonment, for, a highway once shown

121 N. Y. HIGHWAY LAW § 205.
to exist is presumed to continue until its abandonment is affirmatively proved.\textsuperscript{125}

If only a part of the highway is obstructed and there is sufficient width remaining for public travel, an abandonment of the occupied or obstructed portion will not work an abandonment of that part of the highway.\textsuperscript{126} If, however, the highway is obstructed or occupied for its entire width and the highway at that point remains unused for six years, the right to obstruct and occupy the highway will have become a vested right. It then ceases to be a highway and the person who has obstructed it cannot be thereafter enjoined, even though such obstruction, in the beginning, was a wrongful act.\textsuperscript{127} "The closing may have been a wrongful act. None the less, if for six years the highway remains closed with the acquiescence of the public, there is an extinguishment of the public right. * * * Obstructions of a highway across part of its width only, narrowing but not closing the line of travel, are not sufficient, however long continued, to put an end to its existence. * * * To have that effect the obstruction must cover the entire width. But if the entire width is blocked, the obstructed section ceases to be a highway, even though other sections are unobstructed. It is not necessary to show an abandonment along the entire length. * * * These rules have no application where the fee is vested in the public. * * *" \textsuperscript{128}

\textit{Town of Leray v. N. Y. C. R. R. Co.}\textsuperscript{129} was an action for an injunction to restrain the obstruction of a highway.


\textsuperscript{129} 226 N. Y. 109, 123 N. E. 145 (1919).
The defendant, whose railroad tracks crossed the highway at right angles, obstructed the entire width of the street at that point by the erection of a building. This obstruction persisted for more than six years and it was held that, as the highway had been made impassable and had therefore been abandoned for the statutory period, the defendant could not be enjoined. *City of Cohoes v. D. & H. C. Co.*130 is not contrary to the later decisions, as in that case there was a lack of evidence as to the discontinuance or abandonment of the highway, the court saying: “When a highway is once shown to exist, it is presumed to continue until it is shown to exist no longer. * * * The presumption is in favor of continuance, not of cessation.” Nor are the decisions in *City of Buffalo v. D. L. & W. R. R. Co.*131 and *Iselin v. Village of Cold Spring*132 contrary to the rule above set forth, as in those cases it was found that the *locus in quo* never was a highway.

After a highway has been abandoned for six years, the abutting owners, having title to the same, may fence it in or build on it, and convey a good title thereto.133

VI. RIGHTS AND OBLIGATIONS OF ABUTTING OWNERS.

A person who suffers damage or is specially injured by reason of an unreasonable use of, obstruction or encroachment on a street or highway, or who will be injured by a threatened erection of an encroachment, may maintain an action to recover damages, to abate the nuisance, or for an injunction to compel the removal or prevent the threatened erection of an encroachment. While the obstruction thereon, or the unreasonable use thereof, may be a public nuisance, it may at the same time constitute a private nuisance to an

---

130 134 N. Y. 397, 31 N. E. 887 (1892).
adjoining owner or to one who has been specially injured thereby.  

An owner of a factory erected a platform ninety feet long and two feet ten inches high upon the sidewalk, which platform was used for loading and unloading trucks several hours each day. The platform, the erection of which was consented to by the city authorities, extended four feet eight inches into the street, and when the trucks were backed up

to the platform, the entire sidewalk was obstructed. This
obstruction compelled travellers to walk around the obstruc-
tion by going out into the roadway, or by using the other side
of the street. A retail merchant, whose property was on the
same side of the street and distant eighty feet therefrom,
brought an action to restrain the continuance of the nuisance
and for damages. It was held that, although an owner of
land abutting on a street may encroach thereon to a limited
extent necessary for the transaction of his business, such use
must be reasonable; that if a person sustains a special and
peculiar loss by reason of an unlawful obstruction, he may
recover damages therefor and enjoin the continuance of the
nuisance.

In awarding judgment to the plaintiff, the court said
that "whatever unlawfully turns the tide of travel from the
sidewalk directly in front of a retail store to the opposite
side of the street, is presumed to cause special damage to
the proprietor of that store because diversion of trade in-
evitably follows diversion of travel" and "the right to main-
tain the action does not depend on the amount of the special
damage, provided the plaintiff suffered some material injury
peculiar to himself." 135

In McMillan v. Klaw & Erlanger Co., 136 the defendant
erected an ornamental structure about forty-five feet in
height, which extended into the street four feet beyond the
building line. An adjoining owner sought to compel its re-
moval, but the defendant contended that an ordinance of
the Board of Aldermen sanctioned its erection and mainte-
nance. The ordinance was held unconstitutional on the
ground that it deprived the plaintiff of his property without
due process of law, the court saying: "The Legislature of
the State, acting as the representative of the public at large,
has, within constitutional limitations, authority to control
the use of the street. It may widen the street or narrow it;
may change its course or even close it; and being the represen-
tative of the public, it may limit to a certain extent the
use thereof by the public, providing that it does not invade

135 Flynn v. Taylor, 127 N. Y. 596, 600, 28 N. E. 418, 419 (1891); see
Richardson & Boynton Co. v. Barstow Stove Co., 26 Abb. N. C. 150, 11 N. Y.
the property rights of the individual or destroy his property rights without compensation. The municipality has an interest in the street by reason of its being vested with the fee thereof. But this fee is a qualified one, being held by it in trust for the public use and benefit, and that use cannot be departed from without violating an essential condition of the contract between it and the abutting property owners, as expressed by the adjudication in the street opening proceeding under which the land was obtained. So long as the municipality does not violate the contract it may withdraw from the use of the general public a portion of the street, providing that it always acts within the constitutional limits and either under express legislative authority or in the exercise of the inherent right residing in it for controlling the use of its streets for the purpose for which they were dedicated. Familiar examples of the exercise of this power are seen in the appropriation of a portion of the streets for hydrants * * * for stepping stones * * * for shade trees and grass plots * * * for coal holes and vaults * * * for the erection of statuary * * * for public monuments * * * for area-ways * * * for stoops and cellarways * * * for telegraph and telephone poles * * * and for other purposes which need not now be specified. * * * The structure which the defendant in this case is erecting, however, cannot, in any event, be regarded as a use of the street which benefits at all the public at large. On the contrary, it enhances the value of the defendant's property alone, and withdraws from the public a portion of the street itself. If the legality of the ordinance be sustained it would permit individuals to appropriate from two to five feet of public property all along the streets of the city and under the guise of ornamental projections to devote the land to whatever uses their private interests might require.”

A bay window encroaching four feet beyond the building line was ordered removed at the suit of an adjoining owner, notwithstanding that it had been erected in accordance with the requirements and under the authority of a permit issued by the city. “It is well established by the decisions of this court that interferences with public and common rights create a public nuisance, and when accompanied
with special damage to the owner of lands give also a right of private action to such owner, and that a public nuisance as to the person who is specially injured thereby in the enjoyment or value of his lands becomes also a private nuisance. That this encroachment upon the street was a public nuisance and that as to the plaintiff it was a private nuisance we have no doubt. In the language of Blackstone, a private nuisance is 'anything done to the hurt and annoyance of the lands, tenements or hereditaments of another', which embraces not a mere physical injury to the realty, but an injury to the owner or possessor as respects his dealing with, possessing or enjoying it, and that one erecting or maintaining such a nuisance is liable in an action at the suit of another who has sustained such special damages, and he may be restrained in equity from continuing the nuisance.'

Where the City of New York had erected a public bath, the columns of which and a cornice substantially encroached upon the street, it was held, at the suit of an adjoining owner, that the easements of the adjoining owner of light, air and access are property rights, and that the city could not thus take private property for a public use without compensation. In that case, however, it was found that the expense and inconvenience of removing the encroachments far outweighed the plaintiff's convenience and the plaintiff was, therefore, awarded money damages for the injury sustained by him in lieu of the removal of the encroachments.

In Hatfield v. Strauss, the defendant, under the authority of a permit issued to him by the city authorities, laid railroad tracks in the street running from his premises out to and connecting with the tracks of a railway company running through the street, for the purpose of running express cars thereon for the conveyance of merchandise. The court held that such use of the street was unlawful, that the city authorities had no power to issue the permit, and that the plaintiff, an adjoining owner, was entitled to an injunc-
tion to restrain the running of cars and for the removal of the tracks.\textsuperscript{140}

A barn erected flush with the building line with doors swinging outward so as to obstruct the walk, is a nuisance, and one who is injured by such an obstruction may recover from the owner.\textsuperscript{141}

A lessee of property who is injured by the maintenance of an obstruction, may also sue to compel its removal. Where the cornices and glass fronts of show windows encroached from three to four feet and an entrance portico encroached seven feet beyond the building line, they were ordered removed at the suit of the lessee of an adjoining building.\textsuperscript{142}

A marquise, or metal awning, erected with the consent of the city authorities, was so constructed as to be approximately on a level with the centre of a plate glass show window on the adjoining property, and obstructing the view of the show window. In awarding judgment compelling its removal and for damages, in an action brought by the adjoining owner, the court said: “While it is true that the city is vested with the power of control over its streets and may, in the public interest, authorize structures which otherwise would be nuisances, it is without power to authorize a structure which is in fact a public nuisance affecting a private right.”\textsuperscript{143}

There is a distinction between a private use and a public use. While a private use will be enjoined, a public use will not be, and a private corporation may operate a railroad in the street provided such use of the street is for the benefit of the public. In \textit{Stanley v. Jay Street Connecting Railroad},\textsuperscript{144} it was found that the defendant’s railroad was an integral part of the transportation system of the country; the freight which it received over the spurs and sidings from

\begin{itemize}
  \item \textsuperscript{140} See Bradley v. Degnon Contracting Co., 224 N. Y. 60, 120 N. E. 89 (1931).
  \item \textsuperscript{141} Holroyd v. Sheridan, 53 App. Div. 14, 65 N. Y. Supp. 442 (3d Dept. 1900), \textit{aff'd}, 166 N. Y. 634, 60 N. E. 1112 (1900).
  \item \textsuperscript{142} People \textit{ex rel.} Browning, King & Co. v. Stover, 145 App. Div. 259, 130 N. Y. Supp. 92 (1st Dept. 1911), \textit{aff'd}, 203 N. Y. 613, 96 N. E. 1131 (1911).
  \item \textsuperscript{144} 182 App. Div. 399, 169 N. Y. Supp. 530 (1st Dept. 1918), \textit{aff'd}, 227 N. Y. 639, 126 N. E. 918 (1919).
\end{itemize}
private factories was taken to the waterfront, loaded on barges, transferred to railroads, and became part of the interstate commerce of the country; the section of the city where its tracks were laid was devoted largely, if not exclusively, to factories. An abutting owner attempted to enjoin the operation of the railroad. The court followed its earlier decisions which held that "when the owner of property abutting on a street owns also the fee of the land in the bed of the street subject to the public use for street purposes, a railroad in the street is an additional burden on the fee which constitutes a taking of property and entitles the owner to compensation." Although an injunction was denied because the plaintiff did not own the land in the street and the court held that the use of the street was a public use, the court stated further that "if it be found that the occupation of the street is exclusive, permanent and of such a nature as to deprive the owner of such uses of the street as are appurtenant to his abutting property, usually called the easements of light, air and access, the road, although legal so far as the rights of the people are concerned, is illegal as to him until compensation is made. The elevated railroad cases rest on this principle, * * * and the same is the case with other permanent and exclusive occupations of the street for railroad purposes which take easements in streets appurtenant to abutting property. * * * If the use of a street by a railroad lawfully there is so excessive and unreasonable as to deprive an owner of abutting property of his easement therein, he is entitled to his remedy. * * * But no case of which I am aware goes so far as to hold that rails laid on the surface of the street without change of grade, and the reasonable use thereof, constitute a taking of easements in the street. This is all that the defendant has done."

Laches on the part of an adjoining owner will not bar him from maintaining an action for the removal of the encroachment, nor is he estopped by his failure to object to

---

145 See Waldorf-Astoria Hotel Co. v. City of N. Y., 212 N. Y. 97, 104, 105 N. E. 803 (1914).
its construction even though he had actual knowledge of its impending erection.\textsuperscript{147} No acquiescence, short of the statutory period, will bar a person from complaining of a nuisance unless, by some act or omission, he has induced another person to take some action upon which an estoppel may be based.\textsuperscript{148} "To establish an estoppel in pais it must be shown: 1st. That the person sought to be estopped has made an admission or done an act, with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposed to give, or with the title he proposes to set up. 2nd. That the other party has acted upon or been influenced by such act or declaration. 3rd. That the party will be prejudiced by allowing the truth of the admission to be disproved." \textsuperscript{149} Silence alone will not effect an estoppel unless there is not only a right, but a duty to speak.\textsuperscript{150}

In Ackerman v. True,\textsuperscript{151} where the plaintiff succeeded in compelling the removal of an encroaching bay window notwithstanding the fact that she had knowledge of the plans and that a permit for the erection of the encroachment had been obtained, the court said: "As it is obvious that the plaintiff, at most, was merely silent while the defendant erected his building upon the street, she was not, under the doctrine of the cases cited, estopped from asserting her right to have the erection of the defendant adjudged a nuisance, to insist upon its removal, and to recover her damages thereafter."

The damages recoverable by an abutting owner whose property is injured by an unlawful encroachment upon another's land is the difference in the value of the plaintiff's property without the defendant's encroachment, and its value with the encroachment.\textsuperscript{152} The injury, however, must be sub-

\textsuperscript{147} Ackerman v. True, 175 N. Y. 353, 67 N. E. 629 (1903).
\textsuperscript{148} Campbell v. Seaman, 63 N. Y. 568 (1876).
\textsuperscript{149} Brown v. Bowen, 30 N. Y. 519, 541 (1864); see Ackerman v. True, 175 N. Y. 353, 362, 67 N. E. 629 (1903).
\textsuperscript{150} Thompson v. Simpson, 128 N. Y. 270, 289, 28 N. E. 627 (1891).
\textsuperscript{151} 175 N. Y. 353, 67 N. E. 629 (1903).
\textsuperscript{152} Pappenheim v. M. E. R. R., 128 N. Y. 436, 28 N. E. 518 (1891); Reisert v. City of N. Y., 174 N. Y. 196, 66 N. E. 731 (1903); Ackerman v. True, 175 N. Y. 353, 67 N. E. 629 (1903); Ackerman v. True, 120 App. Div. 172, 105 N. Y. Supp. 12 (1st Dept. 1907); Close v. Witbeck, 126 App. Div. 544,
stansl and not merely nominal.\textsuperscript{153} Hence, where, on a business street, the defendant's plate glass show windows extended one foot into the street, it was held that an adjoining owner could not compel their removal nor recover damages for injury to his premises, as his easements were not interfered with and it was not shown that he suffered any damage from the encroachment.\textsuperscript{154} The case of \textit{Sautter v. Utica City National Bank},\textsuperscript{155} holding that an adjoining owner could not restrain the erection of five columns extending from sixteen and one-half inches to twenty-three and three-sixteenths inches into the street, is not law today, except for the proposition that the injury complained of must be substantial and not nominal. Although that decision was unanimously affirmed, without opinion, by the Court of Appeals, such an affirmation does not necessarily mean that the reasoning of the lower court was approved. "That court has repeatedly pointed out that, when they affirm without opinion, they are responsible only for the result, and not for the reason given in the opinion in the lower court by which it arrived at the result. * * * The affirmation of the judgment in that court means nothing more than upon the facts found and appearing in the record the judgment was right."\textsuperscript{156}

Where an action has been brought to restrain the erection or to compel the removal of an encroachment, and the defendant upon whose land the encroachment exists or is about to be erected, conveys the property to a \textit{bona fide} purchaser during the pendency of the action, a judgment rendered against him to remove the same would be valueless, as the court cannot compel him to go upon another person's property and remove the encroachment. In such case the trial of the action should be suspended and the new owner

brought in as a party defendant, but, as the court said, "the difficulty with suspending the trial of the action and directing the plaintiff to bring in the present owner of the property, is that the ownership may continually change to bona fide grantees, and hence the court would never be able to render a judgment of abatement of the nuisance. Of course, irrespective of the court on its own motion directing a person interested to be brought in as a party, the plaintiff has the right to bring in the present owner and make him a party to the litigation and attempt to obtain judgment while he is still such owner. The plaintiff having a right of action for damages against each owner for the period for which he may maintain the nuisance, her most practical remedy would seem to be to bring such several actions and recover her damages, until such time as she shall be fortunate enough to find a defendant who still retains title to the property and upon whom a judgment of abatement can operate. It may be said that this is a hardship and puts her to much litigation to maintain her rights, but that is her misfortune, and it is better that she should be put to this hardship than that the court should be compelled to hold the action continually and retry it against new parties and never be able to render an effectual judgment."

The plaintiff in the foregoing action had filed a notice of pendency of action against the property, but on motion of the defendant it was cancelled, the court holding that the land described in the notice was the land adjoining the street whereon the encroachment was erected and that such land "is in no manner affected by the suit".

A prescriptive right to maintain and continue an encroachment as against an adjoining owner or one who has been specially injured thereby, may be acquired by a continuous user for fifteen years (formerly twenty years),

---

160 Campbell v. Seaman, 63 N. Y. 568 (1876); Galway v. M. E. R. R., 128 N. Y. 132, 18 N. E. 479 (1891); Woodruff v. Paddock, 130 N. Y. 618, 29 N. E.
provided, however, that there were no disabilities at the time the statute began to run.

VII. Marketable Title.

When we come to a consideration of the marketability of the title to real property where the building or some part thereof encroaches upon the street, we find considerable confusion and many conflicting decisions. This is entirely attributable to the rapid growth of the country, particularly in the cities, and to the changed attitude of the municipal authorities in requiring the removal of encroachments in congested areas.

Until a comparatively recent period, the usual and common encroachments upon streets were considered to be too trivial to warrant the rejection of a title, and unless the main front wall of a building encroached more than one inch upon a street a purchaser would be compelled to accept the title. Titles were held to be marketable if the encroachment was not too serious,\(^1\) or if it was erected under a license from the public authorities,\(^2\) or if the encroachment was merely ornamental and not an integral part of the main structure,\(^3\) or if the probabilities were such that there was little likelihood of the public authorities ordering the removal of the

---


encroachment,164 or if the encroachment was patent and visible upon an inspection of the property.165

Because of the assumed power of municipal authorities to license encroachments and the liberal policy of the courts in holding such titles marketable, it is not difficult to understand why so many of the buildings erected in the past encroached to some extent upon the street. It was the common and accepted practice, in drawing building plans, to place ornamental projections, pillars, entrances, stoops and other minor encroachments beyond the building line. Justification for this may be found in the fact that some of the city ordinances permitted such an appropriation of the streets, and little, if any, attention was paid to the fact that the city could, at any time, order the removal of such encroachments. It is small wonder, therefore, that encroachments upon city streets are universal, and that buildings which do not encroach to some extent are the exception.

In order to understand the evolution of the law and to measure the extent of the complete reversal of thought upon the subject, it is necessary to examine some of the earlier decisions.

A projection of a water table, which was not a part of the wall of the building, and could be easily removed, but which extended seven inches into the street, was deemed to be such a minor encroachment as not to relieve a purchaser from taking title, the encroachment having existed for thirty-eight years.166 Where the main wall of a building was erected on the building line but the foundation of the water table encroached five inches and the door posts encroached one foot and three inches over the building line, the title was held marketable.167 A title was held marketable where the stone piers supporting a building were channeled longitudinally at regular intervals for a depth of about two inches with the

---

result that while the inner surfaces of the channels were on the street line, the remainder of the stone work, the superficial area of which was greater than that of the channels, projected over the street line two inches. As this encroachment was within the stoop line and did not bear any part of the weight of the building, it was deemed immaterial. An encroachment by a newel post and the lower step of a stoop for about four inches was considered too small to warrant rejection of a title, and the fact that show windows encroached from sixteen to seventeen inches was likewise considered immaterial.

Where the stoop of a building encroached fifteen feet upon the street and had been so maintained without molestation for thirty years, a purchaser was required to take the title, and even a substantial encroachment by a bay window of seven and one-half inches and by a stoop of six to seven feet was held not to be a good objection to a title, the city having, by ordinance, authorized the same. In the latter case, the court predicated its decision on the fact that "the so-called obstructions are not of such a character as to constitute a public nuisance affecting a private right. In view of the ordinances of the common council of the city of New York and of the acquiescence of the authorities of the city in the allowance of constructions such as those connected with the plaintiff's houses, the possibility of the owner ever being molested is so exceedingly remote that the objections become technical only and not substantial."

An encroachment of one-half an inch over the street line was held to be immaterial, but an encroachment of the front wall of from two and one-half to three and one-half inches made the title unmarketable on the theory that "the vendee is entitled to receive title to the land with four walls to the house and these should stand on the land conveyed,

---

that the purchaser may acquire an unimpeachable title to all.” In a case where the contracting parties agreed that the purchaser should take the title if a bay window did not encroach more than twelve inches and the survey subsequently disclosed that it encroached two feet, the purchaser was relieved from his contract.

The era during which the courts were extremely lenient with respect to street encroachments came to an end about forty years ago, and may be said to have culminated with the Court of Appeals’ decisions in Wormser v. Brown in 1896, and Broadbelt v. Loew in 1900. The rapid growth of the cities, and the congestion of the population in certain sections, required the full width of the streets for public travel and transportation. About this time also the city of New York took cognizance of these conditions, and demanded the removal of unlawful encroachments in those areas where the public travel was heavy. In the light of these changing conditions, the courts re-examined the problem anew.

The first rift occurred in 1897 when Presiding Justice Van Brunt, in the Appellate Division, registered his dissent in the specific performance action of Broadbelt v. Loew, and although the Court of Appeals affirmed that decision, it is not law today. With the advent of Ackerman v. True in 1903, and City of N. Y. v. Rice in 1910, the courts became less tolerant of street encroachments, and new rules of law were laid down which clarified the rights and limitations of abutting owners with respect to the erection and maintenance of encroachments and the rights of municipalities to license and permit them. In the Ackerman case, an adjoining owner succeeded in compelling the removal of an encroaching bay window which injured his property, and in

---

176 149 N. Y. 163, 43 N. E. 524 (1896).
177 15 App. Div. 343, 44 N. Y. Supp. 159 (1st Dept. 1897), aff’d, 162 N. Y. 642, 57 N. E. 1105 (1900).
179 175 N. Y. 353, 67 N. E. 629 (1903).
180 198 N. Y. 124, 91 N. E. 283 (1910).
the Rice case, the defendant was required to remove an ornamental projection in the street.

These decisions, which denied the right of abutting owners to erect and maintain unlawful encroachments, even though they were ornamental, and which refused to recognize the assumed power of municipalities to legalize such encroachments, did not involve the question of the marketability of the titles to such properties. For some time thereafter, the law as to the marketability of titles, where the buildings or some part thereof encroached upon the street, was in doubt. There was no question as to the marketability of a title where the front wall of a building encroached more than one inch upon a street, as the previous decisions had resolved that problem, but there remained considerable doubt as to whether a title was marketable where bay windows which were not a part of the front wall, columns, entrances and other ornamental projections encroached upon the street. The courts found it difficult to abandon the old theory, so often laid down in the earlier cases, that unsubstantial or ornamental encroachments were not grounds for rejecting a title, even though the municipality may step in at any time and require their removal. A distinction was made between the right of the city to compel the removal of encroachments, and the right of a purchaser to reject a title because of encroachments. While the right of the city to remove encroachments was recognized, the courts were loath to permit a purchaser to reject a title where the ornamental parts of a building or the bay windows encroached upon a street.

It is sometimes difficult to break away from outmoded precedents, even though new concepts of thought and social changes disclose the fallacious reasoning upon which such precedents are based. It is, therefore, not surprising to find the Appellate Division in 1910 holding that a bay window, which was not a part of the front wall of the building but was attached thereto beginning two and one-half feet from the ground and extending two feet five and one-half inches into the street, would not make the title unmarketable, because it was built within the stoop line and the city had acquiesced in its maintenance for fifteen years.181

In 1916, the Appellate Division held that the following street encroachments did not affect the marketability of the title: coping, five feet; two stoops, six feet each; cornice at roof, one foot two inches to four feet; stone at entrance, nine and one-half inches; stone over entrance, one foot one and one-half inches; window sills, one and one-quarter inches to three and one-half inches; window frames, two inches; ornamental stone about windows, three inches to seven inches; brick at side of entrance, eight inches; two stone ledges, eight inches to sixteen inches; stone balcony, two feet; and other minor encroachments. The opinion states that these encroachments were "not shown to be integral parts of the structure and presumptively they may be removed without seriously affecting the buildings", and that they "were manifestly visible to the naked eye".

The encroachment by show windows, stoop, areas and steps in excess of those permitted by a city ordinance was held, in 1917, not to affect the marketability of a title. As late as 1922, it was held that four bay windows constructed of wood, two of them being on the second story and two on the third story, which encroached one and one-half feet, did not affect the validity of the title, the court saying: "The bay windows could easily be removed, remodelled and replaced flush with the south front of the building at an expense of $300." Although the court conceded that "the municipality has no power to grant an exclusive privilege of a permanent encroachment upon a highway" and that "an ordinance granting such a privilege would be void", the fact that the windows were twelve feet above the street level did not interfere with the public use of the highway. Additional reasons for holding the title marketable were (1) "the premises are more than a mile from the business center of Buffalo", (2) "the likelihood of interference with the bay windows is very remote", (3) "the expense of reconstruction is very slight", (4) "the encroachment is trivial", (5) "the rental value is not affected" and (6) "the value of the prem-

ises has in no wise suffered". Unfortunately, the court did not indicate where it would draw the line. If the building had been a half or a quarter of a mile from the centre of the town, or if the bay windows were seven or eight feet above the street level instead of twelve feet, or if they extended into the street two or more feet instead of one and one-half feet, would the court have decided differently?

A decision involving the title to the Oxford Theatre Building in Brooklyn was rendered by the Appellate Division in 1932. Two balconies, two pilasters and a marquise encroached upon the street, but the court decided that the purchaser must take the title subject to the encroachments with an abatement in the purchase price, or, in the alternative, a deposit or a surety bond to be put up by the seller for the cost of removing the encroachments "in the event that the defendant shall be required to remove the same". The court also stated that the encroachments "can be removed at an estimated cost of from $675 to $3700, without injury to the theatre building and without affecting its interior, and without a substantial loss in the fee or rental value of the premises."

The first case to reach the Court of Appeals on the question of marketability of title after the decisions in the Ackerman case and the Rice case, was in 1914, the lower court having decided that encroachments by a roof cornice of two and one-half feet, by the sills of four inches, by a ledge of one foot four inches, by the lintels of seven inches and by the window cases of two inches, did not make the title unmarketable, saying: "It must first be noted that Ackerman v. True and other cases where the city compelled the removal of projections did not involve the question of the marketability of the title." This decision was affirmed by the Court of Appeals without opinion, but an abatement from the purchase price was allowed to the purchaser. It was tantamount to saying that although the city may require the re-

---

moval of the encroachments at any time, a purchaser will nevertheless be compelled to accept such a title and take his chances in the event that the city should thereafter insist upon their removal.

More substantial encroachments were involved in the case of Acme Realty Co. v. Schinasi, decided by the Court of Appeals in 1915.187 There the purchaser rejected the title because of the following street encroachments: store front windows, one foot; two oriel windows extending from the bottom of the second story to the cornice at the roof, one foot; one bay window extending from the basement to the roof, one foot; one oriel window directly over the entrance and extending from the bottom of the third story to the roof, one foot; stoop extending fourteen feet along the face of the building, four feet; portico, one foot. The Appellate Division had held that the projections of the bay windows, stoop, portico and balcony rendered the title unmarketable. On appeal, the Court of Appeals, in affirming the decision, recognized that there was "a decided difference of opinion as to their [the encroachments'] legal effect upon the marketability of the title".

In explaining the departure from the rule laid down in the earlier cases, the court said: "From time almost immemorial it had then been the municipal policy to acquiesce in the practically universal custom of encroaching upon the streets with various building projections. This policy had its genesis in the infancy of the city and it had been continued without interruption. Although the population had reached large proportions when the case of Broadbelt was decided, it has since then multiplied in a constantly ascending ratio of rapidity. The growing density of population, and the spread of business into districts that were formerly devoted wholly to residential structures, have created many perplexing problems in connection with the use of the streets as public highways. It is familiar recent history that these changed conditions have led to the compulsory removal of building encroachments from areas, streets and blocks where they had always before been permitted. When the late Mr.

Justice Patterson wrote the opinion in the case of Broadbelt, there was nothing to indicate that there would ever be a radical departure from the early policy of the city with reference to building encroachments on the streets. Since then the change has become an accomplished fact, and its binding force has been recognized in the latter judicial decisions.

* * * The projections on the plaintiff's building, some of which have been found by the Appellate Division to be encroachments of substantial character upon the two streets by which the premises are bounded, may not be public nuisances so long as they are sanctioned by the permissive ordinance and the permit of the building department, but they may be converted into such nuisances at any moment when the municipal authorities exercise the power to direct their removal. When the case of Broadbelt v. Loew was decided the exercise of that power was regarded as an extremely remote possibility. At the present time, in view of the changed policy of the city, it is impossible for the courts to take that view. We know that it has recently been exercised with reference to many encroachments that once were considered immune from municipal interference, and that the courts have upheld the action of the public authorities. In these circumstances it cannot be said that a vendor has a marketable title if his building encroaches upon the public street to such an extent as to threaten a vendee with a substantial loss in the fee and rental value of the premises and a burdensome expense in altering the building to meet the requirements of the law. A vendee has the right to a title that will enable him to hold his land in peace, and to be reasonably sure that no flaw or doubt will arise to affect its marketable quality and value."

A circular bay window which encroached eighteen inches at the corner, and five piers which encroached five inches, together with other minor encroachments, were held, in 1921, to make a title unmarketable.188 In the same year, an encroachment by the wall of a building of two inches on the street was held to justify the rejection of a title, the court saying: "The rule formerly was that certain encroachments upon the city's streets could be disregarded upon the

theory that there was no likelihood that the city authorities
would disturb the encroaching owner in his possession.”
After commenting upon the earlier decisions and the com-
plete reversal of the law by the later cases, the court con-
tinued: “It apparently has yet to be decided whether any
encroachment of a front wall can be regarded as negligible,
no matter how small it may be. It is not clear how or where
a line, necessarily arbitrary, can be drawn. If the city offi-
cials having power in that regard should order the owners
on a street to eliminate all encroachments and cut back to
the street line, could the owner of a building projecting upon
the street escape because his encroachment amounted only,
say, to an inch? And if he were to be permitted to encroach
to that extent, could an intending buyer from him feel safe
from further molestation? Legislative acts, or city ordi-
nances, might be passed for the purpose of permitting the
continuance of encroachments, but at best they would be of
doubtful constitutionality.” 

A similar encroachment of two inches by the front wall
of a building was likewise held to be ground for rejecting
the title in a later unreported case, \(^{189}\) and in 1930, the Court
of Appeals held a title to be unmarketable where the front
wall of a building encroached four inches upon the street. \(^{190}\)

Where the store windows, cellar doors, steps, fire escapes,
cornices and pilasters of a building encroached upon the
street, the pilasters, four in number, encroaching five inches,
the title was held not to be marketable, although “the en-
croachments complained of appear to be common in the neigh-
borhood in question and no action as yet has been taken by
the authorities toward requiring their removal. The failure
to do so does not preclude them, however, from enforcing the
law at any time. It cannot be said that the removal of these
encroachments would decrease the rental value of the pre-
ises and yet the testimony is that the cost of their removal
might exceed $3,000 which must be held to be burdensome.

---

\(^{189}\) Perlman v. Stellwagen, 115 Misc. 6, 7, 187 N. Y. Supp. 845 (1921).

\(^{190}\) Kohn v. Meyer, N. Y. L. J., April 22, 1925, p. 303, col. 3.

\(^{191}\) Ravine Point Corp. v. Kott, 254 N. Y. 580, 173 N. E. 875 (1930).
So that it might be said that the enforced removal of same might entail a decrease in fee value."

A decision by Cropsey, J., in 1923, held a title to be unmarketable where the stairway leading into the cellar, and the steps and a stoop leading into the upper part of the house, encroached upon the street, on the theory that "these are encroachments upon the highway which will have to be removed whenever the city requires it. Dispensing with the steps leading into the cellar will reduce the rental value of the property. To make the changes necessary to remove the obstructions would cost at last $600. * * * The obstructions are substantial and the property cannot be used if they be removed unless substitutes are furnished."

One of the latest decisions of the Court of Appeals on the so-called minor encroachments was handed down in 1926 in the case of Jennings v. Baumann. That case was an action for specific performance where the title was rejected because of the following street encroachments: (1) fence, four feet nine inches; (2) stoop, five feet; (3) cellar steps, one foot ten inches; (4) bay window cornice, one foot nine inches and bay window trim of from two to six inches. The lower court held that the encroachment by the bay window cornice and the bay window trim was governed by the Acme Realty Company case. As to the encroachments in subdivisions 1, 2 and 3, which "do not wholly exclude the public from the use of that portion of the street continuing upon which they are located and that the public continued to have a qualified but nevertheless substantial use of that portion of the street which was included within the courtyards, and that the encroachments are there pursuant to ordinances which were authorized by the common council of the former City of Brooklyn", the court nevertheless held that they were of a substantial character and that the purchaser was not required to take such a title.

A later case involved the title to a valuable parcel of real estate in New York City. Eleven piers of limestone, terra cotta and brick construction extended into the street.

---

from one and one-quarter inches up to five and three-eighths inches. The seller offered to remove the encroachments, or, in the alternative to pay the cost of removal, but the purchaser rejected the offer. The seller also contended that, under the Building Code of Ordinances, columns, pilasters and ornamental projections erected purely for the enhancement of the beauty of a building may project beyond the building line not more than two and one-half per cent of the width of the street, but not more than eighteen inches in any case, and asserted that the encroachments were within the boundaries prescribed by the Building Code, that the location of the property practically precluded the possibility that the encroachments would ever have to be removed, and that even if such action should be taken, the cost of removal would not exceed $2,100 and would not involve serious rental or fee damage. The purchaser estimated that the cost of removing the encroachments would amount to $11,000. The title was held to be unmarketable. In commenting upon the seller's offer to remove the encroachments, the court said that the purchaser "may not be compelled to accept a structure the architectural embellishments of which have been materially altered and the appearance of which has been substantially changed. The architecture and exterior attractiveness of a structure may, no doubt, affect the fee and rental value of the premises to a great extent, and the change proposed by the plaintiff to substitute for the present surface of the piers and their architectural arrangement of limestone, terra cotta and brick in pilaster effect, piers of stucco extending from the street to the roof would no doubt decrease the rental value. This substitution cannot be forced upon the defendant and his refusal to consent thereto is justified". This decision was unanimously affirmed by the Court of Appeals.

The case of Poetzsch v. Mayer is not in conflict with the foregoing decisions. In that case it was held that a building which had encroached for more than fifty years upon

---

195 This, and similar provisions, are contained in the N. Y. Administrative Code § C 26-219.0.
197 115 Misc. 422, 189 N. Y. Supp. 695 (1921).
a private alley could remain as long as the building stood; that the encroachment could not be removed and that the title was marketable. There was no encroachment, in that case, upon a public highway or a city street.

The trend of the decisions is away from the former liberal policy and, in fact, is a complete reversal of the former rules. Many of the minor, unsubstantial and ornamental projections, which were formerly considered trivial, are now sufficient to render a title unmarketable and to warrant its rejection. The fact that the city does not own the fee of the land in the street, but only has an easement therein, does not alter the situation, so long as the street is used and maintained as a public highway.\textsuperscript{198}

In some of the cases, the question was raised as to the right of a purchaser to reject a title where the encroachment was apparent and visible.\textsuperscript{199} It may be definitely stated, however, that the visibility of an encroachment is not a determining factor. In one case, it was said: “The projections were visible, it is true, but they are of such a character that nothing short of an engineer’s survey of the premises would determine whether they encroach upon the street”,\textsuperscript{200} and in another opinion, the court said: “I cannot find any authority nor has one been cited to the effect that the exception in the contract would cover encroachments visible upon inspection but not discoverable without a survey.”\textsuperscript{201}

It has heretofore been shown that if a street or highway has been created by prescription or user and there is no record of its boundary lines other than the line of occupation of the buildings abutting the street, an apparent encroachment over the supposed line of the street may not, in fact, be an actual encroachment.\textsuperscript{202} In an action for the specific performance of a contract it appeared that the building

\textsuperscript{200} Acme Realty Co. v. Schinasi, 215 N. Y. 495, 506, 109 N. E. 577 (1915).
\textsuperscript{201} Klimas v. Brumbach, 116 Misc. 299, 301, 190 N. Y. Supp. 307 (1921).
\textsuperscript{202} See note 107, supra.
seemed to encroach fifteen inches upon the street, but there was no record of the location of the street line. The street apparently came into existence almost simultaneously with the erection of the abutting buildings, i.e., although there was no actual street line, the property owners erected their buildings on a line which they supposed was, or would be, the street line. In this way, the line of the street was given what is called a practical location, and the municipality thereafter acceded to this location by taking jurisdiction over it in that form, thereby recognizing it as a street to the extent that it was being used for travel. It was held that there was no actual encroachment and that the title was marketable.\(^2\)

When surveyors disagree as to the extent of an encroachment, or whether or not there is an encroachment, a purchaser will generally not be relieved from his contract unless he can affirmatively show that there is an encroachment in fact.\(^2\) Where, upon conflicting evidence, it was impossible to determine whether or not a building encroached one inch upon the street, the court said: “It was not established by a preponderance of evidence, as a fact in the case, that there was such an encroachment. The evidence of the surveyors upon that subject creates such a conflict that it cannot be said that the fact was established.”\(^2\)

Vaults under the sidewalk and beyond the building line are ordinarily not included in the usual descriptions which bound the property by the sides of the street. In the case of Leerburger v. Watson,\(^2\) one of the grounds for rejecting the title was that the seller did not have title to the vaults. A boiler room in the building had no exit to the street except through the vaults which were clearly appurtenant to the


building, but it was held that the seller was not required to acquire title to the vaults where he had contracted to sell the property by metes and bounds and the vaults were outside of the bounds. "If the owners of the premises owned the vaults I think they would pass as appurtenances, but, not owning them and not having contracted to sell them, I fail to see how the title he tenders can be rejected because the vaults are not included." 207

To the same effect is Apperson Realty Corp. v. Stafford Bros., Inc., 208 where, after the delivery of the deed, the grantee sued the grantor because no permit for the use of a vault had been obtained by the grantor, and the grantee was compelled to obtain a permit for the use of the vault and to pay the city's charges therefor. On a motion for judgment on the pleadings, the causes of action based upon the contract and the deed were held insufficient, but other causes of action in tort, which alleged misrepresentation, were sustained.

Where a purchaser has taken title to property and later discovers that the building on the property encroaches upon the street, he may maintain an action against his grantor under the covenant against incumbrances contained in the deed. 209 While a covenant against incumbrances is a contract of indemnity and a grantee cannot recover thereunder until the incumbrance has been removed or paid, such rule is limited to incumbrances in the nature of a money charge, such as a mortgage, judgment or tax which may be discharged by the payment of money. "Where, however, the incumbrance is of such a permanent nature that it cannot be removed or extinguished by payment of money such as an easement, restrictions, etc., the covenantee may bring his action immediately upon the breach and recover just compensation for the real injury, and is not limited to mere nominal damages. The measure of damages in such case is the depreciation in value of the land by reason of the incumbrance." 210

207 Ibid.
Because of the changed views of the courts in ruling that minor, commonplace encroachments, which had theretofore not received serious consideration, will make a title unmarketable, the printed forms of contracts generally used in the city of New York were changed so as to provide that the purchaser will take title to the property subject to encroachments of stoops, areas, cellar steps, trim and cornices, if any, upon any street or highway.

While such a contract provision is a necessity in a city where street encroachments are universal, particular care should be exercised in drafting a contract, if reference is made therein to a survey, as such a provision may conflict with the printed portion of the contract. If, for example, a written or typewritten provision in a contract should state that the property is sold subject to any state of facts that a survey may show provided that the same does not make the title unmarketable, such a clause would undoubtedly conflict with the printed clause above mentioned. While no such reported case has been found, it will probably be held that the printed clause must give way to the written clause on the theory that the written parts of a contract control over any parts of the printed contract which are ambiguous or inconsistent therewith.211

In 1928, a purchaser refused to take a title because of encroachments on a street, although the contract stated that he would take title "subject to encroachment of stoop, areas and cellar steps or appurtenances thereto on street and subject also to any state of facts an accurate survey of said premises may disclose that does not render the title unmarketable". Here there was no conflict between two separate clauses, one printed and one written, but the purchaser contended that he was entitled to receive the property free from street encroachments because they made the title unmarketable. It was held that the purchaser could not reject the title because of the street encroachments,212 but it is possible  


that a different rule will be applied where the contract contains two separate and inconsistent clauses, one printed, and the other written into the contract.

In order to alleviate some of the hardships of property owners whose buildings encroached upon the street, and to remove the stigma of unmarketability from such properties, the legislature enacted several statutes of limitation applicable to buildings in the county of New York and in the old city of Brooklyn. The first measure, which affects buildings in the county of New York only, was adopted in 1896. It provides that if the front or other exterior wall of any building then standing in that county shall encroach not more than four inches upon any street, or if a bay or oriel window shall extend not more than twelve inches upon any street, such wall or bay or oriel window shall not be removable unless the city shall commence an action for its removal within one year after the passage of the Act.\textsuperscript{213} A similar Act was passed in 1899, also applicable only to the county of New York, which increased the extent of the encroachment by the front or other exterior wall from four inches to ten inches, but did not change the extent of the encroachment by a bay or oriel window, which was left at twelve inches as in the prior Act.\textsuperscript{214}

A like statute of limitations, applicable to the old city of Brooklyn, was enacted in 1897, and provides that if the front or other exterior wall of any building then standing shall extend not more than four inches upon any street, such wall shall not be removable unless the city shall commence an action for its removal within one year after the passage of the Act.\textsuperscript{215}

Under these several statutes, if a building in the county of New York was erected prior to May 25\textsuperscript{th}, 1899, and its front or other exterior wall encroaches not more than ten inches upon a street, or a bay or oriel window encroaches not more than twelve inches upon a street, it may be per-

\begin{footnotes}
\footnotetext{213}{N. Y. Laws 1896, c. 610, effective May 13, 1896.}
\footnotetext{214}{N. Y. Laws 1899, c. 646, effective May 25, 1899.}
\footnotetext{215}{N. Y. Laws 1897, c. 473, effective May 17, 1897.}
\end{footnotes}
mitted to remain; if a building in the old city of Brooklyn was erected prior to May 17th, 1897, and the front or other exterior wall thereof encroaches not more than four inches upon a street, such wall may likewise be permitted to remain.

JOHN L. FINCK.