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THE EFFECT OF ENCROACHMENTS ON THE MARKETABILITY OF LAND TITLES

Ross D. Netherton*

IT IS A FAMILIAR maxim of real estate law that the purchaser of land may not be required to accept a conveyance of the premises unless the vendor offers a good and marketable title.¹

The parties may, of course, specially agree among themselves as to the title the purchaser will accept, but in the absence of any stipulation in the contract of sale concerning the quality of the title, the vendor's standard of performance is fixed by law.² Because of this, the legal definition of goodness and marketability of title is not only a fair question in connection with any discussion of the rights of vendor and purchaser, but it is a matter which often assumes particular significance in the practical workings of business and the law. Admittedly, any attempt to deal comprehensively with the common law concept of marketability of land titles is a large and difficult order; indeed, even a survey limited to the questions arising in connection with encroachments

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² The purchaser's right has also been described in terms of a "good title," a "good or marketable title," a "good marketable title," a "good and merchantable title," or a "good and sufficient title." See Maupin, Marketable Title to Real Estate (Baker, Voorhis & Co., New York, 1921), 3d Ed., p. 20; 27 R. C. L., Vendor and Purchaser, § 106; 55 Am. Jur., Vendor and Purchaser, § 148. But see note 13, post.
often presents more than ordinary difficulties, for every phase of the subject must be explained without the aid of absolute standards of reference for any except the most general conclusions.⁵ Yet some agreement must be reached at the outset regarding the concept of marketability or no progress in explaining this matter systematically will be possible.

I. THE RATIONALE OF TITLE MARKABILITY

The purchaser's right to insist on a good and marketable title is thought to exist independently of any provisions contained in the contract of sale.⁴ It is usually described as one of the "conditions" or "implications" of the sale,⁵ and has been cited as an illustration of the workings of "natural justice,"⁶ or as an example of the intervention of law on behalf of persons otherwise unable to adequately protect themselves.⁷ From such theoretical beginnings it is an easy step, and a natural one, to say that the existence of any defect or fault in the vendor's title excuses the purchaser from performance if he chooses to insist upon the point. This, however, would never be practical for use in the marketplace where perfectly flawless titles are a rarity. Clearly, one can formulate a useful rationale of title marketability only after one reconsiders with care the meaning and usage of the terms "good title" and "marketable title."

³ Among the attempts to deal generally with the problem see Maupin, op. cit., North and VanBuren, Real Estate Titles and Conveyancing (Prentiss Hall, Inc., New York, 1927), and Jacobson, "Marketability of Land Titles," 2 N. J. L. Rev. 27 (1936).


⁶ Blanck v. Sadlier, 153 N. Y. 551, 47 N. E. 920 (1897); Summy v. Ramsey, 53 Wash. 98, 101 P. 506 (1909). Note also the theory that, since a purchase of land is in effect a contract for the transfer of a legal title, the parties must necessarily be presumed to contemplate a perfect title; 55 Am. Jur., Vendor and Purchaser, § 149.

EFFECT OF ENCROACHMENTS

It is a common habit today to use the phrase "good and marketable title" as if the terms were synonymous, that is as if a "good title" was a marketable title and a "marketable title" referred to a good title. Yet, a second thought will show that each of these terms, taken alone, has a distinct and different meaning. "Goodness," when used to describe land titles, has always referred to perfection and absolute flawlessness, whereas "marketability" has been regarded as a standard of lesser perfection, referring to what a man of reasonable prudence, familiar with the facts and cognizant of their legal significance, would accept in the ordinary course of his business. Under such definitions, it is possible to imagine situations in which a title may have several technical defects and yet be acceptable to the reasonable and prudent man, or to find cases where a title is perfect of record yet is open to suspicions that would defeat its marketability.

This being so, it would seem improper to combine the terms "good" and "marketable" in the same descriptive designation


9 Peckham v. Stewart, 97 Cal. 147, 31 P. 928 (1893); Warner v. Middlesex Assurance Co., 21 Conn. 444 (1852); Roberts v. Bassett, 105 Mass. 409 (1870); Wurfel v. Bockler, 106 Ore. 579, 210 P. 213 (1922).


11 In Moore v. Elliott, 76 Wash. 520, at 521, 136 P. 849 (1913), the court stated that to be marketable within the specific performance rule a "title need not be free from every possible technical criticism, but must be such that a reasonably well informed and intelligent purchaser in the exercise of ordinary business caution would accept it." See also Cappel v. Potts, 192 Iowa 661, 185 N. W. 148 (1921), and Thompson, Title to Real Property (Bobbs, Merrill & Co., Indianapolis, 1919), pp. 95-9.

12 Block v. Ryan, 4 D. C. App. 283 (1894); Smith v. Huber, 224 Iowa 817, 277 N. W. 557 (1938); Rife v. Lybarger, 49 Ohio St. 422, 31 N. E. 768 (1892); Adkins v. Gillespie, 189 S. W. 275 (Tex. Civ. App., 1916); Harras v. Edwards, 94 Wis. 459, 69 N. W. 69 (1896).
unless it can be first shown that, when taken in combination, they lose their original mutually exclusive meanings and emerge as something new in the language of the law. Actually, this is exactly what has occurred. Present usage of the term "good and marketable title" means something more than merely the sum of two standards of performance considered disjunctively. By gradual steps the courts have sketched in a new, composite standard of performance to which the vendor must measure. Under present usage, the term means more than a title which is valid in law, or which could be made valid by litigation designed to establish the point. Validity, in the opinion of the courts, is not enough and will not be substituted for the opinion of the reasonable and prudent man. Generally, it is thought that a reasonable and prudent man would require his title to be free from encumbrances, liens, or outstanding interests of any sort; free from material interferences with peaceful possession and enjoyment of the land; free from the threat of vexatious litigation; and free from any circumstance or suspicion which might jeopardize the subsequent mortgageability or saleability to a reasonably prudent purchaser. A reasonable doubt con-


15 Arnd v. Lerch, 102 Md. 318, 159 A. 587 (1932); DeVero v. Sparks, 189 Mo. App. 500, 176 S. W. 1066 (1915); Kennedy v. Dennstadt, 31 N. D. 422, 154 N. W. 271 (1915); McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816 (1891).


cerning any of these features will defeat marketability.\textsuperscript{19} Sugden once put the whole thing rather neatly when he wrote:

It hath become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title \ldots for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him \ldots [Therefore] to enable equity to enforce specific performance against a purchaser, the title ought, like Caesar's wife, to be free even from suspicion.\textsuperscript{20}

Today, the term "free even from suspicion" may appear a little strong, but without doubt the basic soundness of the rule has remained unchanged.\textsuperscript{21}

Sugden's remark suggests that the first tendencies to depart from the strictly logical construction of the phrase "good and marketable title" appeared in courts of equity when handling suits for specific performance. He discovered, on reading the late eighteenth and early nineteenth century English decisions, that the chancellors often held titles to be unmarketable in spite of their admitted perfection in technical matters, but he was careful to note that "whether a court of law will act on this

\textsuperscript{19} Messer-Johnson Realty Co. v. Security Savings & Loan Co., 208 Ala. 541, 94 So. 734 (1921); Martens v. Berendsen, 213 Cal. 111, 1 P. (2d) 440 (1931); Weberspals v. Jenny, 300 Ill. 145, 133 N. E. 62 (1921); Pound v. Pleister, 106 N. J. Eq. 101, 150 A. 58 (1930); Irving v. Campbell, 121 N. Y. 535, 24 N. E. 821 (1890); Schriver v. Schriver, 86 N. Y. 575 (1881).

\textsuperscript{20} Sugden, Vendors and Purchasers (E. & L. Merriam, Brookfield, Mass., 1836), 9th Ed., p. 410. In Romily v. James, 6 Taunt, 263 at 274, 128 Eng. Rep. 1035 at 1040 (1815), appears the statement that "it is said that the Plaintiff will have made out his claim to recover back his deposit if a cloud is cast upon the title. That is not so in a court of law; he must stand by the judgment of the court as they find the title to be, whether good or bad; and, if it is good in the judgment of a court of law, he cannot recover back his deposit. If he had gone into a court of equity, it might have been otherwise. I know a court of equity often says, 'This is a title which, though we think it available, is not one which we will compel an unwilling purchaser to take'; but that distinction is not known in a court of law."

\textsuperscript{21} Note, in this regard, the statement in Kling v. Greef Realty Co., 166 Mo. App. 190 at 196, 148 S. W. 203 at 205 (1912), to the effect that a "reasonable doubt of title, as \ldots will render it unmarketable in the contemplation of the law, does not embrace mere shadows or possibilities, but probabilities." Jacobson, "Marketability of Land Titles," 2 N. J. L. Rev. 27 (1936), says that marketability lies "somewhere between complete freedom from all defects" and a "subjection to mere suspicions ending only in suspicions."
doctrine is doubtful." To a certain extent, this division was carried over into the American decisions where courts of law were not inclined to hear any equitable arguments either in raising or dissolving objections to title. Today, however, it is possible to see precedents in many courts of law which indicate that the rule of equity has been adopted by the common law.

Anyone familiar with other fields of law, where the opinion of the "reasonable and prudent man" is the general standard of the courts, knows that it is far from being a self-applying principle. Each new fact situation presents a new opportunity for distinctions to be made. So, here, it is not enough to say that the rationale of our present concept of title marketability is based on the judgment of the reasonable and prudent man; something must be said about the factors and circumstances that in times past have been looked upon as capable of persuading such a man. It will not be unusual, in cases soon to be pointed out, that an encroachment of a single inch may defeat marketability in one case and not affect it in another, and both holdings will be justified in the name of the reasonable man. One stops short of explaining such decisions unless one finds out why such decisions vary.

Of course, the first explanatory step the courts take is to say that in one instance the encroachment is "substantial" or "material" and in the other it is not. If pushed further, the

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22 Sugden, op. cit., 412-3. He also noted that "when a man buys a commodity, he expects to get a clear undisputed title, and not such a one as may be questionable, at least in a court of law." This expression seems to refer to the question of whether equitable objections to title are a defence at law. No one is obliged to buy a lawsuit. But in Romilly v. James, 6 Taunt. 274, 123 Eng. Rep. 1040 (1815), where at law the same argument was urged on behalf of a purchaser, it was intimated that if any doubt could be cast on the title of the vendor the plaintiff would be entitled to recover back his deposit. The court noted that "if he had gone into a court of equity, the Chancellor would not, perhaps, have obliged the unwilling purchaser to ratify the contract." See also Roach v. Rutherford, 4 Des. (S. C. Eq.) 126 (1810).


courts might admit that in many instances their concept of substantiality is shaped by balancing the equities of the parties involved, or the competing interests of the community in regard to the free alienability of land and the security of property rights, or the influence of precedent. At best the pattern is hazy, and much must be left to the discretion of the court. But this has not meant that it is impossible to make predictions under our present concept of marketability. In our society, it is not by accident that land has long been a symbol of stability and the courts seem to have consciously cultivated a consistency in their attitude against the pressures for rapid movement in the law.

Speaking generally of encroachments as they affect marketability, the cases are divisible into three main types. One group includes situations where the premises being sold are encroached upon by structures belonging to adjoining landowners. A second class includes cases where the premises being sold are improved with buildings which encroach upon adjoining premises. The third has to do with situations where the premises being sold encroach upon public streets or highways, presenting problems basically similar to those of the second class but complicated by the special rights of the public at large. Encroachments falling within any one of these categories are seldom intentional; they usually result from building without accurate survey or from failure to follow a survey properly made. Intentional or not, they present troublesome possibilities. If the theory of private ownership of lands is carried to its logical conclusion, it may require that such intrusions either be removed regardless of cost or else must operate to render unmarketable to title to the property in question.  

26 Jacobson, "Marketability of Land Titles," 2 N. J. L. Rev. 27 at 31 (1936), comments that "it is submitted that the pragmatic legal results in vendor and purchaser cases over marketability of title [should] be expressed in terms of hazards of litigation. This hazard . . . is what the reasonable purchaser really aims to avoid. If there be any reasonable chance that some third person may question the purchaser's ownership of the property, either by reason of defects in the vendor's chain of title, some outstanding claim or some disputed question of law or fact, the title should be deemed unmarketable."

II. ENCROACHMENTS UPON PREMISES BEING SOLD

The reasons for regarding a vendor’s title unmarketable, when the premises being sold are subject to an encroachment by structures belonging to adjoining landowners, require no extended analysis. So long as the land is subject to the encroachment, the purchaser cannot take possession and enjoy the full amount of land he has contracted to pay for. Not only is the right to immediate and complete possession hampered but the purchaser may never be able to go into full possession of the portion of his land encroached upon without first going to the trouble and expense of litigation to establish his right thereto. These rights, of course, are part of an ancient heritage belonging to all purchasers which Blackstone, in his day, regarded as unquestioned. "Cuius est solum," he wrote, "eius est usque ad caeleum... [This] is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another’s land: and downwards, whatever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface." To this argument there has, in more recent times, been added another, to-wit: that under such circumstances marketability is lost because even though the encroachment does not interrupt the normal use of the land, the purchaser always runs the risk that, in a subsequent attempt to sell or mortgage the land, the market value of the property would be decreased.

Supported by these propositions, the courts have held that where a substantial encroachment exists upon the premises being sold the vendor’s title is unmarketable. As indicated previously, the standard for judging the substantiality of encroachments is often a balance of many factors. Actions at law to

recover deposits or damages have been fairly consistent in permitting relaxation of the rule only in situations that could be defended by the doctrine of *de minimis*.\textsuperscript{30} Courts of equity, with freedom to consider many factors that courts of law could not, have regularly recognized other grounds for mitigating the strictness of the general rule.\textsuperscript{31} In *Merges v. Ringler*, one of the few decisions attempting a systematic explanation of the subject, the court mentions two grounds for holding that an encroachment upon the premises being sold might be disregarded. First, it was said, the extent of the encroachment might be insignificant when compared to the total area of land being sold; and second, the uncertainty of methods of measurement necessarily involved in dealing with encroachments of a fraction of an inch might be reason for disregarding an objection based upon such measurements. In other cases, the fact that the encroaching portions of the offending structure were easily removable at very slight cost, or, if allowed to remain would not interfere with the normal use of the property, were held to justify upholding marketability of title in spite of the encroachment.\textsuperscript{32} On the other hand, both law and equity decisions seem to agree that marketability is lost when the normal or contemplated use of the premises is impaired by the existence of the encroachment;\textsuperscript{33}

\textsuperscript{30} Walters v. Mitchell; 6 Cal. App. 410, 92 P. 315 (1907), action by purchaser to recover deposit; Vogt v. Shumate, 213 Ky. 503, 281 S. W. 514 (1928), action for damages against purchaser for refusal to accept title; Place v. Dudley, 41 App. Div. 540, 58 N. Y. S. 671 (1899), action by purchaser for breach of contract and for recovery of earnest money. But see Geffin v. Schneider, 105 N. Y. S. 1035 (1906), where, in action to recover down payment, it was held that the vendor’s title was not unmarketable in spite of encroachments on the premises being sold.

\textsuperscript{31} See, for example, Sauter v. Frank, 67 Misc. 657, 124 N. Y. S. 802 (1910), a suit for specific performance in spite of a four-inch encroachment by a wall belonging to the adjoining premises, and Ungrich v. Shaff, 119 App. Div. 843, 105 N. Y. S. 1013 (1907), where vendor was held entitled to specific performance even though the foundation of the adjoining premises projected two inches over the lot line below the surface and, in another place, the neighbor’s wall encroached five inches.

\textsuperscript{32} 34 App. Div. 415, 54 N. Y. S. 280 (1898).

\textsuperscript{33} Ungrich v. Shaff, 119 App. Div. 843, 105 N. Y. S. 1013 (1907), where encroachment consisted of loose stones placed to retain mound of dirt piled on the adjoining premises; Geffin v. Schneider, 105 N. Y. S. 1035 (1906), involving an encroachment by “binder stones” in the foundation of the building on the adjoining premises; Celestial Realty Co. v. Childs, 182 App. Div. 85, 169 N. Y. S. 597 (1917), an encroachment by show windows removable without damage to the adjoining property.

\textsuperscript{34} See cases cited in note 29, ante.
when the purchaser’s prospects of future sale are jeopardized, or when the threat of future litigation because of the defect is apparent.

Ordinarily, the legal effect of an encroachment is to be determined at the time when the vendor tenders title. That view would seem to be in harmony with a rationale of marketability which emphasizes actual injury rather than a mere suspicion as the basis for a defect. Occasionally, however, a case appears in which marketability is defeated merely because of the possibility of an encroachment at some future time. So, for example, where a private dedication of land for street purposes cut across the premises being sold, it was held that the filing of the plat of dedication operated to create an encroachment just as surely as would the commencement of excavation for street purposes.

What has been said should be remembered as applying only to cases where the parties have specified nothing in their contract of sale concerning the quality of the title to be conveyed. Should the contract contain an express covenant against encroachments, or possess terms otherwise specifying the physical condition of the premises, the courts are noticeably stricter in their insistence upon freedom from encroachments. A New Jersey case, that of *Herring v. Esposito*, will serve as a typical illustration. The contract there provided, among other things, that the parties “agreed and understood that the buildings upon said premises are all within the boundary lines of the property described in the deed therefor, and that there are no encroach-

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37 Simpson v. Klipstein, 89 N. J. Eq. 543, 105 A. 218 (1918). But query here whether the decision could not have been equally well supported by claiming that the dedication created an easement in favor of the public, which was a defect in the title.
39 94 N. J. Eq. 348, 119 A. 765 (1922).
ments thereon.'" In refusing to uphold the claim that marketability was unaffected by an encroachment of a few inches, the court declared that specific performance had to be refused, although the encroachment was not sufficient to have prevented specific performance of the contract if under the usual covenants, "because to disregard the stipulations would be to draw a new contract for the parties on which their minds had not met."\(^{40}\) This same respect for the intent of the parties, however, has been held conducive to an opposite result where the premises are described in "more-or-less" terms.\(^{41}\)

### III. Encroachments Upon Adjoining Premises

In the case of encroachment by the vendor's buildings upon the premises adjoining, the general rule stands the same as in the case of encroachment upon the premises being sold, to-wit: where a substantial encroachment exists, the vendor's title may be rejected as unmarketable.\(^{42}\) Again, as with other types of encroachments, the courts tend toward a stricter application of the principle in actions at law than would be the case in equity.\(^{43}\) The rationale of the courts, however, is somewhat different for the purchaser cannot claim that he is actually getting less than he should as the vendor's conveyance undertakes to pass all and more than the description requires. Rather, the trouble is that the vendor's attempt to thus convey more than he actually owns may involve the purchaser in expensive and vexatious litigation over his right to maintain his buildings in the encroaching position. If unsuccessful in the defense of his rights, the purchaser

\(^{40}\) 94 N. J. Eq. 348 at 350, 119 A. 765 at 766.


may be put to the expense of removing the encroachment or be forced to depend upon a servitude in his neighbor’s land for the right to maintain the buildings. At the very least, the purchaser would be forced to maintain himself always prepared to show that his predecessors in title had undisputed occupation of the area encroached upon in a manner and for a time sufficient to establish a right by adverse possession.

These considerations, naturally, have affected the application of the rule. The main question is still whether or not the offending encroachment is a substantial one, but a new factor appears to be influential in determining substantiality. In the last analysis, the inquiry is as to the likelihood of there being any molestation of the buildings on the land as they stand at the time of conveyance. The result is invariably a delicate balance based on a consideration of the character of the encroaching structure, the purpose to which it is put, and the estimated expense of removing the encroaching portions. The exact extent of the encroachment and whether or not it actually injures the adjoining premises do not seem to be factors of any great import.

In practice, it has meant that the courts have been inclined to disregard objections based on encroachments by old or dilapidated buildings, by temporary structures of small value, or by structures which, regardless of type, are removable at only slight effort or expense. On the other hand, a fatal defect has been found where the encroachment is by a permanent structure.

46 See Scheinman v. Bloch, 97 N. J. L. 404, 117 A. 389 (1922), holding a four-inch encroachment by a dilapidated frame shed not to be substantial, and Weil v. Radley, 31 App. Div. 25, 52 N. Y. S. 398 (1898), treating an old, partly wrecked building, which encroached two inches, as not being a defect which justified rejection of title.
48 In Weil v. Radley, 31 App. Div. 25, 52 N. Y. S. 398 (1898), the evidence showed that, prior to any future occupancy of the premises, it would be necessary to remove and reconstruct the building. The court therefore found that “if any encroachment existed, it could then be remedied, and easily, and without expense be made to conform to the boundaries stated in the deed.”
EFFECT OF ENCROACHMENTS

or one with respect to which the cost of removal would be considerable.\(^5\) The rule of *de minimis*, cautiously applied only to encroachments of a clearly negligible extent and rarely used alone to justify disregarding an encroachment, has been mentioned fairly often in combination with other mitigating circumstances.\(^6\)

Just as no mathematical formula is possible for determining when to apply the rule of *de minimis*, so there is no definite list of factors which, when taken in combination therewith, will be sufficient to persuade any given court to disregard the objection of an encroachment. In the search for predictability in this field, one is driven back upon the general requirement that the facts should show "no practical danger" that the purchaser would be unable to enjoy the property as it stood at the time of conveyance.\(^5\)

Inevitably, the analysis of what constitutes a "substantial" encroachment brings up the question of how much significance is to be attached to a long-continued sufferance on the part of the owner whose premises are being encroached without any move to challenge the right to maintain the encroaching structures. The question may take form in either of two arguments. On the one hand, the vendor may claim that he has perfected a legally recognized right to maintain his buildings in their encroaching position by means of adverse possession, estoppel or statutory easement.\(^5\) Here the vendor's argument supposes that he has acquired a right in the land of his neighbor which can be passed on to a subsequent purchaser, protecting the latter by completely extinguishing any right to challenge the maintenance of the buildings as they stand. In its other form, the argument does not claim that no further right of action against the encroachment exists

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but rather that it has been demonstrated that there is no likelihood that there will be any action challenging the encroachment, which fact would persuade a man of reasonable business prudence to complete the purchase.

Typically, the latter argument runs along the line that evidence of long unchallenged continuance should serve to rebut the presumption upon which the purchaser must rest his right to reject the title. Unless, therefore, it can be shown that there is pending some litigation which challenges the right to maintain the encroachment, the same ought not be deemed "substantial." Such reasoning has, in times past, impressed the courts, both in actions to recover money paid and in suits for specific performance.\textsuperscript{54} Facts of that character are said to show not only a disinclination on the part of the injured owner to bring legal action challenging the encroachment, but even more, that if challenge were made, the injured owner would permit the correction of the matter at a time and in a manner most convenient to the owner whose structures cause the encroachment.\textsuperscript{55}

This last point, and what has gone before concerning encroachments upon adjoining premises, must, of course, be remembered with the same general reservation made in connection with similar rules pertaining to encroachments on the premises being sold, that is the exceptions will be applied solely in situations where the contract of sale contains no special stipulation concerning the character of the vendor's title. A contract stipulating that the vendor shall convey "free from encumberances and encroachments," or one which contains a description of the premises by metes and bounds, does not admit of compromise with the maxim of the law in the manner just described. Even though clearly established easements and servitudes be shown, the existence of encroachments will defeat marketability under such contracts.\textsuperscript{56}


\textsuperscript{55} Van Horn v. Stuyvesant, 50 Misc. 432, 100 N. Y. S. 347 (1906).

\textsuperscript{56} Jacobs v. Freyham, 156 La. 583, 100 So. 726 (1924); Richman v. Camorsil Realty Co., 120 Misc. 648, 200 N. Y. S. 166 (1923); Hennig v. Smith, 151 N. Y. S. 444 (1915).
IV. ENCROACHMENTS UPON STREETS AND HIGHWAYS

Special problems arise where structures belonging to the premises being sold encroach upon public streets and highways. In the general setting, of course, this topic is treated like any other encroachment upon adjoining premises. The fundamental rationale of the cases is to be found in the same desire to protect the purchaser in his right to maintain the structures in the same position as when he agreed to buy them, hence the rule is still that "substantial" encroachments will defeat marketability but "trivial" ones will not. It is in connection with classifying the factors and circumstances that minimize an encroachment into triviality, however, that the special problems occur.

Because encroachments upon streets and highways are encroachments on the right of the sovereign, their implications are more serious than when only private persons are involved. For example, no vendor may argue that, through long unchallenged use, he has acquired rights against the state or city by adverse possession which may be passed to the purchaser as his guarantee that his rights will never be challenged. Nor will the law allow a state or a municipality to commit itself, in matters affecting the public interest, as by acquiescence or permissive ordinance operating to provide an estoppel for the future. It is generally agreed that the paramount right of the public in the unobstructed use of streets and highways is not a matter which will admit of compromise or bargaining.

57 First National Bank v. Tyson, 133 Ala. 459, 32 So. 144 (1902); People v. Harris, 203 Ill. 272, 67 N. E. 785 (1900); In re City of New York, 217 N. Y. 1, 111 N. E. 256 (1916); Acme Realty Co. v. Schinasi, 215 N. Y. 435, 109 N. E. 577 (1915); City of New York v. Rice, 199 N. Y. 124, 91 N. E. 283 (1910); Leo Levy Corp. v. Dick, 116 Misc. 145, 190 N. Y. S. 238 (1921).


The position of a vendor whose premises encroach upon a street or highway is, in this way, at a distinct disadvantage when compared with his position as to an encroachment which does not involve the public. Being unable ever to completely bar a reassertion of the right of the public to have the offending structure removed, he must, if he is to prevail, convince the court that a reasonable man would readily accept the title notwithstanding the defect. The problem is one of balancing risks and costs. He may prevail, and save the marketability of his title, by showing that the cost of removal is slight even though the risk of being challenged is high, the matter then being regarded as insignificant. Or, the element of cost being assumed to be constant, the risk may be made variable so that he would still be entitled to prevail if he could show that the risk of being challenged was a trifling one.

Where the cost of removal is the variable factor, the points of main concern will naturally be the extent of the effort and the amount of the expense which will be involved. As a general test, it has been said that the rule of *de minimis* marks the line separating trivial from significant infringements. When the cost of removal is such as may be absorbed within the rule, the vendor’s title will be upheld; when the cost cannot be dismissed in this way, the encroachment has been held to be substantial regardless of the extent of the area of the street that is encroached upon or whether the offending structure serves a functional or an ornamental purpose.

Where risk of challenge is the variable factor, several possible tests have been proposed. One attempt at generalizing the entire element of risk puts the basis of distinction at whether the encroachment has resulted in any practical interference with the

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62 Leerburger v. Watson, 75 Misc. 3, 134 N. Y. S. 818 (1911); Van Horn v. Stuyvesant, 50 Misc. 432, 100 N. Y. S. 547 (1906).
use of the streets. More satisfying for purpose of long-run prediction, however, are the decisions that depend on the various positive manifestations of local public policy as being favorable to the vendor’s claim. When depending upon positive assurances of this sort, the vendor would seem at his strongest when he is able to show official acts or ordinances recognizing and permitting the encroachment. These may deal with encroachments of a particular class generally, or with the vendor’s case in particular. In such cases, even though the courts assert that municipalities have no power to compromise public rights or to commit the public to any future policy, it is clear that the public acts do have a certain probative value. So, in Ebert v. Hanne

man, a case arising in New York over the matter of a bay window which encroached upon a street, the combination of fifteen years of undisturbed existence and a recently issued permit from the municipal authorities was regarded as sufficient to uphold marketability. Even without the factor of a special permit, the showing of a friendly public policy may be persuasive. The

64 See, for example, Harrington Co. v. Kadrey, 105 N. J. Eq. 389, 148 A. 3 (1929); Gellman v. Hermann, 118 Misc. 290, 103 N. Y. S. 174 (1922).
65 In Gellman v. Hermann, 118 Misc. 290 at 291, 103 N. Y. S. 174 at 175 (1922), the court said: “Of course, the municipality has not power to grant an exclusive privilege of a permanent encroachment upon the highway. An order granting such a privilege would be void. Such an ordinance does, however, indicate the policy of the municipality . . . to permit . . . encroachment[s] of . . . trivial nature . . . and . . . courts have held uniformly that such encroachments do not make the title to the building unmarketable . . . But, with the change of the municipal policy . . . the courts have held that if the building encroaches on the public street to such an extent as to threaten the vendee with a substantial loss of fee or rental value, or a burdensome expense of altering the building, it cannot be said that the vendor has a marketable title. When the attitude of the municipality has been unknown, their existence has been held to make title unmarketable, when they are of a substantial nature and the cost of removal would be burdensome.” In Scheinman v. Bloch, 97 N. J. L. 404 at 406, 117 A. 389 at 390 (1922), the court said: “Primarily such encroachments on the street are nuisances at common law. But where, under statutory authority . . . they are licensed and authorized by the municipality, which represents the public, they necessarily become lawful structures, and so remain so long as the municipal license is legally in force.” Italics added. The case of 556-558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 N. Y. S. 886 (1908), indicates that where the legislature has deprived the city of the right to institute action against an encroachment such right “to cause the encroachment to be removed has at least been suspended indefinitely.” Accord: Moser v. Cochrane, 107 N. Y. 35, 13 N. E. 442 (1887); Ungrich v. Shaff, 119 App. Div. 543, 105 N. Y. S. 1013 (1907); Broadbelt v. Loew, 15 App. Div. 343, 44 N. Y. S. 159 (1897); Celestial Realty Co. v. Childs, 100 Misc. 532, 166 N. Y. S. 921 (1917).
66 69 Misc. 223, 125 N. Y. S. 237 (1910).
case of Levy v. Hill, another New York case, may be regarded as typical. There the question was whether the encroachment of a stoop some fifteen feet onto the sidewalk operated to render the vendor's title unmarketable, but was held not to have that effect. The stoop had occupied its position for some thirty years without objection either on the part of the municipality or from adjoining property owners. The contingency that its removal would ever be compelled by any person having authority was deemed to be so remote as not to be within reasonable contemplation. On the other hand, where municipal policy is known to require removal of street obstructions, or else leaves the matter in doubt, evidence of long-continued acquiescence is insufficient to make a balance in favor of the vendor.

The intention of the parties, evidenced by their contract of sale, is again given the same controlling weight in cases of encroachments upon streets as with other types of encroachments. Where it is stipulated that the buildings upon the vendor's premises must all be within the lot lines, the courts stiffen their standards noticeably, so it is only where the parties agree to a de-
scription which would allow for an encroachment or accept one which speaks in approximate terms that the encroachment may be overlooked.\textsuperscript{71}

V. CURES FOR DEFECTS DUE TO ENCROACHMENTS

The right to assert an objection based upon an encroachment depends on the existence of the encroachment at the moment when the vendor becomes bound to perform his part of the contract. At any time prior to that moment, the vendor may, if he can, remedy the objectionable defect and thereby deprive the purchaser of any grounds for refusing to accept conveyance of title. A study of the effect of encroachments on marketability of title should, therefore, include some word about the means by which admitted encroachments may be rendered harmless as objections to title.

One obvious cure lies in the physical removal of the encroachment and a restoration of the premises to their original or proper condition. This may be possible at the pleasure of the vendor when he controls the building which constitutes the encroachment, but will rarely be possible without resort to litigation in cases where the encroaching structure is owned by the adjoining landowner. While it is certain that the vendor has a right to seek an injunction to force removal of an encroachment upon his land, and while it is certain that such action would be a means of curing the objection to title, this method has a serious limitation in that it can be utilized only where the encroachment causes irreparable damage.\textsuperscript{72} Courts still could not issue injunctions in

\textsuperscript{71} In Steckler v. Godillot, 17 Misc. 286, 40 N. Y. S. 364 (1896), the contract allowed for a variance of one inch from the record dimensions. See also Sheil v. Samarayan Realty Corp., 223 App. Div. 820, 228 N. Y. S. 425 (1928).

\textsuperscript{72} Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 55 A. 168 (1903); Pradelt v. Lewis, 297 Ill. 374, 130 N. E. 785 (1921); Turner v. Shriver, 269 Ill. 164, 109 N. E. 708 (1915); Antilla Protective Ass'n v. Wolfsohn, 244 Ill. App. 71 (1927); Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278 (1897).
that class of cases where the damage may be serious enough to impair marketability if the impairment may be compensated for by money damages.

Equally unsuccessful is the argument of the vendor who obtains personal assurance from the owner of the encroachment upon the vendor's land that he will remove it. Here the courts have understandably felt that the purchaser should not be forced to rely upon the assurance of one who is in no way a party to the purchase contract nor to the pending litigation and thereby assume the risk of later becoming involved in a controversy over the matter. Nor is such weakness cured by reducing the agreement between the vendor and the adjoining landowner to writing. One popular device has been for a vendor to attempt to cure an encroachment by concluding a party-wall agreement as to the invading structure. But here, just as with the oral assurance, the courts have held the vendor's action insufficient to cure his defective title. Unless the purchaser, with notice of all the facts, consents to such an agreement, the courts have not felt that the purchaser should thus be forced to compromise his right to complete independence in the use of the land.

Where the encroachment in question is one by the vendor's building against the adjoining premises, adverse possession is almost invariably suggested as the cure for the objection. In theory, such a possibility is always present but, from the practical standpoint, there are several difficulties. The vendor must always be sure that his possession has actually been adverse, for it is a familiar proposition that mere possession and exercise of dominion over premises the record title to which is in a stranger does not necessarily import hos-

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73 Ziebarth v. Manion, 161 Wash. 201, 296 P. 561 (1931).
74 Richman v. Camorsil Realty Co., 120 Misc. 648, 200 N. Y. S. 166 (1923). Where, however, the vendor's negotiations are based on a prior agreement with the purchaser and the contract of sale describes the premises in question in terms of the party wall, such party wall agreement has been held to cure objection to marketability due to encroachment of the original wall on vendor's premises: Levy v. Hill, 50 App. Div. 294, 63 N. Y. S. 1002 (1900).
EFFECT OF ENCROACHMENTS

In addition, the vendor must take care that during the period of his possession no circumstances have arisen which could prevent that possession from ripening into the title that he seeks. Illustration of a failure due to both the causes just mentioned is provided by the case of Spero v. Schultz. There the vendor sought specific performance of his contract of sale despite an encroachment by his own wall upon the premises adjoining because, he claimed, an unchallenged adverse possession of thirty years had ripened into an easement to maintain the wall. The argument was denied, however, when the court said:

Upon the question of the time the wall has been used, the evidence is satisfactory. But the added evidence of the absence of circumstances . . . which may have prevented the use of the wall from ripening into title is wanting. For all that appears there may or may not have been parties in being against whom the statute of limitations could have run, but we do not understand that in the absence of proof a presumption will arise or be indulged in that such was or was not the fact, or that an agreement had ever been made between the owners of the buildings in question permitting the use of the wall as claimed. . . . The burden was upon the vendor to show the title to such use of the wall.

Other pitfalls could be cited, but enough has been said, in pointing out the most frequent causes of failure, to put an examiner

77 14 App. Div. 423 at 426, 43 N. Y. S. 1016 at 1018. Justice Ingraham dissented, but on the sufficiency of the evidence rather than the principles concerning the test of marketability. As to the latter, he said: "We have lately examined the question of the nature of the evidence to justify an action of specific performance in compelling a purchaser to take title . . . founded on adverse possession, and we there held that continuous possession of thirty-two years was not sufficient but that the vendor was bound to show in addition that the person in whom the legal title was vested was not under such legal disability as would prevent the title from vesting by adverse possession." 14 App. Div. 423 at 431, 43 N. Y. S. 1016 at 1022.
78 Recall, for example, the special problems arising when the vendor attempts to claim adverse possession against the government in connection with encroachments upon streets and highways.
of titles on guard against too freely accepting adverse possession as a complete cure.

Occasionally it is possible to claim that the vendor has cured an objection based upon encroachment by obtaining rights based upon an estoppel. This cure, of course, is useful in the case where the vendor's buildings constitute the encroachment. In its most frequent appearance, it depends on the establishment of facts which show the adjoining landowners have recognized a "practical" boundary which is favorable to the vendor. The rule that a practical boundary might, if recognized by the parties concerned, become conclusive as an estoppel, binding upon them and their privies in estate, seems to have been developed in New York about the middle of the nineteenth century. A chancellor there once thought that acquiescence in such cases affords ground not merely for an inference of an original parol agreement, but for a direct legal inference as to the true boundary line. It has been held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. . . . The rule seems to have been adopted as a rule of repose with a view to the quieting of titles.

That view clearly made estoppel respectable as a separate theory on which encroachment defects might be cured, but it did not point out how there was much to choose between estoppel and adverse possession. Especially is this true when it is noted that the key requirement of "long acquiescence" tends to be similar to the period required in the adverse possession cases. As a practical matter, it might well be that the necessary period of acquiescence is as long as the time of possession required to prove title by adverse possession but it also might well be decided that

79 Reed v. Farr, 35 N. Y. 113 (1866); Baldwin v. Brown, 16 N. Y. 359 (1857).
81 It was pointed out in Baldwin v. Brown, for example, that "in all cases in which practical locations have been confirmed on evidence [of acquiescence], the acquiescence has continued for a long period, rarely less than twenty years." 16 N. Y. 359 at 364.
estoppel is still the cure to be preferred since it has fewer technical requirements attached to its validity than does adverse possession.

The establishment of practical boundaries by acquiescence of the parties involved is probably the most frequent setting for the estoppel argument. A still more interesting problem arises when the alleged estoppel is based on the doctrine of merger of titles. Here the argument proceeds on the theory that when title to both the encroaching premises and the premises encroached upon are united in one owner, any defect due to an encroachment is cured for purpose of subsequent sale of either of the properties. It was so argued with success in the New York case of Schaeffer v. Blumenthal.82 There the beams of the vendor’s house were lodged in the wall of a building belonging to the adjoining landowner. The apparent encroachment was held insufficient to permit rejection of the vendor’s title for both lots had, at one time, been owned by the same person who had erected the houses in question in the manner described. By so doing, he had created a servitude upon the encroached lot so that any subsequent purchaser of the lot to which the encroaching structures belonged was said to get a “clear and undisputable right” to rest the beams of his house in the wall as long as the houses should both exist.

The proposition of that case appears to have been accepted without dissent, but the limits of its permissible extension seem to have been set by the Illinois court in the case of Winters v. Polin.83 The vendor there sought specific performance despite the fact that a survey, made subsequent to the execution of the sale contract, revealed the encroachment of bay windows several inches onto the adjoining lot. It was shown that the purchaser already owned the encroached premises and the vendor argued that the conveyance of title to the encroaching structure

82 169 N. Y. 221, 62 N. E. 175 (1901).
83 309 Ill. App. 458, 33 N. E. (2d) 497 (1941). Leave to appeal was denied: 310 Ill. App. xix.
would result in the merger necessary under the rule of the Schaeffer case. The contention was rejected for two reasons. It was thought, first, that the doctrine of merger could not be applied prospectively. It was one thing to base estoppel on past behavior of an ancestor in whom title to both parcels of land had been united, but quite different to claim that estoppel could spring from actions and legal relationships that had not yet occurred. Second, even assuming that the circumstances would preclude the present purchaser from questioning the matter during the period of his ownership of both premises, what would happen if the present purchaser subsequently attempted to sell or mortgage either parcel of land using the description which was now the basis of negotiation? Answering its own question, the court said it could not be done except by running the risk of future litigation, hence the merger could not now be used to cure the defect beyond any reasonable threat to peaceful enjoyment. In this way, the court seemed to be saying that the real trouble arose in compelling the purchaser to assume the risk of being prepared, in the event that he chose to sell either parcel of land, to defend his title in an action to force removal of the encroachment or a suit for specific performance of the contract. "We know of no rule," the court declared, "that compels a person against his wishes to buy a law suit."

Any mention of devices available for the cure of title defects due to encroachments must include a discussion of the powers of a court of equity to aid the vendor who has substantially but not completely performed his bargain according to the letter of the contract. Naturally, the use of such a power has been peculiarly an equitable remedy, associated with specific performance, to be applied only with great caution. It usually takes the form of a grant of specific performance with an abatement of the purchase price to compensate for the damage done by the encroachment, provided the encroachment is one which may be

84 The court's handling of this point was criticised in a comment on the case appearing in 30 Ill. B. J. 301.
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compensable by an abatement of the price. In practice, this has meant that equity will aid the vendor when the area encroached upon is of negligible value when compared to the total value of the property being sold; where the measurements are uncertain and removal can be accomplished with ease; where the encroachment fails to materially affect the value of the premises being sold; or the normal or intended use thereof. If the parties bargained for land as it stood without a survey, in terms of “more or less,” there has been relaxation with respect to all of these requirements. In direct contrast, if the evidence has indicated that freedom from encroachment is a major inducement to the making of the contract of sale, the persuasive force of the vendor’s argument has waned and has often been completely lost even though some combination of the foregoing factors has been present.

A less frequent form of equitable relief through specific performance, but one quite as available under proper circumstances, is a decree of performance coupled with a grant of additional time for the vendor to perfect his defective title. Where the vendor has substantially performed his contract on the date of


87 In Sauer v. Bloch, 67 Misc. 657 at 659, 124 N. Y. S. 802 at 803 (1910), it appeared that a wall encroached 4½ inches upon the premises being sold. It was held that “under the evidence based on the value of the lot, $78.00 will amply compensate for the deficiency and it would be manifestly inequitable to defeat a $53,000 purchase by a defect so inconsiderable that it can be compensated by such a small sum.”

88 The vendor, in Merges v. Ringler, 84 App. Div. 415, 54 N. Y. S. 280 (1898), deposited an amount with the court and a referee determined the sum proper to compensate for the defects. See also Smyth v. Sturges, 108 N. Y. 495, 15 N. E. 544 (1888) ; Keating v. Gunther, 57 Hun 591, 10 N. Y. S. 734 (1890) ; Wynne v. Reynolds, 6 Paige 407 (N. Y. 1837).


91 The case cited in note 90, ante, involved a contract specifying the dimensions as “more or less.” In Sheil v. Samaroyan Realty Co., 223 App. Div. 820, 228 N. Y. S. 425 (1928), the contract was subject to any state of facts “which an accurate survey might show.”

92 In Herring v. Esposito, 94 N. J. Eq. 348, 119 A. 765 (1923), the contract stipulated that “buildings upon said premises are all within boundary lines of property described—and that there are no encroachments thereon.”
performance, and has failed only with respect to an encroach-
ment which requires no great time or expense to remove, courts
of equity have often felt that the element of time may properly
be ignored and indulgence granted to the vendor until he can
perfect a good and marketable title without jeopardizing his right
to specific performance thereafter. 93 A requirement of due
diligence is imposed upon the vendor to do what can be done
toward removing the defect,94 so the vendor’s own carelessness
which resulted in the creation of the encroachment, or any other
circumstance which would render specific performance inequita-
ble, will serve to bar relief.95 Where additional time is granted,
it is common to have the rents of the land in question awarded
to the purchaser pending final performance and to allow the
vendor to have interest on the purchase money. Under such an
arrangement, the delay in bringing about the necessary cure
might extend for several years without destroying the vendor’s
ultimate right to performance.96

Occasionally an attempt is made to procure judicial appro-
bation of a defective title without any accompanying decree of
specific performance or injunction. Most states, by legislation,
authorize chancery courts to quiet titles as well as to remove
clouds on the title to land. Under these statutes, an owner who
is entitled to maintain such an action may cure a title which is
defective because of an encroachment. Similarly, many states,
having adopted some local variation of the Uniform Declaratory
Judgments Act, have recognized that these statutes possess a
scope broad enough to include adjudication as to titles and rights

93 See Bispham, Principles of Equity (Banks Law Pub. Co., Philadelphia, 1919),
9th Ed., § 391.
94 Welland v. Huber, 8 Nev. 203 (1873); Bruce v. Tilson, 25 N. Y. 194 (1862).
In such cases, it seems to be sufficient if the vendor can make good his title by the
time of the decree: Collins v. Park, 93 Ky. 6, 18 S. W. 1013 (1892); Harriman v.
(1870); Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298 (1894); Spencer v. Sandusky,
46 W. Va. 582, 33 S. E. 221 (1899).
95 Dikeman v. Sunday Creek Coal Co., 184 Ill. 546, 56 N. E. 864 (1900); Mc-
Laughlin v. Equitable Assurance Society, 38 Neb. 725, 57 N. W. 557 (1894).
in land. It has, however, been pointed out that these declaratory judgment statutes are intended merely to modify the common-law rule that there is no justiciable controversy until a right has been invaded. For this reason, they may not ordinarily be invoked where an adequate remedy at law is available. It has, for example, been held that a claim of title and a defense of adverse possession may not be tried in a declaratory judgment action inasmuch as the remedy of ejectment is full and adequate for the purpose. That interpretation would seem to exclude the possibility of seeking a declaratory judgment in a case where a title proves defective because of an encroachment upon the petitioner's land. On the other hand, however, a declaratory judgment would seem to be entirely possible where the petitioner could, by adverse possession or estoppel, establish a right to maintain his own encroachment upon his neighbor's land.

Much the same reasoning can be applied to, and similar conclusions be reached concerning, statutory suits to quiet title or to remove clouds upon the title to land. When the encroachment is upon the land of the plaintiff, most courts would feel themselves constrained to dismiss the suit because of the requirement that plaintiff must be in possession of the land in question when the action is begun. Exceptions to this requirement have been made when the land in question is unoccupied and unimproved or where plaintiff's failure to have possession is due to defendant's fraudulent or forcible ouster, but these exceptions provide no major source of cure for encroachments of the type under consideration. The Iowa case of DesMoines & Fort Dodge Rail-

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99 State v. Inman, 238 Ala. 555, 191 So. 224 (1939).

1 See, for example, the provisions of Ala. Code 1940, Tit. 7, § 1109; Cal. Code of Civ. Pro. 1941, Tit. 10, Ch. 3 §§ 738 and 749; Ill. Rev. Stat. 1947, Ch. 22, § 50; Iowa Code 1946, Ch. 649 § 1; Mich. Stats. Anno. 1936, Tit. 27 § 545. See also Holland v. Coleman, 162 Ala. 462, 50 So. 128 (1909); Dempsey v. Burns, 281 Ill. 644, 118 N. E. 193 (1917); Cummings v. Schreur, 236 Mich. 628, 211 N. W. 25 (1926).


road Company v. Whitaker, however, stands as a contradiction for the court there, in an equity action to quiet title, considered the claim of adverse possession by the defendant, whose elevator was located in part on grounds belonging to the plaintiff railroad, as a cloud on the plaintiff’s title, entitling plaintiff to a decree quieting title, even though the defendant’s answer, as finally amended, did not expressly assert any claim to part of the grounds. When the encroachment causing the defect in title consists of an intrusion by plaintiff’s buildings upon the land of a neighbor, an action to quiet title or to remove a cloud may be successfully maintained subject, of course, to plaintiff’s ability to prove a right to maintain his structure by reason of adverse possession or estoppel.

A final word might be said, in connection with litigation designed to cure defects in title, as to the occasional decision which denies a petition for positive relief but where the court, in passing, makes a serviceable adjudication as to plaintiff’s rights. One such case, that of LaCost v. Mailloux, arose in Illinois. The defendant there, by counterclaim, sought a mandatory injunction to compel plaintiff to remove an eight-inch encroachment produced by a concrete sidewalk. The encroachment was admitted but the chancellor, finding that no useful purpose would be served by the destruction of the concrete walk, merely ordered plaintiff to imbed brass plates so as to denote the true boundary line and dismissed the counterclaim. The decree was affirmed when the reviewing court noted that the defendant’s prime concern was one to avoid the danger that plaintiff might obtain a title by prescription. That danger being removed, no other affirmative relief was necessary.

The development of title insurance and its availability in most urban communities where problems of encroachments are

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4 172 Iowa 394, 154 N. W. 604 (1915).
6 401 Ill. 283, 81 N. E. (2d) 920 (1949).
more apt to arise, generates a fair question as to what extent title guaranty policies may provide a method for curing encroachment defects. Realistically, there is no denying that title insurance has become the business man’s standard for the acceptance of a title, and many lawyers have joined in wishing that procurement of insurance against disturbance of the purchaser’s rights of ownership could be substituted for the degree of perfection required by the law’s mythical and often none too predictable reasonable man. If one assumes that the chief concern of the law is the protection of the purchaser from the need of always being ready to defend his title, and that the principal advantage of title insurance lies in the fact that it shifts the cost of defending, and of paying losses arising from, litigation concerning the title in question, it would seem to follow that courts should not hesitate to recognize insurability as the test of marketability in the modern market. Such a rule would seem well calculated to bring law into a better adjustment with business, but in fact the matter is not quite as simple as logic would have it.

Take, as the first practical limitation on this proposition, the fact that title guaranty policies rarely guarantee over encroachments. In Winter v. Polin,7 a case already referred to, the vendor agreed to furnish his purchaser with an insurance policy guaranteeing the title to the property in question. Once this was done, he argued that such should be recognized as evidence of the marketability of title notwithstanding the existence of the encroachment. The court was persuaded differently, however, when it was revealed that “matters of survey” were excepted from the coverage of the particular policy which the vendor had procured.8

Such is the typical experience and only by special arrangement,

7 309 Ill. App. 458, 33 N. E. (2d) 497 (1941).
8 The exception of matters of survey was waived by the insurance company after the suit had been filed. In describing the legal significance of this fact, the court stated: “the sufficiency of the guaranty policy is to be determined by the date fixed by the contract for closing the deal and not some time subsequent to the filing of a suit for specific performance. . . . In the face of this situation, when officials of the company state their policy did not cover any loss by reason of encroachments, by what equitable principles was defendant bound to take the property subject to possible law suits and losses?” See 309 Ill. App. 483 at 484, 33 N. E. (2d) 497 at 500.
with payment of special premiums, have title insurance companies been willing to accept the risks arising from encroachments.⁹

Even with insurance policies which do guarantee against loss arising from encroachments, it is still a matter of doubt whether insurance may be taken as evidence of marketability. New York precedents would indicate that the willingness of a title insurance company to guarantee the vendor’s title carries with it no necessary implication that the title is or will be quiet on this question.¹⁰ These cases point out that the insurer, by issuing its policy, does not imply that it believes the title is marketable but rather merely that it has examined the risks and is willing to assume them for the premium paid. In this way, the issue is squarely whether the law should accept title insurance standards as the test of marketability or, retaining its own standards, leave title insurance as a practical but unofficial means of shifting business risks.

Here, admittedly, there are arguments on both sides. The case for acceptance was put by a Washington decision which holds that, beyond doubt, the refusal of a title company to insure the vendor’s title is evidence of its unmarketability.¹¹ There the court said neither the title insurance company nor its attorneys “had any interest in the main transaction and we can conceive of no higher evidence of a want of marketability of title as the term has been construed by this court, than these opinions.”¹² Perhaps fairness requires a certain obligation to give as much


¹¹ Flood v. Von Marcard, 102 Wash. 141 at 146, 172 P. 884 at 886 (1918). In that regard the court said: “We are convinced that the title was not free from reasonable doubt. . . That it was not such a title as a buyer would take when exercising ordinary prudence in the conduct of his affairs is sufficiently evidenced by the refusal of the title insurance company to guarantee it, and the refusal of its general counsel, whose learning and skill in the law cannot be questioned, to approve the title.”

¹² 102 Wash. 141 at 147, 172 P. 884 at 886.
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credit to the insurer's decision to accept the risk as the court was willing to give to the same insurer's opposite decision, both being arrived at by use of the same careful and objective title examination methods. In the last analysis, however, neither fairness nor logic can extend the curative powers of insurance beyond certain other basic limitations. The insurer's liability, in cases where encroachment defects defeat marketability, does not go beyond payment of the costs of the unsuccessful defense of the title plus the face amount of the policy; it is powerless to restore rights that cannot be measured in terms of that amount of money. Further, it must be recognized that the effect of title insurance is determined as of the moment when the policy is issued. It is imaginable that defects may arise between the moment of issuance and the time for the vendor's performance of his contract. Finally, what of the contract of sale which requires the vendor to tender both a marketable title and, in addition, a title guaranty insurance policy? So far, no court has been willing to say that the procurement of insurance obviates or satisfies the requirement of a marketable title.

Perhaps the most sensible analysis of the place which title insurance may play as a cure for encroachment defects has come from a federal district court sitting in Connecticut. In a suit for specific performance, decided there in 1934, it was argued that a title guaranty company's offer to insure should be given "just weight" in determining marketability because it was the result of careful examination by experts whose business it was


14 The statement in Winters v. Polin, 309 Ill. App. 458 at 464, 33 N. E. (2d) 497 at 500, to the effect that the "sufficiency of the guaranty policy is to be determined by the date fixed by the contract for the closing of the deal" might support the implication that, under certain circumstances, the court might regard the title guaranty policy as proper protection against defective title.

to calculate risks and support their statements with their fortunes. Admittedly there was risk; the very term "insurance" implied it. But, the argument ran, since no title can with absolute certainty be known to be perfect, and there exists no instrument of precision to test it, "the marketplace has evolved, as an effective substitute by way of protection, the institution of title insurance, on which the marketplace must and does rely." Against this argument, the lines of reason preferred by the New York courts were offered. The decision of the court plainly showed that it was impressed by the insurability of the title. While it was not willing to accept the judgment of the title insurance company as a substitute for its own, it had "no doubt that the court, whether or not it may take judicial notice of the general custom and practice with respect to title insurance, may consider evidence of the custom and the weight given in the marketplace to title insurance." This, one suspects, is about as close as the courts will go, when framing and judging the law, considering the practical affairs of business.

VI. CONCLUSIONS

In summing up, it is hardly necessary to point out that in one sense this discussion has come back to its point of beginning for, in the last analysis, the problem is still one concerned with the rationale of marketability. This time, however, the object of the inquiry is more concerned with what the rationale should be rather than with what it actually is.

If the main difficulty with this subject were simply to be able to declare what should constitute marketability when title is jeop-

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18 The court continued: "... an acknowledged expert and a senior officer of the title company... points out that the practice of his company has been to draw no distinction between a marketable and an insurable title, and to refuse insurance regardless of any additional premium preferred if there was any reasonable doubt of marketability." See 9 F. Supp. 288 at 313-4.
ardized by the presence of encroachments, then the answer is that the definition may be found strewn along the way this discussion has proceeded. As, in each case, there have been different dominating characteristics, so there have also been different standards of marketability for each of the main types of encroachment defects. Decisions on one type of encroachment have resembled those concerning another type only in their common adherence to the maxim that substantial encroachments defeat marketability while trivial ones do not. The maxim has thus become a key to many locks, but it has at no time seemed to possess the familiar characteristic true of most master keys, that of reflecting a common denominator in the problems that they unlock. When all the cases are viewed and reviewed, the conclusion is still that there are three different types of encroachments with three different tests for determining their effect on marketability.

Against such a background, the desirability of formulating a new rationale of marketability, one which will include all three types of encroachments, would seem to be obvious. Nor is it a need that could be called new. It may be questioned, however, whether the decisions of the courts hold much promise of help in creating a useful rule since, in times past, the courts themselves have seldom thought of the problem in terms of an overall pattern within which the several subordinate rules could be reconciled. This has been so regardless of whether the immediate issue before the court was the classification of an encroachment as substantial or insignificant, or the cure of a defect already acknowledged to exist. And it is likely so to continue as long as the courts remain preoccupied with treating the subject in terms of a number of mutually exclusive type-classes.¹⁹

¹⁹ See, for example, the attempt in Volz v. Steiner, 67 App. Div. 504 at 508, 73 N. Y. S. 1006 at 1008 (1902), to formulate a general pattern. There the court said: "In determining what is necessary to cure a defect of an encroachment onto adjoining land, consider the distinction between it and the case where the vendor cannot give title to all the land he contracts to sell. In the latter case he defaults on the vendee's legal right to get all the land he pays for. In the former case he defaults on the vendee's right to maintain the buildings on the conveyed premises in the same state as they exist at the time of conveyance. . . . Where title fails
Some assistance will naturally always be provided by statutes and rules of local bar associations. But overall statutory regulation is not likely to develop from the present prototypes for, in current practice, most statutes bearing on the problem of encroachments and marketability are merely local or municipal exceptions to general state-wide common law or equity rules.\textsuperscript{20} Local bar association rules for title examination seem equally unpromising because of their tendency to become simply restatements of rules which are unknown or generally overlooked by title examiners.\textsuperscript{21}

As an alternative some attention has been given to the possibility of achieving a new rationale of marketability by the substitution of insurability for the standard of the hypothetical reasonable man. Arguments exist on both sides of the question and have been suggested earlier. More could be cited again if such a review would reveal insurability as the unifying standard capable of becoming the new rationale.\textsuperscript{22} But if, on the other hand, such a substitution would only result in setting up title insurance companies as quasi-administrative tribunals, organizations whose fact-finding activities were to be carried on without benefit of any basic formula other than a company policy dictated by the ability of a given company’s resources to assume risk, the result would again not be especially desirable. The fact that the analysis would be made by impartial experts must always be balanced by the fact that these experts would have absolutely no reason, other than to

\textsuperscript{20} The present New York statute recognizes this when, in connection with legislation authorizing property owners to maintain actions for injury to real property due to building encroachments, it is provided that the right to sue shall not be deemed to modify or alter other local statutes on the subject: N. Y. Cons. Laws, Real Property Law, Art. 16, § 539.


\textsuperscript{22} Foehrenbach v. German-American Title & Trust Co., 217 Pa. St. 331, 66 A. 561 (1907).
promote good public relations, to adhere to any degree of *stare decisis* in their decisions. What, then, is to be gained by substituting one type of uncertainty for another?

One is inclined to think, after a study of this sort, that perhaps there is no single unifying rationale into which all the aspects of the problem can be fitted. The courts, without saying so in plain words, seem to have decided not to attempt to define their terms beyond the elementary proposition that "substantial" encroachments defeat marketability but "insignificant" ones do not. Each case arising thereafter must be classed as substantial or trivial according to its own facts. Such an approach is not novel to the law nor unique with the encroachment problem and perhaps it is the best one after all. Whenever a problem, from its very nature, requires that the analyst use terms of relativity, perhaps it is much safer to endure an apparent multiplicity of rules rather than to seek for simplicity in handling and for uniformity of interpretation. Change is not desirable if it comes at the expense of those advantages in perspective and experience such as the law provides by its natural growth.
THE UNDERSIZED HOUSE: A MUNICIPAL PROBLEM

ROBERT MCCLORY*

There is no question but what building costs sharply affect the potential size of the intended structure. When costs are low, the floor area and cubical content of any planned building will be apt to expand for dollars can purchase more material and services. Conversely, as prices rise, the money allotted for building purposes will purchase less, thereby forcing a reduction in size or resulting in a finished product of inferior quality. Nowhere is this more evident than in the field of residential building where, under present circumstances, people desiring to build are forced to reduce the dimensions of their dream homes to fit their limited budgets. In much the same fashion, large-scale operators, seeking quick profits from a ready market, find it desirable to erect row on row of cracker-box type dwellings, devoid of ornamentation and minute in proportion. These undersized dwellings, whether standing alone or in rows, are not only incompatible with the character of many of our residential areas but, in the long run, cannot make for comfortable living. The adverse effect these three or four-room homes will have upon a residential community primarily consisting of substantial six to eight-room dwellings, erected when costs were lower, is obvious. To prevent that blight, the question of whether or not a municipal ordinance designed to regulate floor area and cubical content could be validly enacted is a matter of prime importance to many communities.

Any attempt to prevent the erection of undersized dwellings in Illinois, thereby preserving the character of existing residential areas, must necessarily be predicated upon valid restrictions contained in building, zoning or other ordinances. In the past, the

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1 Illustration of such an ordinance may be found in the following excerpt taken from the zoning ordinance of the Town of Southfield, Oakland County, Michigan. It provides: "Area of buildings: No dwelling shall be erected or altered in this zone (Residence 1) which provides less than five hundred twenty-five (525) square
emphasis has been on regulation designed to limit the maximum use which might be made of property. The issue now is whether statutory authority exists for minimum regulation, for no municipal ordinance can stand unless it rests upon proper statutory authorization. In that respect, municipal authority for such local legislation is to be found, if at all, in provisions permitting the municipality to adopt building ordinances, to exercise police power, or to promulgate zoning ordinances. The first of these may be uncertain warrant for such regulation as the power conferred grants the right to "prescribe the thickness, strength and manner of constructing all buildings and . . . fire escapes thereon." It primarily intends regulation of such things as the materials which are to enter into the finished structure or the manner of their incorporation to the end that the building will be structurally safe.

The second, i.e. police power, while worded as a blanket authorization to "pass and enforce all necessary police ordinances," is not so unlimited as it would, at first, appear for that provision has been interpreted to limit the police regulation to only those subjects over which the municipality has been given express authority by other specific paragraphs of the statute. There is, however, some support to be found for regulation of the type

feet of floor area per family at the first floor level, exclusive of any garage area or area in any accessory building. Size of building: No dwelling shall be erected or altered in this zone (Residence 1) which provides less than ten thousand (10,000) cubic feet of content."

2 Covenants in deeds or restrictions on building imposed by subdividers are beyond the scope of this article. It has not been uncommon, in such cases, to insert provisions requiring the expenditure of a stated sum, but the amount mentioned has proved to be woefully inadequate in most instances by virtue of the staggering increase in construction costs. In addition, such covenants customarily operate only for a stated time, the life of which, in many instances, has already run out.

4 Ibid., § 23—105.
5 Ibid., §§ 73—1 to 73—10. See also Smith-Hurd Ill. Stat. Anno., Ch. 24, § 23—1, particularly note 2.
6 See, for example, Consumers Co. v. City of Chicago, 313 Ill. 408, 145 N. E. 114 (1924); Moy v. City of Chicago, 309 Ill. 242, 140 N. E. 845 (1923); City of Marion v. Criolo, 278 Ill. 159, 115 N. E. 820 (1917); City of Chicago v. O'Brien, 268 Ill. 228, 109 N. E. 10 (1915); People v. City of Chicago, 261 Ill. 16, 103 N. E. 609 (1913); City of Chicago v. M. & M. Hotel, 248 Ill. 264, 93 N. E. 753 (1911); Wice v. C. & N. W. Ry. Co., 193 Ill. 351, 61 N. E. 1084 (1901).
under consideration in the case of Moy v. City of Chicago. There an ordinance designed to regulate laundries, and which imposed the requirement that there should be "at least 1,000 cubic feet of air space provided for each person employed therein," was found to be valid. The court, after referring to the grant of police power, also found sanction for the ordinance in a specific provision authorizing municipal legislation designed to promote the public health. It would seem to follow, therefore, that a municipal ordinance fixing a minimum size for residential buildings might well be sustained provided there was also specific authority for its enactment in sections of the statute dealing with building, zoning, or the like.

It is under the third aspect of municipal authority, i.e. through the use of the zoning power, that an ordinance of the type proposed might find its greatest support. The zoning provision of Illinois was broadened by amendment in 1943, so that its preamble now recites the desired end to be "that adequate light, pure air, and safety from fire and other dangers may be secured, that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted."

To accomplish those purposes, each municipality has been empowered, among other things, to (1) regulate and limit the height and bulk of buildings hereafter to be erected; (2) to establish, regulate and limit the building or set-back lines on or along any street, traffic-way, drive or parkway; (3) to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; (4) to classify, regulate and restrict the location of trades and industries

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7 309 Ill. 242, 140 N. E. 845 (1923).
and the location of buildings designed for specified industrial, business, residential, and other uses; (5) to divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited; (6) to fix standards to which buildings or structures therein shall conform; and (7) to prohibit uses, buildings, or structures incompatible with the character of such districts.\textsuperscript{11}

The statute referred to appropriately closes with the admonitory remark that in all ordinances passed "due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire municipality and the uses to which the property is devoted at the time of the enactment of such an ordinance," and that the power so conferred shall not be exercised "so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted, but provision may be made for the gradual elimination of uses, buildings and structures which are incompatible with the character of the districts in which they are made or located."\textsuperscript{12}

Certain parts of the present statute clearly indicate a purpose to carry out original zoning concepts, to-wit: that in the interest of public health, safety and welfare regulation may well be imposed prescribing maximum limits on height and bulk of buildings, fixing their location with respect to lot lines, as well as to control the uses to which structures may be put. It cannot be said, however, that in the interest of regulating maximums, the legislature has overlooked the desirability of fixing minimum standards, for there is much in the statute which looks in that direction. The preamble, for example, suggests the desirability of conserving the "taxable value of land and buildings" as well as preserving the "public health, safety, comfort, morals, and welfare." There

\textsuperscript{11} Ibid., subsection (1) to (7).
\textsuperscript{12} Ibid., concluding paragraph.
is specific authority for the "regulation" of, as well as limitation upon, the height and bulk of buildings. Standards may be established to which buildings and structures are to conform. Each municipality may prohibit uses, buildings or structures "incompatible with the character" of established zoning districts. But above all, with due regard to private rights, the municipality may act to secure the "conservation of property values, the direction of building development to the best advantage of the entire municipality" in addition to bringing about the gradual elimination of uses, buildings and structures which are "incompatible" with the character of the districts in which they are located.

Regulation in these respects must, of necessity, take into account the fact that values may be as effectively destroyed or diminished by the introduction of cheap, shoddy, or skimpy construction as they would be by permitting overbuilding in the area. Health and comfort may be as seriously endangered in residential areas by inadequate and insufficient housing as they would be by the introduction of pest houses, factories and the like. It would seem, then, that a zoning ordinance which prescribed minimum dimensions for residential building, unless otherwise shown to be arbitrary or unreasonable, should be valid in Illinois, although it must be admitted there are no known decisions in this state dealing precisely with the subject.

Attempts to secure these ends in other states have met with varying success. Probably the leading case on the point is the decision of the Supreme Court of Michigan in the case of Senefsky v. Lawler.\textsuperscript{13} It was there held that a zoning ordinance which required a minimum floor area of 1300 square feet was unreasonable and invalid as applied to a plaintiff whose building plans called for 980 square feet of usable floor space.\textsuperscript{14} The decision

\textsuperscript{13}307 Mich. 728, 12 N. W. (2d) 387, 149 A. L. R. 1433 (1943). Bushnell, J., wrote a dissenting opinion concurred in by Butzel, J.

\textsuperscript{14}An analogous situation in this state would probably be found only in communities located in resort areas where housing accommodations are usually of temporary character. Very few persons, in average residential areas, would desire a reduction in minimum area requirements.
cannot be said to stand for the proposition that all minimum standards are invalid, for the court was careful to note that a very substantial portion of existing dwellings in the area did not measure up to the ordinance there sought to be applied, that a large number of vacant lots would be materially restricted, and that there was uncontradicted testimony to the effect that "there were a lot of people who wanted to build smaller houses and they couldn't build them after the ordinance was enacted." It further appeared that plaintiff's contemplated structure would be in as full accord with the requirements of public safety, health and welfare, as one having a larger area of floor space. The majority were content to order the issuance of a building permit, saying it was not "necessary for decision . . . and we do not hold that under proper circumstances a municipality may not exercise its delegated police power" in the manner there attempted.

The dissenting opinion of Judge Bushnell is even more forceful on the point. He wrote:

This question of minimum floor area is one of first impression in this State. At the outset, we are confronted with the elementary propositions that every intendment is in favor of the constitutionality of an ordinance and the plaintiff must bear the burden of showing that the one in question has no real or substantial relation to public health, morals, safety or general welfare . . . [The] power to zone is not limited to a protection of the status quo, and the city may validly plan its future development . . . [Ordinances] having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children . . . the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property . . . are within the proper ambit of the police power . . . The legis-

16 307 Mich. 728 at 742, 12 N. W. (2d) 387 at 390.
lative authorities in the City of Huntington Woods are better acquainted with the necessities of their city than we are. They are also better able to determine whether the ordinance in question will accomplish the desired result of stabilizing and preserving property values. We cannot say that the requirement is clearly unreasonable because, under the circumstances, it is at least a debatable question. Whether or not the means adopted by defendant City will accomplish the desired end is also debatable. That being the case, we cannot substitute our judgment for that of the legislative body which is charged with the responsibility of deciding that question. 17

Viewed in that light, the decision in the Senefsky case is not conclusive even though it appears to have been followed in two later decisions from the same state. 18 In the most recent of these, that of Elizabeth Lake Estates v. Waterford, 19 the primary reason for nullifying the minimum floor area requirement, there fixed at 500 square feet, appears to have been the fact that the township ordinance in question applied to only two square miles out of the total thirty-six square miles in the township, the balance being left unzoned. When it is remembered that the Michigan statute is not nearly as broad as the one found in this state, 20 and that there is at least tacit recognition in the Senefsky case for some minimum standard, although perhaps not as high as the

20 Mich. Comp. Laws 1929, Vol. 1, § 2634, provides: "The legislative body of cities and villages may regulate and limit the height and bulk of buildings hereafter erected, and regulate and determine the area of yards, courts, and other open spaces, and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Such regulations shall be uniform for each class of buildings throughout each district, but the regulations in one (1) district may differ from those in other districts. Such regulations shall be made in accordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development." See also Mich. Stat. Ann. 1936 § 5.2932.
1300 square feet there required, the way is still left open for some form of regulation.21

Similar questions have been considered in other states. The Nebraska Supreme Court, in Baker v. Somerville,22 reversed a trial court decree which had enjoined the defendants from proceeding with the erection of a one-story home containing approximately 1500 square feet of floor space as being in violation of a city ordinance placing a minimum of 2000 square feet on one-story residences. The zoning provision was extended to cover defendants' property after the lot had been purchased, after a building permit had been obtained, and after some $5,600 had been invested in the partially completed structure. It seems to have been conceded that the purpose of the ordinance was to discourage the construction of one-story residences in an area where other homes were two stories in height. The upper court not only refused to give the ordinance retroactive effect but also declared that a zoning provision could not be sustained on aesthetic grounds alone as such would not "promote public health, safety, morals or the general welfare."23 Such language is clearly in accordance with general rules governing zoning regulations, but it would not necessarily render invalid the minimum floor area requirement, especially if the latter bore a reasonable relationship to the character of existing buildings in the area involved.

21 In the unreported case of Most v. Township of Southfield, decided in 1944, the Circuit Court of Oakland County, Michigan, upheld the ordinance quoted in note 1, ante, fixing a minimum floor area of 525 square feet, on the ground that there was no showing that the ordinance did not bear a reasonable relationship to the welfare, peace and public health of the community, the court declaring that the size of a building might have direct bearing on public health and welfare. Citation supplied by the Chicago Regional Planning Association. In the more recent case of Thompson v. City of Carrollton, 211 S. W. (2d) 970 (Tex. Civ. App., 1948), the plaintiff sought to enjoin the enforcement of a part of a city zoning ordinance which required a minimum floor area of 900 square feet. Plaintiff's application to build a home containing an area of 752 square feet had been denied. The Court of Civil Appeals, affirming the trial court, held that the section of the ordinance attacked was not unreasonable and that the minimum floor area requirement bore a reasonable relationship to the general welfare. It declined to hold that the case of Senefsky v. Lawler, 307 Mich. 728, 12 N. W. (2d) 387 (1943), was contra, referring to distinguishing language in the majority opinion and also quoting with approval from portions of the dissenting opinion.

22 138 Neb. 466, 293 N. W. 326 (1940).

23 138 Neb. 466 at 471-2, 293 N. W. 326 at 329.
As a matter of fact, the same court, in the later case of *Dundee Realty Company v. City of Omaha*,24 distinguished the earlier holding of the Baker case when it sustained the validity of an ordinance requiring a minimum area requirement of 1200 square feet for two-story dwellings and of 1000 square feet for one-story homes. After pointing out that the ordinance involved in the Baker case had been repealed subsequent to the decision therein and had been replaced with the one under consideration, the court went on to state that the case before it did not conflict with the earlier holding. It said:

The facts are not analogous. In that case, the engineer testifying to parts of the ordinance now repealed stated that the section in question was zoned purely for aesthetic reasons, while in the instant case the facts deal decisively with the welfare, morals and safety of the people of the city of Omaha . . . We hold . . . that such ordinance is not arbitrary or unreasonable, as applied to plaintiff's land, but is to the best interests of the city of Omaha . . . [and is] constitutional and valid.25

It may be said, then, that if an ordinance is predicated upon clear evidence of necessity in the interest of public health, safety, and the like, there is every reason to believe that it should withstand attack.

The Maryland Court of Appeals, in the case of *County Commissioners of Anne Arundel County v. Ward*,26 likewise sustained the denial of a writ of mandamus by which it was sought to compel the issuance of a building permit for the erection of several rustic cabins. The application for a license had been denied by the lower court for non-compliance with a county zoning ordinance which provided in part, that the area involved was to be "strictly residential . . . limited to one-family residences . . . no house shall be constructed to contain less than 3200 cubic feet." The

24 144 Neb. 448, 13 N. W. (2d) 634 (1944).
25 144 Neb. 448 at 455, 13 N. W. (2d) 634 at 637.
higher court, without commenting specifically on the subject of the cubic feet requirement, held that the denial of the permit was not arbitrary nor unreasonable.\textsuperscript{27}

A slightly different type of ordinance was involved in the Florida case of \textit{City of West Palm Beach v. State},\textsuperscript{28} for it directed that "every new building or structure must substantially equal that of the adjacent buildings or structures in said subdivision in appearance, square foot area and height." Upon complaint against the building inspector who had refused to permit the erection of a five-room house, that portion of the ordinance was declared invalid for the obvious reason that it provided no adequate standards to be followed by the administrative officer, the failure to specify a minimum floor area appearing to be the primary point for criticism. As the court itself observed, when regulations of this type are to be imposed in order to promote health, welfare, safety and morals "it is necessary that exactions be fixed in the ordinance with such certainty that they not be left to the whim or caprice of the administrative agency."\textsuperscript{29}

So far as height is concerned, it is not felt that any useful analogy could be made between the instant problem and cases in which minimum height regulations have been considered.\textsuperscript{30} For one thing, the present popularity of ranch-type houses and other one-story residences would seem to make obsolete decisions such as that in \textit{City of Mobridge v. Brown}\textsuperscript{31} which overthrew an ordinance prohibiting one-story buildings, obviously designed to prevent the spread of bungalows. In that regard a nip and tuck decision by the highest court of New Jersey in the case of

\textsuperscript{27}The court was likewise not convinced by the argument that the "technical violation of the regulations" should be excused in view of the "housing shortage." See 136 Md. 330 at 340, 46 A. (2d) 684 at 688. See also Potts v. Board of Adjustment, 133 N. J. L. 230, 43 A. (2d) 850 (1945), where an application to convert a single-family dwelling to a two-family apartment, because of the "critical housing shortage," was denied.

\textsuperscript{28}—Fla.—, 30 So. (2d) 491 (1947).

\textsuperscript{29}—Fla.— at —, 30 So. (2d) 491 at 492.

\textsuperscript{30}The case of Brown v. Board of Appeals, 327 Ill. 644, 159 N. E. 225 (1927), held invalid a provision of a zoning ordinance requiring that buildings in a certain business area had to be "not less than forty feet" in height. See also annotation on the point in 56 A. L. R. 247.

\textsuperscript{31}39 S. D. 270, 164 N. W. 94 (1917).
Brookdale Homes Incorporated v. Johnson is of more than passing interest, for it too dealt with an ordinance regulating maximum and minimum heights for buildings in residential areas. That ordinance specified that no building should be "erected to a height in excess of 35 feet" or "with its roof ridge less than 26 feet above the building foundation." It was held invalid, by a vote of seven to six, when the majority adopted and approved a lower court opinion attacking the minimum height limitation as an attempt to legislate a minimum cost.

An excerpt from the lower court opinion illustrates one side of the argument. That court wrote:

It is insisted that the presence of buildings less than 26 feet in height does not tend to conserve the value of property, but rather tends to reduce ratables and thus increase the general tax burden. The testimony of the single witness to that effect lacks persuasion. . . . But be that as it may, there is persuasive proof that there is a substantial demand for one story houses in the neighborhood and that the cost of construction of such houses may often be equal to, if not greater than, the costs of construction of two or two and one-half story houses. And, as pointed out for prosecutor, if respondents' theory be sound, a municipality under the cloak of its zoning power, might provide that no house costing less than a certain sum should be erected in a specified area. This it cannot legally do. For obviously such a provision or regulation could not properly be said to be made 'with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.' . . . No person under the zoning power can legally be deprived of his right to build a house on his land merely because the cost of that house is less than the cost of his neighbor's house.

33 It should be remembered that the Illinois Supreme Court, in Brown v. Board of Appeals, 327 Ill. 644, 159 N. E. 225 (1927), relied largely on the earlier New Jersey case of Dorison v. Saul, 98 N. J. L. 112, 118 A. 691 (1922).
34 123 N. J. L. 602 at 605-6, 10 A. (2d) 477 at 478.
THE UNDERSIZED HOUSE

The dissenting opinion written by Justice Heher, concurred in by five other justices, is much more persuasive. After commenting on the factual situation, the justice continued:

The classification in this respect is not unreasonable or arbitrary. I hold the opinion that the general zoning scheme takes the category of a reasonable regulation for public convenience, prosperity and welfare; and the particular provision is justly classable as an integral part of the plan. If, for reasons of public safety and the like, dwelling houses may be limited to a fixed maximum height, so also may a minimum height be prescribed if reasonably necessary to secure the use for which the land in the district is peculiarly suitable, considered from the standpoint of the community at large, and thus to conserve its character and value and promote the general prosperity and welfare. If not, dwellings even less in keeping with the character of the district, e.g., shacks and the like, would be unobjectionable. Can it be that our sovereignty is so circumscribed that one-room shanties may not be excluded from a community peculiarly suited to materially higher residential uses, and devoted to such, even though this radical departure will substantially depreciate property values and otherwise disserve the essential public interest? In this behalf, the difference between such structure and the common bungalow would seem to be one of degree merely and not of kind; certainly, such classification is not to be condemned as palpably unreasonable, arbitrary or oppressive. As said, we are not at liberty to nullify a legislative enactment unless its constitutional invalidity is not open to reasonable doubt. . . . Viewed as a whole, the regulations are designed, not for the special benefit of par-

35 The court said there was evidence "tending to show that the use thus prescribed, considered in relation to the character and location of the land, and the existing dwelling houses and the general zoning scheme, is the most appropriate and suitable; and that the erection of the banned bungalow type of structure upon the vacant land in the district would result in a depreciation of land values and a reduction of ratables to a degree materially affecting the public welfare. Respondent is the owner of 'undeveloped' land in the district to the extent of 'about 3000 feet frontage'; and it is proposed to use these plots, in large part at least, for the erection of bungalows to meet a 'demand for all living rooms on one floor.'"
ticular landowners, but for the material advancement of the entire community as a social, economic and political unit. It would seem that identical reasoning can well be applied with respect to minimum floor area provisions.

While regulations of this character have not received entirely favorable treatment at the hands of courts, there is enough to indicate that if they are not applied in arbitrary fashion to existing conditions, nor made invalid by retroactive features or lack of suitable standards, there is some occasion to believe zoning restrictions of the kind in question may be upheld in Illinois. Municipal officers, then, should be realistic and fortify their intended action with adequate data assembled in advance to meet constitutional attack. Before adopting such an ordinance, a survey should be made of existing residences in the area to be zoned. That survey should include not only the over-all size of the buildings but the size of the room units as well. It might even be wise to establish tables of valuation to show how taxables might be affected by the erection of incompatible structures. From such data, a reasonable and proper minimum area requirement could then be calculated consistent with the realities of the situation. So fortified, it is doubted that authority for the adoption of such a plan would be denied to the municipality. To hold otherwise would mean that municipalities would be powerless to prevent the erection of one, two or three room shacks in well-to-do neighborhoods so long as the former met the bare structural requirements of a municipal building code.

36 126 N. J. L. 516 at 527, 19 A. (2d) 868 at 873.
39 City of West Palm Beach v. State, — Fla. —, 30 So. (2d) 491 (1947).
40 See, in support thereof, County Commissioners v. Ward, 186 Md. 330, 46 A. (2d) 648 (1946); Dundee Realty Co. v. City of Omaha, 144 Neb. 446, 13 N. W. (2d) 634 (1944).
41 It is believed that a stronger case for minimum floor area requirements can be made out under the zoning powers granted by Ill. Rev. Stat. 1947, Ch. 24, §§ 73—1 to 73—10. The possibility that a building ordinance might find approval as a proper exercise of the police power, in the light of the decision in Moy v. City of Chicago, 309 Ill. 242, 140 N. E. 845 (1923), should not be overlooked.
DISCUSSION OF RECENT DECISIONS.

CONTRACTS—REQUISITES AND VALIDITY—WHETHER OR NOT CONTRACTS DESIGNED TO LIMIT VENUE IN PROCEEDINGS UNDER THE FEDERAL EMPLOYEES’ ACT ARE VALID—The appeal taken in the recent case of Akerly v. New York Central Railroad Company1 required the United States Circuit Court of Appeals for the Sixth Circuit to pass upon the validity of an agreement designed to limit venue in proceedings arising under the Federal Employers’ Liability Act. Plaintiff therein, a resident of Penn-

sylvania, was injured in that state while working on a locomotive owned by his employer, a New York railroad corporation. Subsequent to the injury, the railroad company made an advancement of a sum of money to plaintiff for living expenses, in consideration of which the plaintiff agreed in writing not to sue the railroad in any court outside the state where the injuries were sustained or outside the state where he resided at the time of the accident. Plaintiff did sue the railroad to recover damages for his injuries but brought the action in a federal district court located in Ohio, contrary to the terms of his contract. The defendant moved to dismiss on the ground of improper venue, supporting its motion by the agreement aforesaid, which motion was granted. On appeal by plaintiff, predicated on the argument that the agreement was void as a violation of Section 5 of the Federal Employers' Liability Act and was also lacking in consideration, the majority of the higher court reversed the decision of the trial court and remanded the cause for further proceedings. It found the agreement to be void on three grounds, to-wit: (1) that as the venue provision of the statute forms an inherent part of the employer's liability, any attempt to limit venue by contract amounted to an attempt to exempt the railroad from liability; (2) that public policy prohibits the enforcement of contracts which purport to limit access to the courts; and (3) that there was no consideration for the contract since the amount advanced was to be deducted from the amount of any final settlement.

It would appear that this is the first time that a federal court of the rank indicated has had occasion to pass on the validity of agreements of this character, although the issue has been raised heretofore and has been decided both ways, principally because of a difference of opinion as to the purpose intended by Congress when passing the statute in question. The problem arises over the meaning of the word "liability" as found in Section 5 of the statute. Was it designed to bear its usual

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2 45 U. S. C. A. § 55 provides: "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void..." Italics added.

3 The dissent by Miller, C. J., was based on the idea that the consideration was sufficient and the contract was not illegal as it did not affect the liability of the defendant nor tend to exempt it from paying damages.

4 45 U. S. C. A. § 56, fixing venue, declares in part that "an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

5 It is recognized that a contract lacking in consideration is unenforceable. For the purpose of this discussion, however, it is assumed that the contract in question was adequately supported by consideration. As to whether payment of a sum of money to be credited on an eventual recovery is sufficient consideration, see 13 C. J. S., Contracts, § 154, and cases there cited.
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connotation of responsibility to respond in damages or to possess some esoteric meaning? On the surface, at least, there would appear to be no reason for going behind the language of the act, nor is there any glossary provided with the statute fixing a special definition, so unless considerable judicial legislation is indulged in only contracts granting exemption from liability would appear to be banned. The contract in the instant case granted no such absolute exemption, hence did not fall clearly within the statutory prohibition.

It has been decided that the prohibition against contracts designed to exempt from liability does not apply to releases, but it is possible that Congress may have intended that Section 5 should apply to both contracts made before liability has accrued, that is to those designed to prevent it from ever arising, and to those made after the occurrence of injury but not made to operate as releases. The statute does not fix the time of making of the contract as the basis for testing validity, hence the prohibition should not be limited solely to invalidate contracts made before injury. But does it prohibit anything more than contracts designed to "exempt" from liability? Wherever there is liability the employer cannot escape by any contract short of a release, but is there warrant for giving strange meanings to the word "liability" so as to strike down agreements, whenever made, which leave liability to be determined?

A federal district court sitting in Illinois, in the case of Sherman v. Pere Marquette Railway Company, by taking parts of Sections 5 and 6 of the statute in question and adding them together, came up with the idea that an agreement of the type in question was invalid on the theory that the comprehensive phraseology of Section 5 included contracts the purpose or intent of which was to enable the common carrier to exempt itself from liability to suit if not entirely then at least in the district in which the defendant was doing business at the time of commencing the action.

Much the same idea was adopted by a majority of the judges of the Supreme Court of Utah in the case of Peterson v. Ogden Union Railway

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6 Callen v. Pennsylvania R. R. Co., 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 235 (1947). The court indicated that a release is not a device "to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility."

7 See, for example, Chicago & Alton R. R. Co. v. Wagner, 239 U. S. 452, 36 S. Ct. 135, 60 L. Ed. 379 (1915).


10 This concoction seems to have appealed to the majority of the court deciding the instant case, for it followed much the same recipe.
& Depot Company," only there the agreement was one not to sue in any court except the "District Court of the United States, Northern Division." That case presented a situation somewhat different from the one posed in the instant problem and also from that involved in the Pere Marquette case, in that the claimant was limited to suit in one federal court whereas the instant agreement allowed the claimant to sue in either a state or federal court anywhere in the state while the earlier federal case dealt with an agreement which named one state and one federal forum. Courts achieving the same result as that attained in the instant case, however, do not appear to have given much regard to such distinctions, being of the opinion that any restraint by agreement is improper. \\

At this point, it should be noted that while Section 6 is commonly referred to as a "venue" statute it is, in reality, more complex. It fixes venue for federal courts, as a federal statute can properly do, at the same time that it makes federal jurisdiction concurrent with that of equivalent state courts. It does not purport to fix the venue of state tribunals for that is a matter of state regulation. But it is unnecessary to go to Section 5 of the statute to determine which provisions of Section 6 may be the subject of valid contract and which may not. It is elemental that while jurisdiction cannot be conferred or waived by litigants, venue may be a matter of personal choice unless otherwise specifically prohibited by statute. Jurisdiction of state courts over proceedings under the Federal Employers' Liability Act may not be contracted away, any more than this is possible as to the federal courts. Venue provisions, however, whether in relation to state or federal courts may be made the subject of valid contract for there is no provision in the act to the contrary. Viewed in this light, the holding in the Utah case is correct even if the reasoning is unsound, but the same thing cannot be said of the other cases, including the instant one. If Congress wants to say that the venue provisions of Section 6 cannot be waived, it can do so. Until that time, courts should not interfere with private arrangements which violate no express legislative command nor undermine constitutional requirements.

Prior to the decision in Sherman v. Pere Marquette Railway Company, courts were having little difficulty with the question. They understood that the term "liability" as used in the Federal Employers' Liability Act commonly referred to as a "venue" statute it is, in reality, more complex. It fixes venue for federal courts, as a federal statute can properly do, at the same time that it makes federal jurisdiction concurrent with that of equivalent state courts. It does not purport to fix the venue of state tribunals for that is a matter of state regulation. But it is unnecessary to go to Section 5 of the statute to determine which provisions of Section 6 may be the subject of valid contract and which may not. It is elemental that while jurisdiction cannot be conferred or waived by litigants, venue may be a matter of personal choice unless otherwise specifically prohibited by statute. Jurisdiction of state courts over proceedings under the Federal Employers' Liability Act may not be contracted away, any more than this is possible as to the federal courts. Venue provisions, however, whether in relation to state or federal courts may be made the subject of valid contract for there is no provision in the act to the contrary. Viewed in this light, the holding in the Utah case is correct even if the reasoning is unsound, but the same thing cannot be said of the other cases, including the instant one. If Congress wants to say that the venue provisions of Section 6 cannot be waived, it can do so. Until that time, courts should not interfere with private arrangements which violate no express legislative command nor undermine constitutional requirements.

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11 110 Utah 573, 175 P. (2d) 744 (1946). But see the concurring opinion of Larson, Ch. J., and the dissenting opinion of Pratt, J., which appear to be much better reasoned than the majority one.


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Liability Act meant one thing, while concepts such as "jurisdiction" and "venue" meant something else. As early as 1936, for example, the Supreme Court of Minnesota, in Detwiler v. Lowden, held valid an agreement by an injured employee not to sue his employer except in the state of the employee's residence or in the state where the injury was inflicted. A federal district court sitting in the same state later came to the same conclusion, as did another federal court in Missouri. Even more remarkable, perhaps, is the fact that a different district court judge, sitting in the same federal District Court in Illinois, after the decision in the Pere Marquette case, held a similar contract to be valid despite the influence of the earlier decision.

It is unfortunate, then, that the first and only higher federal court holding on the subject has followed not only the weaker line of reasoning with its predeliction for judicial legislation but that it supports the earthy and unprincipled result that plaintiffs, with the approval of the judiciary, may now go "shopping for a judge or a jury believed to be more favorable" despite the terms of contracts freely made.

Grace Thomas Stripling

Corporations—Corporate Existence and Franchise—Whether Amendment to Articles of Incorporation Designed to Cancel Accrued but Undeclared Preferred Dividends on Cumulative Preferred Stock is Void as to Objecting Stockholders—The transition in economic levels from depression to war-born prosperity brought with it a problem which was dealt with, for the first time in Illinois, in the

19 The recognized judicial function of interpreting ambiguous statutes is far removed from writing laws to suit judicial beliefs: Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894).
21 Editorial Note: Since the foregoing material was written, the plaintiff's choice of a forum has been lessened considerably by the adoption of Section 1404(a) of the new Judicial Code, 28 U. S. C. A. § 1404(a). As to the application thereof to suits arising under the Federal Employers Liability Act, see Ex parte Collett, — U. S. —, 69 S. Ct. 944, 93 L. Ed. (adv.) 901 (1949). In the event Congress should amend the Judicial Code in this respect, the foregoing material may possess prime significance. See also, on the specific point concerned, the decision in Kringer v. Pennsylvania R. Co., 174 F. (2d) 556 (1949), where the Court of Appeals for the Second Circuit, Swan, C. J., dissenting, reached a similar result to that attained in the instant case.
recent case of The Western Foundry Company v. Wicker.¹ The problem grew out of the burden of accrued dividends which have accumulated on the cumulative preferred stocks of many corporations, thereby preventing the resumption of dividends on the common shares. In that case, the defendant was a minority shareholder of both cumulative preferred and common stock in the plaintiff corporation. Substantial accumulations had accrued on the preferred stock when the plaintiff attempted to amend its articles of incorporation, with the consent of two-thirds of the shareholders of each class of shares, so as to cancel all right of the preferred shareholders to the accrued but undeclared dividends by making changes in the corporate capital structure.² Defendant neither attended the stockholders’ meeting called to vote on the amendment nor voted in favor thereof, but frequently objected that the purported amendment was void. Plaintiff sought a declaratory judgment to establish the validity of the amendment, at which time the defendant counterclaimed for the payment of all dividends accumulated on the preferred stock prior to the amendment as well as for dividends declared subsequent thereto on both the preferred and common shares. The trial court found in plaintiff’s favor but the judgment was reversed by the Appellate Court for the First District when it held the amendment to be void insofar as it sought to cancel the accumulated unpaid preferred dividends. Leave to appeal having been granted by the Illinois Supreme Court, that court reversed the holding of the intermediate court and reinstated the decision of the trial court to the extent that it held the amendment valid.

The fundamental question as to whether or not it is possible, by forced amendment of the articles of incorporation, to cancel the right to accrued cumulative dividends has never before been decided in Illinois, either under the present Business Corporation Act or any prior statute. For that matter, while many different phases of the problem have been made the subject of extensive treatment in legal publications,³ there are

² The purpose of the amendment was to eliminate an operating deficit and to permit the resumption of the payment of dividends. It was to be made pursuant to authority allegedly contained in plaintiff’s articles of incorporation to the effect that “the corporation shall not, without the consent of the holders of at least two-thirds (%) in amount of the preferred stock of the corporation at the time outstanding... alter or change the preferences hereby given to the preferred stock... [But] subject to the limitations hereinabove set forth, the authorized capital stock of the corporation may be changed, the rights and preferences of the preferred stock may be changed” etc. Although the corporation was organized under the 1919 Act, the holding in the instant case clearly reflects what the attitude of the court would be to a problem arising under the present Business Corporation Act.
relatively few cases in the country where the attempt has been made to cancel such dividends outright, most of the cases involving voluntary exchanges of stock with loss of accrued dividends occurring only as an incident. Unlike its English counterpart, the Illinois corporation possesses only those powers which are clearly conferred upon it by statute, any ambiguity being resolved against it, hence the answer to the problem must be found, if at all, in statutory enactment which would require resolution of the subordinate problem as to whether any existing statutory provision should be given retroactive or only prospective operation.

While the provisions of Section 52 of the Business Corporation Act, dealing with amendment to the articles of incorporation, are generally quite broad, only one sub-section thereof is in any way germane. It permits the corporation, upon receiving sufficient approval from the shareholders, to change the "preferences, qualifications, limitations, restrictions, and the special or relative rights in respect of all or any part" of its shares. Although the statute makes no specific reference to dividends, the authority to change "preferences" among shares might be considered adequate for this purpose since one common form of preference between groups of shareholders is with respect to dividend payments. But while the authority may be present to change preferential


5 See, for example, Kreicker v. Naylor Pipe Co., 374 Ill. 364, 29 N. E. (2d) 502 (1940), where the corporation amended its charter to provide for the issuance of prior preferred stock with an option on the part of the existing preferred stockholders to exchange the preferred for the prior preferred. If exchange occurred, the stockholder waived the right to accrued dividends but the exchange was not compulsory and the shareholder who declined to exchange retained his right to the old stock with its accumulated dividends. The court held no vested rights were impaired, hence treated the amendment as being valid.


10 Ibid., § 157.52(g).
dividend features as to the future, that is far different from saying there is authority to do so with respect to the past.

The Delaware Corporation Act, although not a verbal duplicate of the Illinois statute, not only contains a substantially similar amendatory provision but one which is likewise lacking in expression as to retroactive operation. 11 When passing upon the application of this statute to a situation much like that found in the instant case, the Delaware Supreme Court once said that it "authorizes nothing more than it purports to authorize, the amendment of charters. The cancellation of cumulative dividends already accrued through passage of time is not an amendment of a charter. It is the destruction of a right in the nature of a debt, a matter not within the purview of the section." 12 The court, as a consequence, held the statute to be without retroactive effect.

Much the same view was exhibited in the Ohio case of Harbine v. Dayton Malleable Iron Company 13 where the court, dealing with a statute permitting changes in shares, 14 also regarded as illegal an attempt to cancel cumulative dividends. The Ohio legislature, however, realizing the problem and the necessity for its solution, soon thereafter amended the statute to add further authority to make changes in the corporate structure to the point where the change might include the "discharge, adjustment or elimination of rights to accrued undeclared cumulative dividends" on any class of shares. 15 Under a New Jersey statute, the funding or satisfying of dividends in arrears may be accomplished by the "issuance of stock therefor or otherwise." 16 Statutes of this character not only recognize the problem, which is more than can be said for the one in Illinois, but they also prevent rise of the claim that the right to dividends can be called a vested one, at least prior to declaration. As these statutes become part of the contract between the shareholder and

11 Rev. Code Del. 1935, Ch. 65, § 26. The statute authorizes amendment, among other things, by "increasing or decreasing its authorized capital stock or reclassifying the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value." See also Del. Corp. Law Anno., The Corporation Trust Co., Chicago, 1947, p. 151.


13 61 Ohio App. 1, 22 N. E. (2d) 281 (1939).

14 Page's Ohio Gen. Code Ann. 1938, § 8623-14, permits the corporation to amend the charter so as to change "issued or unissued shares of any class whether with or without par value into a different number of shares of the same class, or into the same or a different number of shares of any other class or classes with or without par value, therefore or thereby created."

15 Ibid., § 8623-14(1), added by amendment in 1939, reads: "... which change, if desired, may include the discharge, adjustment or elimination of rights to accrued undeclared cumulative dividends on any such class."

the corporation, the former cannot claim that to be vested which he has agreed shall be purely contingent.

Even if the Illinois act were broad enough to deal with the question, there is nothing in its terms to indicate any purpose to make it retrospective in operation. On that score, the Illinois Supreme Court once observed that no "rule of interpretation is better settled than that no statute will be allowed a retrospective operation unless the will of the General Assembly is declared in terms so plain and positive as to admit of no doubt that such was the intention. Retrospective laws, although they may be valid, are looked upon with disfavor, and an intention that laws shall have such operation will not be supposed unless manifested by the most clear and unequivocal expressions." 17 Despite this, the same court came to the conclusion in the instant case that what was essentially a retroactive charter amendment should be sustained. To accomplish that result, it had to reject the idea that shareholders' rights to accrued dividends could be said to be "vested" and, instead, was forced to treat the same as nothing more than a prospective "preference" subject to cancellation in the manner agreed upon.

It is true that no dividend or dividend right can be called "vested" prior to its declaration, 18 but is it true, as the court said, that non-declaration of cumulative preferred dividends merely enlarges the size or quantity but does not change the character of the contractual right of the shareholder? The average holder of cumulative preferred stock would think otherwise, regarding the passed dividend as his due but with its enjoyment temporarily postponed until more favorable times. It is at this point, then, that a clear break occurs between the instant case and other American holdings. One thing is certain, however, and that is that the Illinois Supreme Court has shown the way by which it will be possible to clear a backlog of arrearages on outstanding issues of cumulative preferred stock.

G. W. Hedman

Federal Civil Procedure—Parties—Whether Class Suit May Be Maintained Against One Defendant as Representative for Group of Non-Joined Parties Defendant on Claims Growing out of Legal Demands—A provocative challenge concerning the extent to which a fusion between law and equity has been produced by the Federal Rules of Civil Procedure grew out of the recent case of Montgomery Ward &

17 People v. Deutsche Evangelisch Luthersche, etc., Confession, 249 Ill. 132 at 137, 94 N. E. 162 at 165 (1911).
18 Beers v. Bridgeport Spring Co., 42 Conn. 17 (1875).
Company, Inc. v. Langer.\(^1\) The plaintiff there sued Langer and some seventy-one others in the United States District Court sitting in Missouri\(^2\) to recover damages for an alleged libel. The individual defendants were sued as individuals, as members of a national labor union and one of its locals, and also as representatives of the entire membership of the unincorporated associations.\(^3\) The union organizations, not being sui juris in Missouri, were afterwards dropped as parties and the remaining defendants moved to dismiss the complaint on the principal ground that a complete diversity of citizenship did not exist. The District Court, when considering the motion, passed over the stated ground, proceeded to examine into the right of the plaintiff to bring a class suit, and concluded that Rule 23(a)(1) of the Federal Rules was not applicable to an action at law. When plaintiff chose not to amend the complaint to divest the case of its representative character, the action was dismissed. On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, that court, by a unanimous holding, reversed and remanded the cause, treating the class action device as being applicable to the entire field of civil litigation coming before the federal courts. It said, in part, that if "courts will disregard the ancient and often arbitrary distinctions between actions at law and suits in equity and will permit the Rule to operate in all cases to which it justly and soundly may be applied, it will serve its intended purpose."\(^4\)

Although the device of the class or representative suit was developed by equity and was not, heretofore, available for use in law actions,\(^5\) no serious issue can be taken with the interpretation given to Rule 23 by the court from the technical standpoint, however novel its effect may be. Not only did the enabling statute empower the United States Supreme Court to prescribe rules for the district courts so as to secure one form of action for law and equity,\(^6\) but the rules so adopted were expressly declared to be applicable to all civil actions, with certain exceptions not

\(^{1}\) 168 F. (2d) 182 (1948). Johnsen, J., wrote a specially concurring opinion.

\(^{2}\) Jurisdiction was founded on diversity of citizenship.

\(^{3}\) The basis for a class suit was said to be Rule 23(a)(1) of the Rules of Civ. Pro. for U. S. District Courts, 28 U. S. C. A. foll. § 723c, which provides: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it."

\(^{4}\) 168 F. (2d) 182 at 187.


here involved. The letter of transmittal accompanying the rules indicated a deliberate purpose to provide but one form of action in the federal courts for suits heretofore designated as being in law or equity. In addition, the advisory committee, in a note to Rule 23(a), observed that while the same was a substantial re-enactment of former Equity Rule 38, which also dealt with representative suits, the revision was intended to apply "to all actions, whether formerly denominated legal or equitable." There is ample basis, therefore, at least on paper, for the instant holding. But declaring that a class suit can be maintained in a law action is one thing; making the principle work is another. The court has raised the cover of a legal Pandora's box from under which the "misery and evils" that confronted Epimethus will be deemed mere trifles compared to those that can harry a legal scholar as he considers the effect of a judgment in personam rendered as at law in a suit brought against a class of defendants.

Once the question of whether a class suit will lie on legal demands is answered affirmatively, the specially concurring opinion rendered by Judge Johnsen in the instant case becomes of greater interest than the main opinion, particularly because of his comments with respect to the usefulness of any judgment which may be rendered therein. He first notes that, as a matter of Missouri substantive law, members of non-profit associations are not liable for the tortious acts of their officers or of other members in the absence of proof of authorization, ratification, or participation. Second, he states that pecuniary liability cannot attach, as a result of the judgment, against those defendants not personally before the court. But he indicates the judgment might be helpful, third, in reaching the association's assets, and fourth, that it could probably serve to foreclose all questions against the membership as a group, leaving only the need to bring separate actions against the several members of the class wherein the issue could be limited simply to the question of their participation in, or authorization or ratification of, the conduct held actionable.

A seemingly fundamental defect in the plaintiff's case ought to be examined at the outset before considering the indicated consequences of a judgment, if one were rendered against the defendants. The plaintiff sued all of the members of the union as a class, presumably on the theory

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7 The exceptions referred to in Rule 1, 28 U. S. C. A. foll. § 723c, could not apply to class actions.
that the right sought to be enforced against the class was a joint one.\textsuperscript{10} Yet it does not appear that a truly joint right actually exists among members of an association such as the one in the instant case. At most, the defendants there were no more than alleged joint tort-feasors for their association was not organized for profit and had no other legal status. Being no more than joint tort-feasors, no jural relationship was present among them which could be termed joint in the sense in which that term has been applied as a prerequisite to the bringing of a class suit.\textsuperscript{11} Joint tort-feasors cannot be considered to be essential parties to an action brought against any one of them for they are, usually, severally liable and may not, in the absence of statute, get contribution from one another. Unless the doctrine has now been developed that any group of allegedly joint tort-feasors may be sued as a class, if sufficiently numerous and joinder would be difficult, it is hard to believe that the defendants in the instant case are members of a class as is contemplated by the rule in question.

Supposing for the purpose that they are, consideration must then be given to that which will follow in the wake of a judgment against the class. What, first, of pecuniary liability? Judge Johnsen remarks upon the fact that no jurisdiction to enter a personal judgment against the class defendants existed under former Equity Rule 38. If this be true, and in view of the fact that the new rules were not designed to “change previous jurisdictional concepts,”\textsuperscript{12} the federal courts would not now possess the necessary jurisdiction to pronounce a binding judgment \textit{in personam} against the represented defendants. There is a complete absence of case law on this precise point, either in support of, or in opposition to, the judge’s contention. While some actions of legal character involving the doctrine of virtual representation have been maintained in code jurisdictions, not one of them was an action designed to recover money damages against the class defendants.\textsuperscript{13} In addition, a reading of the textual authorities is no more profitable. At best, the comments are inconclusive;\textsuperscript{14} at worst, the question is disregarded.\textsuperscript{15}

\textsuperscript{10}The principal opinion so regarded it: 168 F. (2d) 182 at 187.
\textsuperscript{11}It is here assumed that the reference in Rule 23(a) (1) to a “joint” right is designed to follow the pattern established under former Equity Rule 38. There the joint factor was determined from the presence of jural relations among the members of the class: Moore, Federal Practice (Mathew Bender & Co., Inc., Albany, N. Y., 1938), Vol. 2, p. 2235. That author rejects the need for a joint proprietary interest or for the presence of a common fund, indicating rather that the true class suit should be one wherein, but for the class action device, the “joinder of all interested persons would be essential.” Ibid., p. 2236.
\textsuperscript{12}See 28 U. S. C. A. § 723b.
\textsuperscript{13}The cases are collected in 39 Am. Jur., Parties, § 46, note 20.
\textsuperscript{14}See, for example, Moore, op. cit., p. 2283 et seq.
\textsuperscript{15}39 Am. Jur., Parties, §§ 44 and 52.
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probably because of a universally accepted attitude, prior to the codes, that representative suits against class defendants were only to be brought in equity concerning some res over which the court could extend its power and to which it was obliged to confine the decree.

There being no precedent on the particular question, it becomes necessary to examine into the general nature of judgments *in personam*. It is elementary, in fact it is a substantive right of every litigant, that no tribunal shall have the power to make a binding adjudication as to the rights *in personam* of the parties except where it has acquired jurisdiction over them by due process of law. The due process required when the proceeding is strictly one *in personam*, that is one brought to determine personal rights and obligations, demands either valid personal service or a voluntary appearance in the cause. Such being the case, it can hardly be said that pecuniary damages can be assessed against the class members in a representative suit, especially if they are present in the litigation only by virtue of a rule of procedure not designed to modify substantive rights. The class defendants in the instant case were not personally served nor did they voluntarily appear. Therefore, if the traditional elements of due process in personal actions are to remain unaffected, it would appear that the same have not been satisfied in a suit such as this one.

Professor Moore, working with the Advisory Committee who drafted the rules in question, sought to obviate uncertainty as to the efficacy of a judgment in a suit brought within the framework of Rule 23 by specifically declaring the several effects thereof. He proposed, under Rule 23(a)(1), that the judgment should be conclusive against and binding upon the entire class, but his proposal was rejected by the committee as amounting to a substantive change in the law. The decision to reject such proposal was sound in the light of the enabling statute, but even if it had been the opposite way there would still be occasion to question the worth of such a judgment. As one learned authority has said, a judgment at law "disconnected from the right to issue execution, would be so idle and worthless a record that we can scarcely conceive that its creation would be encouraged, or its existence tolerated."

If the judgment would not impose pecuniary liability on the members

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18 Moore, op. cit., p. 2283 et seq.
of the class, can it then truly be the "helpful step" which the specially concurring opinion suggests it would be to reach the association's assets? The judgment being a nullity as to the personal estates of those before the court merely as a class, it would seem to be a non sequitur to say that the assets of the association would be subject to execution on such a judgment, particularly where the association is not suable as an entity. At most, only so much of the assets as represents the interests of those personally before the court might be levied upon, and even this is doubtful. The interests of individuals who compose an unincorporated nonprofit association are peculiar in the law. It has been said that by becoming a member a person "ordinarily acquires, not a severable right to any of its property or funds, but merely a right to the joint use and enjoyment thereof so long as he continues to be a member." Since the right of any individual is not severable, it is probably immune from execution although, comparable to the share of a partner, it might be subjected to equitable processes.

Difficulties would likewise arise if the judgment were to be employed as the basis of a suit in attachment to reach funds in the hands of the association. The tort claim has been reduced to a liquidated obligation only as to those members of the class personally under the court's jurisdiction. So far as the rest of the membership is concerned, the plaintiff has only a professed right to sue them in tort, a claim which would hardly support an attachment against their interests. The class judgment, then, would settle few problems as to pecuniary liability:

Would such a judgment serve to minimize future proof by foreclosing all questions except those relating to participation, authorization, or ratification by other members of the class when the latter are sued in separate actions? Here again, there is uncertainty of success. The orthodox view has been that a judgment in a law action is res judicata only as to the immediate parties and their privies. The judgment being inadequate to impose pecuniary liability, it is difficult to see how other members, subsequently sued, would be estopped to deny facts established in the representative suit on any accepted theory of privity. The almost inescapable conclusion, then, is that any judgment which might be

20 7 C. J. S., Associations, § 27.
21 See Sec. 28 of the Uniform Partnership Act; 7 Unif. Laws Anno. 162.
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rendered in favor of the plaintiff would be worthless for all practical purposes, except as it might be used against those defendants over whom jurisdiction was established without the aid of the class suit device.

It must, in candor, be admitted that none of the questions posed by the instant case is amenable to a conclusive answer at this stage of the development of the rule. The very novelty thereof causes any proffered solution to be no more than speculation. But it is doubtful if the matter should be left to be worked out, as was suggested by the court, through a "case by case demonstration of what [it] is possible for the rule to do in actual practice." So many fundamentals of substantive principle are involved that nothing short of congressional action will serve. One commentator has suggested a revision which would make notice to all the members of the class a condition precedent to a class action, leaving the mechanics of the notice to be left to the discretion of the court concerned. Such a revision, if authorized by statute, would amount to a declaration of what should be deemed due process in class actions in personam and might serve to bind all members of the case whether they elected to file an appearance or not. If the judgment then pronounced were also declared to be conclusive only as to facts actually litigated and established, the possibility of individual injustice, as where there was a failure by those representing the class to raise a meritorious personal defence, would be prevented. Without implementation by such a revision, the present rule might as well be returned to its original service in connection with truly equitable matters for it is not yet a mechanism fully adapted for use with all civil actions.

D. C. AHERN

TORTS—INVASION OF PERSONAL SAFETY, COMFORT OR PRIVACY—WHETHER PUBLICATION OF PHOTOGRAPH WITHOUT PERMISSION CONSTITUTES VIOLATION OF RIGHT OF PRIVACY—Two recent federal cases, one arising in the District of Columbia and the other in Minnesota, renew interest in the question of the existence of a right of privacy. In the first of them, that of Peavy v. Curtis Publishing Company, the District Court for the District of Columbia had to rule on a case involving the unauthorized publication of plaintiff's photograph in conjunction with a satirical article appearing in a national magazine concerning taxicab drivers in the nation's capital where plaintiff was a woman taxicab driver.

25 168 F. (2d) 182 at 189.
The complaint contained two counts, one for libel and the other for damages flowing from the invasion of a claimed right of privacy. Defendant's motion to dismiss the complaint for insufficiency was readily overruled as to the libel count but, because the question of the existence of a right of privacy was an open one in the District,\(^2\) the court went to some length to establish that such a right did exist. In reaching that decision, the court, at least by implication, joined the bolder or, as described by some, the more enlightened courts\(^3\) which recognize a legal right of privacy independent of some property right, or implied contract, or breach of trust, a right which has been roughly described as the right to be let alone. The court stated that it is "time that fictions be abandoned and the real character of the injury be frankly avowed."\(^4\) The second case, that of *Berg v. The Minneapolis Star and Tribune Company*,\(^5\) was brought for an alleged wrongful publication of a news photograph taken of plaintiff during a recess in a court hearing between plaintiff and his wife over the custody of their children. It was alleged that plaintiff's right of privacy had been invaded to his humiliation and distress. The court there, however, denied recovery, quoting from the celebrated article on the subject by Warren and Brandeis to the effect that the "right of privacy does not prohibit any publication of matter which is of public interest."\(^6\) Although recovery was denied, it is of interest to note that the court did not discuss the necessity of finding one of the usual bases for the right of privacy but seemed to assume its independent existence.

A reading of the decisions dealing with the subject leaves an impression of substantial lack of uniformity in the reasoning employed to

\(^2\) But see *Peed v. Washington Times Co.*, 55 Wash. L. Rep. 182 (1927), decided by the Supreme Court for the District of Columbia, wherein the defendant newspaper published a picture that had been stolen from plaintiff. A demurrer to a complaint predicated on an invasion of the right of privacy was overruled.

\(^3\) Feinberg, "Recent Developments in the Law of Privacy," 48 Col. L. Rev. 713 (1948), discusses the growth of the law of privacy and notes a trend to recognize the existence of a right of privacy independent of either a property right, a contractual or a confidential relationship. See also Restatement, Torts, Vol. 4, § 867 and annotation in 138 A. L. R. 22.

\(^4\) 78 F. Supp. 305 at 308.

\(^5\) 79 F. Supp. 957 (1948).

\(^6\) Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 at 214 (1890). It was not until the publication of this article that the right of privacy was introduced and defined as an independent right and the distinctive principles upon which it was based were formulated. The Supreme Court of Georgia, in *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190 at 193, 50 S. E. 68 at 69 (1905), noted that, prior to 1890, "every case in this country and in England which might be said to have involved a right of privacy was not based upon the existence of such right, but was founded upon a supposed right of property, or breach of trust, or confidence, or the like, and that therefore a claim independent of a property or contractual right or some right of a similar nature had, up to that time, never been recognized in terms of any decision."
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support the right of privacy. Some recognize its existence only when property is involved, a contractual relationship can be implied, or when a relationship of trust can be established. A second group place recognition on a constitutional basis. Others say an independent legal right of privacy exists and seek no further for its support.

Indicative of the first view are decisions from England where the courts have long been hampered by the unfortunate dictum, pronounced by Lord Eldon in *Gee v. Pritchard*, to the effect that equity acts to protect only property rights. In *Prince Albert v. Strange*, for example, it was declared that the defendant could not be restrained from performing the acts he was doing simply on the ground that plaintiff's feelings would be injured thereby so long as no property right was being invaded. Still later, in *Pollard v. Photographic Company*, the court had to search for an implied contract before it could say that defendant's conduct amounted to an actionable breach. Much the same sort of reasoning was relied upon in the early New York case of *Roberson v. Rochester Folding Box Company*. There the court adverted to the fact that the law is not designed to remedy all evils so that if a right of privacy was to exist it would be a legislative function to create one. But such uncritical reliance on dictum has been condemned both by writers and courts.

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9 40 Ch. Div. 345 (1888).
11 The New York legislature was not slow to follow the hint. The present statute may be found in Cahill, Cons. Laws New York 1930, Civil Rights Law, Art 5, § 51.
12 Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 Harv. L. Rev. 640 (1916); Chafee, "The Progress of the Law—1919-1920," 34 Harv. L. Rev. 388 (1921); Long, "Equitable Jurisdiction to Protect Personal Rights," 33 Yale L. J. 115 (1923); W. B. G., "A Re-interpretation of Gee v. Pritchard," 25 Mich. L. Rev. 889 (1927); Walsh, "Equitable Protection of Personal Rights," 7 N. Y. U. L. Q. 578 (1930); Leflar, "Equitable Prevention of Public Wrongs," 14 Tex. L. Rev. 427 (1936); Bennett, "Injunctive Protection of Personal Interests—A Factual Approach," 1 La. L. Rev. 665 (1939); Oberfell, "Jurisdiction of Equity to Protect Personal Rights," 29 Notre Dame Law. 56 (1934). Case comments on the decision in Reed v. Carter, 268 Ky. 1, 103 S. W. (2d) 663 (1937), to be found in 51 Harv. L. Rev. 166 and 13 Ind. L. J. 416, are to the same effect, the latter one referring to the adherence to the dicta of Lord Eldon as "unintelligent." But see Simpson, "Fifty Years of American Equity," 50 Harv. L. Rev. 171 at 222 (1936), who states: "May not the repeated judicial statements that equity protects only rights of property involve something more than the uncritical acceptance of an old dictum of Lord Eldon? May not these statements be predicated on a deeper wisdom in the actual administration of justice through fallible human instruments than are the logically sound and humanly appealing arguments of modern legal scholarship?"

13 See, for example, Henley v. Rockett, 243 Ala. 172, 8 So. (2d) 852 (1942); Stark v. Hamilton, 149 Ga. 227, 99 So. 861, 5 A. L. R. 1041 (1919); Foley v. Ham, 102 Kan. 69, 189 P. 183, L. R. A. 1918C 204 (1917); Reed v. Carter, 268 Ky. 1, 103 S. W. (2d) 663 (1937); Itzkovitch v. Whitaker, 117 La. 709, 42 So. 228, 116 Am.
who have attacked the fundamental premise, still followed by some tribunals, 14 that preventative relief is not available to secure interests in personality where no property right is concerned. 15

Only two states have turned to constitutional provisions to find support for the right of privacy. The Missouri case of Barber v. Time, Incorporated 16 rests squarely on a provision in the bill of rights to the state constitution to the effect that all men have inalienable rights to life, liberty and the pursuit of happiness; 17 thereby obviating an earlier case which had striven to find a property right in a picture as justification for recovery. 18 The California case of Melvin v. Reed, 19 on the other hand, used two premises to support recovery, one founded on a similar constitutional guarantee, 20 the other treating the right as an incident to personality rather than arising from property. The infrequent reference in the cases to the constitutional right to pursue happiness is the more noteworthy as it has been passed over in all of the more recent decisions although the constitutional guarantee has been universally accepted in this country.

The third and more liberal attitude, recognizing an independent legal right attaching to every human being, whether property owner or not, is displayed in the decisions from the highest courts of eleven American jurisdictions 21 as well as in nisi prius decisions to be found

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15 In Kenyon v. City of Chicopee, 320 Mass. 528, 70 N. E. (2d) 241 (1946), the court pronounced Lord Eldon's dictum to be a "sweeping generalization" unsupported by any convincing reasons.

16 348 Mo. 1191, 159 S. W. (2d) 291 (1942).


18 In Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911), the defendant had demurred on the ground that the invasion of the right of privacy was not actionable unless accompanied by some injury to property or interference therewith. The court observed that plaintiff had an exclusive right to his picture on the score of it being a property right of "material profit."


21 Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945); Cason v. Baskin, 159 Fla. 31, 30 (2d) 635 (1947), and the companion case of Cason v.
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in Ohio and Pennsylvania. In each instance, fictional bases for recovery have been repudiated and no reference has been made to any constitutional guarantee. An actionable invasion has been said to occur in those states whenever there has been an “unwarranted appropriation or exploitation of one’s personality, the publicizing of one’s private affairs with which the public has no legitimate concern, or the wrongful intrusion into one’s private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.”

The weight of authority, to say the least, is favorable to that view.

Whether courts of appellate rank in Illinois would recognize a right of privacy remains to be seen. Should they desire to do so, they now have the advantage of a substantial body of precedent on which to rely. They could summon to their aid the same type of constitutional provision utilized in other states. They could conjure up property rights where none in fact exist. They might imply contracts in areas where the law of quasi-contracts would fear to trespass. They could, if they feared historical prejudices limiting common law writs, find a relationship of trust without a corpus, to meet the doctrine that equity acts only to protect property rights. They might insist that the problem is one for legislative cognizance only. But if they would stand with the growing majority, they would fearlessly proclaim that privacy is as natural a human right as is that of bodily security.

W. H. Brewster


WILLS—REQUISITES AND VALIDITY—WHETHER OR NOT CANCELLATION OF ONE OF TWO DUPLICATE ORIGINAL WILLS OPERATES TO REVOKE OTHER DUPLICATE ORIGINAL LEFT IN CUSTODY OF ANOTHER PERSON—The Illinois Supreme Court recently had occasion to determine a novel question in the law of wills when it reviewed the lower court holding in the case of In re Holmberg's Estate. The decedent there concerned had executed a typewritten original of her will as well as a copy, the copy being a carbon impression of the original instrument. Both were executed in conformity with statutory requirements. The decedent delivered the original to a friend for safekeeping but retained the executed carbon copy. Upon decedent's death, the friend filed the original instrument in the probate court and the person named to act as executrix filed a petition for probate. A few days later, the carbon copy was found in decedent's home and it, too, was filed. The carbon copy, however, had the word "void" written diagonally down the length of the first page so as to extend across each paragraph appearing thereon. The word "void," with the decedent's signature above and below it, was also written in large letters on the second page above the original attesting signatures. It was conceded that the superimposed writings were in the handwriting of the testatrix, and that the carbon impression also bore the legend "Copy." The Probate and Circuit Court, upon finding that both the original and the duplicate copy of the will and the inscriptions written thereon were executed by the decedent, declared the words so written on the carbon copy were effective to revoke the original instrument and therefore denied probate of the purported will. The proponents appealed from this order, thereby projecting the question as to whether an otherwise effective revocation of a will is to be deemed nullified by the continued existence, in the possession of another, of a duplicate original bearing no mark or evidence of revocation. That question was answered, for the first time in this state, when the Supreme Court, affirming the decision below, held that the cancellation of one of two duplicate originals operated to revoke the other will also.

Because of the novelty of the issue in Illinois, the court turned for

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1 400 Ill. 366, 81 N. E. (2d) 188 (1948).
3 The court decided that the defacement appearing on the duplicate copy would have been sufficient to cause a revocation if it had been placed on a single instrument executed by the testator.
4 A more complete discussion of other aspects concerning revocation and revival of wills, but exclusive of the question involved herein, may be found in Zacharias and Maschinot, "Revocation and Revival of Wills," 25 Chicago-Kent Law Review at pp. 185-215, 271-323, and in Vol. 26, pp. 107-55.
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support to those states that had previously had occasion to decide the question and had reached the conclusion that the revocation of a duplicate executed copy of a will might serve to revoke the original but that the destruction or loss of the duplicate original merely raises a presumption of revocation which is rebuttable and, therefore, becomes a fact issue. In the case of In re Martin's Will, for example, the testator executed duplicate copies of his will but destroyed the original which had been retained in his possession. Evidence introduced in the proceeding to probate the duplicate copy tended to show that the testator had destroyed the instrument in his possession because it was marred by ink spots. The court, admitting the copy to probate, said that the mere failure to produce the original of the testator's will did not serve to bar admission to probate of the carbon copy.

But the rule remains that when the testator can be shown to have had in his possession an executed copy of his will, and subsequently this copy is either found destroyed or cancelled or cannot be found at all, the presumption arises that the copy was destroyed animo revocandi. For this purpose, it makes little difference whether it is the original or the duplicate impression that has become lost, destroyed or cancelled. Thus, in the case of In re Wall's Will the testator kept the carbon

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5 In re Walshe's Estate, 196 Mich. 42, 163 N. W. 70 (1917); Manangle v. Parker, 75 N. H. 139, 71 A. 637 (1908); In re Lawrence's Will, 138 N. J. Eq. 134, 47 A. (2d) 322 (1946); Crossman v. Crossman, 95 N. Y. 145 (1884); In re Wall's Will, 223 N. C. 591, 27 S. E. (2d) 728 (1943); In re Estate of Bates, 286 Pa. St. 583, 134 A. 513 (1926); Combs v. Howard, 131 S. W. (2d) 206 (Tex. Civ. App., 1939); In re Wehr's Will, 247 Wis. 93, 18 N. W. (2d) 709 (1945).

6 Manangle v. Parker, 75 N. H. 139, 71 A. 637 (1908); In re Moore's Estate, 137 Misc. 522, 244 N. Y. S. 612 (1930).

7 In re Walshe's Estate, 196 Mich. 42, 163 N. W. 70 (1917); In re Breding's Estate, 161 Misc. 322, 291 N. Y. S. 750 (1936); In re Andriola's Will, 160 Misc. 775, 290 N. Y. S. 671 (1936).


9 40 N. Y. S. (2d) 685 (1943).

10 Snider v. Burke, 84 Ala. 53, 4 So. 225 (1888); Stuart v. McWhorten, 238 Ky. 82, 36 S. W. (2d) 842 (1939); In re Walshe's Estate, 196 Mich. 42, 163 N. W. 70 (1912); Manangle v. Parker, 75 N. H. 139, 71 A. 637 (1908); In re Lawrence's Will, 138 N. J. Eq. 134, 47 A. (2d) 322 (1946); In re Beaney's Estate, 62 N. Y. S. (2d) 341 (1946); In re Flynn's Estate, 174 Misc. 565, 21 N. Y. S. (2d) 571 (1940); In re Robinson's Will, 168 Misc. 545, 5 N. Y. S. (2d) 671 (1938); In re Breding's Estate, 161 Misc. 322, 291 N. Y. S. 750 (1936); In re Andriola's Will, 160 Misc. 775, 290 N. Y. S. 671 (1936); In re Moore's Estate, 137 Misc. 522, 244 N. Y. S. 612 (1930); In re Vogelsang's Will, 133 Misc. 395 (1928); In re Field's Will, 109 Misc. 409, 178 N. Y. S. 778 (1919); In re Schofield's Will, 129 N. Y. S. 190 (1911); Crossman v. Crossman, 95 N. Y. 145 (1884); In re Wall's Will, 223 N. C. 591, 27 S. E. (2d) 728 (1943); In re Dawson's Estate, 277 Pa. St. 168, 120 A. 826 (1923); Combs v. Howard, 131 S. W. (2d) 206 (Tex. Civ. App., 1939); In re Wehr's Will, 247 Wis. 93, 18 N. W. (2d) 709 (1945).

copy and gave the original to the scrivener of the will. When the original was filed for probate and it was found that the carbon copy was unaccountably missing, the court held this was sufficient to raise the presumption of revocation and, absent evidence to the contrary, the instrument was revoked. Conversely, in the case of In re Field’s Will, the testator had kept possession of the original instrument and its unexplained absence at death served to effect a revocation of the duplicate.

For that matter, the one-time existence of a number of executed copies of the will has not served to influence the court into modifying this position. Thus, in the case of In re Moore’s Estate, the unexplained absence of the original copy of the testator’s will, kept in his possession, was deemed sufficient to nullify two other duplicate originals left in the possession of others. The holding in In re Andriola’s Will would likewise indicate that all copies of the will, whether in duplicate or multiplicate, are to be looked upon as collectively one will and, while only one will is admitted to probate, all copies must be presented to the court for the duplicate or multiplicate copy is the alter ego of the original. The destruction or loss of a conformed copy of a will, on the other hand, does not raise the presumption of revocation any more than should the destruction or loss of an unsigned copy.

It has been said that the strength of the presumption that arises when the testator is known to have destroyed one copy of a will which has been executed in duplicate depends upon the fact situation. If he destroyed the only copy in his possession, the presumption of an intent to revoke would be strong. If he was possessed of both copies and destroyed but one, it would be weaker. If he altered one and then destroyed it, retaining the other entire, the presumption has been said to still hold although even more faintly. In Roberts v. Roberts, however, the testator first altered and then destroyed one copy of his will, both then being in his possession. The court held that, since the testator had both copies in his possession and could have revoked or

13 137 Misc. 522, 244 N. Y. S. 612 (1930).
15 In re Wehr’s Will, 247 Wis. 98, 18 N. W. (2d) 709 (1945).
16 Search reveals no case actually involving this point but that result would seem to be dictated by principle. As the unsigned copy is not a “will” for lack of execution, its destruction could hardly amount to a nullification of something it does not purport to be.
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destroyed both, the fact that he allowed one to stand was evidence of his intent to acknowledge the remaining copy as his will.

Upon precedent and principle, then, it appears that the instant case has been correctly decided. It may, however, be pertinent to observe that the questionable practice of executing duplicate wills might conceivably lead to results quite unintended by the testator. The design of such an individual is to achieve greater security thereby. In the event one copy is lost, he has another with which to replace it. But a testator who is ignorant of the legal effect to be given to the unexplained absence of a duplicate executed will which has been kept in his possession achieves not security but a result that may well be the opposite of his intended testamentary disposition. These possible results are not beyond the realm of probability; in fact, so possible do they become, that the careful attorney would do well to advise his client of the pitfalls that exist in executing duplicate wills. The suggestion is not made as a criticism of the principle of law involved nor of the presumption based thereon, for it is far more logical to presume that the testator intended to cause a revocation of his will when he destroys the only copy in his possession, or that he did destroy such copy with intent to revoke when its disappearance is unexplained by any act or word of his, than to believe the contrary. What is designed is a caution to the unwary testator to have greater respect for an executed duplicate copy of his will.

H. SILVERSTEIN
CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—WHETHER STATE ENFORCEMENT OF RESTRICTIVE COVENANTS VIOLATES FOURTEENTH AMENDMENT—State enforcement of a restrictive covenant designed to exclude Negroes from occupying a specified area on the south side of Chicago was sought in the case of *Tovey v. Levy*. Injunction was granted by the trial court on the ground that the restrictive agreement, voluntarily entered into between the several property owners, in no way violated state or federal constitutional provisions. On direct appeal to the Illinois Supreme Court because of the constitutional issues concerned, that court, deeming itself bound by the recent holding of the United States Supreme Court in *Shelley v. Kraemer*, reversed on the ground that judicial enforcement of restrictive covenants amounts to prohibited state action under the Fourteenth Amendment. The court found no vice in restrictive agreements themselves, nor regarded them open to objection if voluntarily adhered to. The question still remains open, then, as to whether a suit for damages for violation of such an agreement may yet serve to provide some legally coercive backing for their recognition.

CORPORATIONS—DISSOLUTION—WHETHER INSTITUTION OF STATUTORY PROCEEDING TO HAVE VALUE OF SHARES FIXED PREVENTS DISSenting SHAREHOLDERS FROM MAINTAINING ACTION IN EQUITY ON CLAIM OF FRAUD—The Appellate Court for the Third District recently had occasion, in the case of *Opelka v. Quincy Memorial Bridge Company,* to deal with the possibility of an election of remedies in a proceeding by minority shareholders to obtain relief against the corporation for a fraudulent sale of its assets. In that case, the stock held by plaintiffs was preferred as to assets to the extent of its par value, and cumulatively preferred as to dividends, there being substantial accrued unpaid dividends. The assets of the defendant corporation were purchased by the City of Quincy, pursuant to a reservation of power to recapture the franchise, which had originally been given to the city, on condition that

*Editorial note: A new section has been added to the CHICAGO-KENT LAW REVIEW in which recent Illinois cases, not considered worthy of a more extended treatment, are noted for the particular benefit of the Illinois lawyer as these cases appear to possess some novelty or significance to the law of this state.

1 401 Ill. 393, 82 N. E. (2d) 441 (1948).
2 The validity of such a covenant had been tested in the earlier case of *Burke v. Kleiman*, 277 Ill. App. 519 (1934), and had there been upheld. That decision, not referred to in the instant case, must now be regarded as overruled.
4 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).
1 335 Ill. App. 402, 82 N. E. (2d) 184 (1948).
the city apply the purchase money first to the retirement of the bonds, second to the preferred stock, and last to the common stock of the corporation. The plaintiffs claimed that the common stockholders were paid while they had been given nothing for their preferred. They alleged that there was a fund on deposit in the name of the corporation which could be used to pay their claims, but that the defendant corporation refused to do so. The question of election of remedies was brought about by the fact that plaintiffs, in order to prevent themselves from being legally presumed to have assented to the sale, had filed a statutory action under Section 73 of the Business Corporation Act, although they much preferred the equitable relief sought in the present action. The Appellate Court held that, in cases involving fraud and illegality, the remedy provided by Section 73 was not exclusive. The decision, first of its kind in Illinois, not only recognizes the need for more flexible relief than that provided by the statute but also eliminates the difficulty which previously arose from a failure to file an appropriate statutory action in sufficient time to prevent the operation of the automatic presumption of approval of the sale, at least in cases where fraud can be shown.

Injunction—Subjects of Protection and Relief—Whether Injunction May Be Obtained to Prevent Successive Breaches of an Installment Contract—The plaintiff in the case of Serafin v. Reid filed a bill in equity to enjoin defendant from breaching a written

2 Ill. Rev. Stat. 1947, Ch. 32, § 157.73. The material provisions of that statute indicate that in the event of a sale of all of the property or assets of a corporation, otherwise than in the usual and regular course of its business, "any shareholder who shall not have voted in favor thereof, may, within twenty days after the vote was taken, make written demand on the corporation for the payment to him of the fair value of his shares." The statute further directs that, in the event no agreement can be reached as to the worth of the shares, a suit is to be filed to determine the value thereof. That suit must be filed within a limited period of time or else, for failure to sue, the shareholder "shall be conclusively presumed to have approved and ratified the sale or exchange and shall be bound by the terms thereof." The motion to dismiss the instant case, granted by the trial court, urged that proceedings based on the statutory provision aforesaid had been providently instituted.

3 Plaintiffs asked that the fund on deposit and all other funds and property of the corporation be impressed with a trust for their benefit.

4 The case was not heard on the merits. As the ruling had been made on a motion to dismiss, plaintiff's allegations of fraud were regarded as true for the purpose of ruling on the motion to dismiss.

5 In Morris v. Columbia Apartments Corporation, 323 Ill. App. 292, 55 N. E. (2d) 401 (1944), the plaintiff did not proceed under Section 73 of the Business Corporation Act within the time specified but elected to maintain an action independent thereof. The court held that the statute created a conclusive presumption of approval of the sale which operated to preclude plaintiff in the action he did bring. It is difficult to see how, in a case in which only equitable relief would be adequate, a plaintiff shareholder could obtain that relief in the absence of a ruling such as the one in the instant case.

1 335 Ill. App. 512, 82 N. E. (2d) 381 (1948).
agreement executed by the parties therein under the terms of which the defendant, in consideration of plaintiff's forbearance to institute bastardy proceedings, agreed to pay plaintiff a weekly sum for the support and maintenance of their minor child. Equitable jurisdiction was invoked on the ground that successive suits at law would be necessary to enforce plaintiff's rights under the contract and would thereby give rise to an undesirable multiplicity of suits. After issues were joined on defendant's claim that the agreement had been obtained by duress, the trial court entered a decree finding not only that a specific sum was due to plaintiff but also enjoining the defendant from breaching the contract. On appeal, the Appellate Court for the First District reversed the decree saying that an adequate remedy at law could be had since the issues were simple, a determination of the suit would be res judicata, and there was no showing that the defendant was insolvent or that he would persist in refusing to meet his obligations under the contract. That court preferred that the issue as to validity of the contract be determined according to law, and by jury trial if requested, rather than under equitable principles. The question as to whether equity should take jurisdiction, in cases where a periodic sum is due under a contract and a refusal by the defendant to make payments might lead to a number of suits at law, has been the subject of controversy. In ordinary commercial transactions, the rule might well be one remitting the parties to available legal remedies. In the instant case, however, the question was more nearly one of child support. The court has acknowledged jurisdiction to order support in divorce and separate maintenance cases. Is there not, then, some propriety in assuming jurisdiction where paternity of a child born out of wedlock is admitted and the obligation to support is contractually acknowledged rather than judicially determined? The difference in the status of the parents should not be controlling.

INToxicating LiQuors—Licenses and Taxes—Whether Degree of Proximity of Licensed Premises to Public Buildings Is to Be Measured From Structure or Boundary of Land—In the case of Smith v. Ballas, arising in the Appellate Court for the Third District, the court was obliged to construe a provision of the Liquor Control Act which declares that no license "shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any

2 See, for example, Weininger v. Metropolitan Fire Insurance Co., 359 Ill. 584, 195 N. E. 420 (1935).
1 335 Ill. App. 418, 82 N. E. (2d) 181 (1948).
military or naval station." The petitioner-appellant had applied for a liquor license to conduct a business in petitioner’s building located 101 feet and 1 inch from a high school building proper but only 87 feet 8 inches from the nearest point of the real estate upon which the school building was located. The local commissioner denied a license, but the state commission, on review, ordered that a license be granted. The circuit court directed reinstatement of the decision of the local commissioner and, on further appeal, the Appellate Court affirmed the holding denying a license. The point specifically in issue called for construction of the phrase “within 100 feet of any church, school, hospital” or the like. A narrow construction would have limited the application of the statute to cases based on measurements drawn from actual structures standing on the land. The court preferred to find that the legislative purpose was to protect children, among others, while within the confines of the premises where they would be apt to gather and that this could be accomplished only by keeping taverns beyond a reasonable area to be measured from the boundary line of the property. An early English case on statutory interpretation furnishes the best guide to be followed in similar situations. The court there said that “the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.”

Limitation of Actions—Computation of Period of Limitation—Whether Time Runs From Loss in Gambling Transactions or From Time of Payment of Bet—Actions to recover money lost by gambling are not often filed. For that reason, there is unusual significance in the case of Holmes v. Brickey wherein the person who lost money gambling in a dice game filed a suit based on a statutory provision which permits the loser to sue within six months with a secondary qui tam action thereafter by any other person. The gambling transaction in question occurred on January 4th but actual payment of the money lost did not take place until two days later. Suit was instituted by the loser on July 5th next thereafter, being one day over the six-month period following the gambling transaction but one day before the end thereof with respect to the pay-

3 Heydon’s Case, 3 Co. 7a at 7b, 76 Eng. Rep. 637 at 638 (1584).
1 335 Ill. App. 390, 82 N. E. (2d) 200 (1948).
The trial court dismissed the suit on motion, but that holding was reversed on appeal when the Appellate Court held, seemingly for the first time, that no cause of action accrued until the money was paid. As the statute refers to the “losing and paying” of money or “delivering” of any other valuable thing, the decision appears to be obviously correct.

NEGLIGENCE—ACTIONS—WHETHER RES IPSA LOQUITUR DOCTRINE APPLIES WHEN INSTRUMENTALITY HAS PASSED FROM DEFENDANT’S CONTROL—

The question as to whether or not a plaintiff may rely on the doctrine of res ipsa loquitur in cases in which the defendant has relinquished control of the agency causing the harm at the time of the injury was considered in the recent case of Roper v. Dad’s Root Beer Company. The plaintiff was injured by the explosion of a bottle containing root beer left standing on a shelf in a self-service market. The record showed merely that the defendant’s truck driver placed such bottles either into the storeroom or into a display rack, from which they were taken by store employees to replenish stock removed by customers from the shelf. No evidence was presented as to when the bottle in question had been delivered or as to its subsequent handling. The Appellate Court for the First District held that res ipsa loquitur applied to carbonated beverages, even if the bottle was not under the control of the defendant at the time of injury, so long as the defendant had control at the time of the negligent act causing the injury. However, the court demanded, as a condition precedent to recovery, that the plaintiff show affirmatively the absence of intervening negligence in the handling of the bottle after it left the control of the defendant. As the plaintiff had wholly failed to comply with this condition, judgment for the defendant was affirmed. It would appear that this is the first time that an Illinois court has formulated such a requirement for previous applications of the doctrine of res ipsa loquitur to situations in which harmful foreign substances were found in bottles have been sustained even though defendants have objected that the injurious instrumentality had previously gone out of the control of their agents. Since

3 Ibid., Ch. 110, § 172(f), authorizes the use of such a motion when the cause of action “did not accrue within the time limited by law for the commencement of an action or suit thereon.”

4 The court referred to the holding in English v. Cannon, 17 Ill. App. 475 (1885), wherein it was decided that the delivery of a promissory note was not sufficient to give rise to a cause of action inasmuch as the maker was under no obligation to pay the same.

5 Compare with Mrowiec v. Polish Army Veterans Ass’n of America, 73 N. Y. S. (2d) 361 (1947).

6 Paolinelli v. Dainty Food Manufacturers, 322 Ill. App. 586, 54 N. E. (2d) 759 (1944), appeal den. 326 Ill. App. xiv, noted in 23 CHICAGO-KENT LAW REVIEW 69,
the courts have thus extended the doctrine of res ipsa loquitur, it seems only fair to require in return as a safeguard for the defendant that the plaintiff be required to show that the injury was not caused by intervening negligent or wilful acts. Such a doctrine cannot be considered contrary to established principles in tort cases and may be regarded simply as an extension of the requirement that the plaintiff must prove that he was in the exercise of due care and caution.

4 Dealt with a bone in certain soup mix; Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N. E. (2d) 739 (1943), involved paint in a milk bottle; Rost v. Kee & Chapell Co., 216 Ill. App. 497 (1920), concerned glass particles in milk. The dissent objected to application of res ipsa loquitur since defendant did not have control at the time of the injury. In Duval v. Coca-Cola Bottling Co., 329 Ill. App. 290, 68 N. E. (2d) 479 (1946), a mouse-in-bottle case, the “defendant, for practical purposes, had exclusive control of the bottle.”


Hanson v. Trust Co. of Chicago, 380 Ill. 194, 43 N. E. (2d) 931 (1942); Dee v. City of Peru, 343 Ill. 36, 174 N. E. 901 (1931); Illinois Cent. R. Co. v. Oswald, 338 Ill. 270, 170 N. E. 247 (1930); West Chicago St. R. Co. v. Liderman, 187 Ill. 463, 58 N. E. 387, 52 L. R. A. 655, 79 Am. St. Rep. 226 (1900); Aurora Branch R. R. Co. v. Grimes, 13 Ill. 585 (1852).
BOOK REVIEWS.


One undertaking to examine a real estate title must hold himself prepared to draw from all the corners of the law as he conducts his search through the chain of title. As a consequence it is not surprising to learn that no one has yet written a book which satisfactorily presents the entire field of title examination. The author of this work, however, states his purpose to be (1) to cover as fully as possible, in one fair-sized volume, the law relating to real estate titles (2) in a way that should be useful not only as a practical reference for lawyers familiar with real estate law but also as a guide for those who have less experience with such matters. By these two statements, one concerning what he will write and the other concerning how he will write it, the author has fairly indicated, as well as anyone could, the direction from which criticisms of his book might come.

As to the first, any attempt to list all the topics included would be impractical. Suffice it to say that the index of this volume alone favorably reflects the author's more than twenty years of service as a lawyer in the title business and the purposeful thoroughness of his workmanship. Only two shortcomings might be cited. First, the book fails to include any treatment of the use of the power of eminent domain or of condemnation proceedings based upon that power. This omission, in the face of the present interest in public housing and municipal development, might be regretted by some. The other lies in the lack of any systematic treatment of estates in land, whether present or future. What little that is said about such matters is only incidental to the discussion of the state of the law governing conveyances, mortgages, wills and liens. Although the author has privately expressed to this reviewer his dissatisfaction at stopping without more future interest material, the compromise was necessitated by considerations of space. With these two exceptions, there seems to be no aspect of Illinois law relating to real estate titles that is not stated, explained and documented with appropriate citation to statute or case.

On the other score, the author has always kept in mind the title examiner's point of view while developing the material for the book. Take the chapter on mortgage foreclosures as an example. One without experience in following a title through foreclosure proceedings will find that the
author has so grouped his topics that one can immediately grasp the outline of those aspects of the proceedings which will affect the title and can draw up therefrom a list of the steps to be considered in ascertaining the ultimate sufficiency of the proceedings. On the other hand, examiners with more experience will find that within the subdivisions of this topic the author explains in detail such mysteries as when the owners of paid notes should be joined as parties defendant to the proceedings, or the preference in rights of redemption from the foreclosure sale by judgment creditors as opposed to decree creditors. In his effort to make this a practical book for practical men, the author has, however, avoided the style of a practitioner's manual or a handbook for real estate men generally. The arrangement of materials has been carefully worked out to reflect the problems approximately as they would naturally occur to an examiner. Instruments of transfer or conveyance, for example, are discussed as they would be read, i.e., from the names of the parties down to the concluding acknowledgments. Judicial proceedings are described from the initial pleadings down to the mechanics of the last possible appeal. But in every case, matters extraneous to the problem of tracing title and determining marketability are omitted.

The utility of the approach just described may be questioned by some on the premise that (1) if this is a reference book for Illinois title examiners, and (2) if most of the title examining is nowadays done by title insurance companies, then (3) it follows that none but title guaranty men will find the work of interest. Actually nothing could be more wrong for, although title insurance has in many places replaced the attorney's opinion as the most convenient evidence of marketable title, the title insurance companies are by no means the only people who have an interest in knowing their way around in this branch of law. Every attorney who deals with titles, those who procure title insurance for their clients as well as those who serve as title examiners, can do a better job of protecting the interests represented if a reference book such as this is available. Knowledge of title law and skill in analyzing the objectionability of matters affecting titles should not be allowed to become the mysterious and exclusive art of the title guaranty companies. By equipping lawyers to deal more intelligently with the title insurance companies, the author has done no inconsiderable service to both groups. Whether he has made the most of this potential usefulness to the lawyer who ordinarily prefers to leave the primary responsibility for title examination to a title insurance com-

1 Perhaps this is just as well in view of the able examples of both types of books that have appeared in the recent past. See, for example, Kratovil, Real Estate Law (Prentice-Hall, Inc., New York, 1946), and Becker and Savin, Illinois Lawyers Manual (Callaghan & Co., Chicago, 1948).
pany may be questioned. It is this reviewer's wish that there might have been included more material explaining the subject of title insurance. Such matters as the nature of the title insurance contract, the extent of its coverage, the conditions under which liability thereon may arise and terminate are all interesting to most readers outside the circle of professional title men. More material on that aspect would greatly enhance the attractiveness of this already valuable volume.

R. D. Netherton.


A business man's death may prove to be of shattering effect so far as his business and his business associates are concerned; and this to say nothing of the catastrophic effect that death might well have upon the family fortune. Through the use of a proper estate plan, upsets consequent upon death can, to some extent, be eliminated. Essentially the problem is one to provide a reservoir of liquid assets so that the decedent's liabilities can be met without undue sacrifice to his estate from forced liquidation. The theme of this book is the role that life insurance can play in the preparation of an adequate estate plan. If the book be read and used with discrimination, it could prove to be of considerable value for it comments on four critical situations apt to affect the business enterprise. They are (1) compensation of the employer in the event of the loss of key personnel, (2) providing for the continuity of a solely owned business, (3) insuring some measure of success for a stock purchase plan in a closely held corporation, and (4) establishing the continuity of a partnership after the death of a partner.

The discussion is both stimulating and provocative but here, unfortunately, is coincidently both the bloom and the blight of the work. The author neither contemplated nor achieved an exhaustive study of all of the problems he conjures up. The discriminating reader will be stimulated and will desire to read more before he could feel competent to discuss, analyze, and suggest solutions for the problems his clients might well raise. But there is neither bibliography nor incidental citation of suggested reading material. In other respects the book fails to bear up too well under scrutiny. Two chapters appear to be almost entirely unre-

lated, being a discussion of employee benefit plans. There is a noticeable lack of lucidity at this point for the material is little more than a grouping of excerpts from the routine material likely to be found in the average insurance brochure. The accompanying forms may be of service to the lawyer, especially since they are designed simply to illustrate the discussion. In the hands of laymen, however, they invite disaster.

E. G. Robbins.


A mathematician, dipping his pen in whimsy, can write fantasies in prose and verse to charm the youthful. A political economist, tired of authoritative works, can write nonsense in so humorous a vein as to tickle the ribs of the aged. But both must go beyond the area of their more serious pursuits to achieve renown. Here is a lawyer-editor who accomplishes both fantasy and humor on the one hand and earnest treatise on the other, all in the course of one book; preparing a blend so fascinating as to charm while it also serves to instruct. The annual "headache" produced by the income tax burden here finds an analgesic treatment worth a hundred times the cost of the prescription.

On the serious side, the reader will find an introduction to a confused and irrational subject designed to help him understand the law rather than to provide the guide which leads to all the answers. It provides the background necessary to help evaluate the more desirable approach to basic concepts. It casts revealing light on attitudes, displayed by courts and officials, which ought not be overlooked by one confronted with a maze of perplexing verbiage provocative of unjust results and shot through with irrationalities. It sharpens attention to inconsistencies while it bears heavily on inequalities developed not only between legal theories but also between persons. It is timely but it is also timeless.

The obverse characteristic of this book, priceless among legal tomes, lies in its ability to clear the air like a fan turned suddenly on in a smoke-filled poker room. That simile is not unworthy of the author's own style for his humorous asides are filled with picturesque and pungent language, descending at times to the level of slang but more often revealing poetic

imagery of the highest caliber. He can write of the somnolent effects given by a reading of the Internal Revenue Code, adopt the jargon of the sporting world, pin-point ridicule until it sticks like a burr, or sharpen a phrase until the joke stands out like a gleaming diamond. The pun is not overlooked, nor the quip that rests on contrast. The laugh may be provoked by broad overstatement, or by the aptness of the simile. One is left impressed by the idea that it would be a shame to deprive the reader of the fun of finding the laugh come to his own lips. If, however, the reader would feel chagrin from being observed laughing to himself, he should be warned to read when alone. The book is "light" reading, but the term is emphasized for the illumination which the work casts not to reflect either its weight or its significance.

W. F. Zacharias


It is doubtful if a single lawyer exists who has not, at some time or another, been asked to explain the basic concepts governing the work to be performed by a corporate director and to supply some essential tips as to what the director may or may not do. If, to answer such a query, the lawyer feels impelled to furnish a documented opinion, replete with citations, he would receive no assistance from this little book for it contains no table of cases, no reference to standard authorities, nor even so much as a single footnote. But if the query originates from one who seeks only a general resume of the scope of his present, or contemplated, job as a director and who preferably wants that resume written in a conversational and non-technical style, then here is the book to recommend for his perusal. It is more nearly a handbook for the corporate executive than it is a text book for the lawyer, but it loses nothing in its effectiveness from being written without the use of the "ten-dollar" words that frequently mark more technical publications.

W. F. Zacharias

1 The reference, at p. 190, to the bite of the tax "beadle" evokes a curious thought. Does the author possess feet of clay after all? May unconscious error have fashioned the pun, when "beetle" was the word intended? C.f., also, "foresee" for "foresee" at page 347, and "forgo" for "forego" on page 274.

2 Talking of tax deductions, the author, at page 325, writes: "You can take off an automobile license but not a dog license. The difference, apparently, is that you run around in one and the dog runs around with the other; ergo, the last one is on him."

3 See, for example, at page 325, the following: "Congress finally made it clear, while millions of ordinary taxpayers waited with bated breath, that, in the interests of simplifying the Revenue Code, a subsidiary of a subsidiary of a domestic corporation should be eligible" for a credit for foreign taxes paid.

4 C.f., page 368, a "mouse hole angrily plugged with a bale of hay."