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# THE EFFECT OF ENCROACHMENTS AND PROJECTIONS UPON THE MARKETABILITY OF TITLE†

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The purpose of this article is to consider the effect of encroachments and projections on marketability of title to real property. As an introduction, and to supply some background on its nature, extent and limitations, marketability of title in general will first be discussed.

## MARKETABLE TITLE GENERALLY

In a sale of real property, a buyer's unconditional right to possession, and a title which is free of question or encumbrances, are both so crucial that if there is any reasonable doubt of either, the contract of sale will not be enforced against the purchaser.<sup>1</sup> A contract of sale implies a buyer's right to these, unless the parties stipulate otherwise.<sup>2</sup> The buyer may of course agree to take the property subject to a specified lease, and the tenant's possession thereunder, or to a mortgage, easement, restrictive covenant or other encumbrance, in which case the buyer's rights will be qualified accordingly.<sup>3</sup> Marketability of title will be discussed herein in the abstract, as if there were no overriding contractual stipulations relative thereto, and the reader must accordingly bear in mind that the rights of vendor and vendee in the abstract may, in a particular case, be varied by agreement.

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\* See Contributors' Section, Masthead, p. 271, for biographical data.

<sup>1</sup> See note 4 *infra*.

<sup>2</sup> *Baker v. Howison*, 213 Ala. 41, 104 So. 239 (1925); *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280 (1891); *Taylor v. Day*, 102 Fla. 1006, 136 So. 701 (1931); *Drake v. Barton*, 18 Minn. 462 (1872); *Master Laboratories v. Chestnut*, 154 Neb. 749, 49 N.W.2d 693 (1951); *Paradis v. Bancroft*, 97 N.H. 477, 91 A.2d 925 (1952); *Lounsbury v. Locander*, 25 N.J.Eq. 554 (Ct. Err. & App. 1874); *Vought v. Williams*, 120 N.Y. 253, 24 N.E. 195 (1890); *Rossum v. Wick*, 56 N.W.2d 770 (S.D. 1953); *Roos v. Thigpen*, 140 S.W. 1180 (Tex. Civ. App. 1911); *First Nat'l Bk. v. Laperle*, 117 Vt. 144, 86 A.2d 635 (1952); 4 *Williston, Contracts* § 923 (rev. ed. 1936); *Maupin, Marketable Title* 20, 767 (3rd ed. 1921); *Patton, Titles* § 30 (1938); *Davis, Marketability of Title in New York* § 50 (1916); 66 C.J. 845.

A contract to sell an undivided one-quarter interest in a contingent remainder, subject to a prior life estate, mortgages, etc., is not an agreement to transfer the vendor's right, title and interest, but an agreement to sell an interest in remainder free of all encumbrances against the property except those specified. *Bacot v. Fessenden*, 130 App. Div. 819, 115 N.Y. Supp. 698 (1st Dep't 1909).

<sup>3</sup> *Ibid.* And see p. 266 *infra*.

Specifically, a marketable title is one free of encumbrances and free of any right or interest in a third person which is incompatible with full enjoyment and ownership of the property. It has been defined as:

... one free from liens or encumbrances, and dependent for its validity on no doubtful questions of law or fact; a title either of record, or, if dependent upon facts extrinsic to the record, dependent only upon facts sure to be easily accessible at all times in the future to a vendee should his title at any time be attacked ... free from any reasonable objection ... of a character to insure ... quiet and peaceable enjoyment of the property ... defensible and saleable ... on the face of records as well as in fact.<sup>4</sup>

Marketability does not relate to good or bad titles as such, nor necessarily to defects of title. For instance, assume that A's title depends upon his being the sole heir of B and that he is such heir. Then his title is "perfect." But the title is "unmarketable" if there is reasonable doubt of this fact. Conversely, if A has a good record title, the title is marketable although it may be overthrown by facts *dehors* the record.<sup>5</sup>

Unmarketability at the time provided for delivery of the deed is not necessarily fatal in those cases where, by rule of law or agreement, the seller is entitled to a reasonable adjournment to cure defects or may satisfy an encumbrance from the purchase price.<sup>6</sup> After acceptance of deed, the buyer's rights are merged in the deed and are limited to the warranties, if any, contained therein except for any claim he may have for fraud or rescission.<sup>7</sup> A provision in the contract of sale for a quit claim deed does not affect the buyer's right to a marketable title.<sup>8</sup>

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<sup>4</sup> 57 A.L.R. 1253, 1284-1286 (1928). For good, short, well-annotated articles on the general subject of marketability of title see Jacobson, "Marketability of Title," 2 N.J.L. Rev. 27 (1935); Shepard, "Marketable Titles," 19 Case & Com. 747 (1913).

<sup>5</sup> The examples are from Maupin, *Marketable Title* 768-769. See also Patton, *Titles* § 29 (1938); Notes 57 A.L.R. 1253, 1282 et seq. (1928); 38 L.R.A. (N.S.) 1, 6 (1912).

<sup>6</sup> Maupin, *Marketable Title* 214.

<sup>7</sup> *Weller v. Fidelity Trust & S. V. Co.*, 23 Ky. L. Rep. 1136, 64 S.W. 843 (1901); *Leach v. Johnson*, 114 N.C. 87, 19 S.E. 239 (1894); *Smith v. Vehrs*, 194 Ore. 492, 242 P.2d 586 (1952); 42 W. Va. L.Q. 260 (1936); Patton, *Titles* § 24 (1938); 66 C.J. 809, 845-847. In the absence of fraud or mistake and except where the contract of sale creates rights collateral to or independent of the conveyance, acceptance of the deed is *prima facie* the completion of the contract and all stipulations therein. The cases conflict on whether a buyer's agreement, contained in a contract of sale, to assume a mortgage or other obligation is merged by the deed. See Notes, 84 A.L.R. 1041 (1933); 101 A.L.R. 281 (1936). A conveyance does not merge a builder's undertaking to erect a building. *Appell v. Comstock*, 118 N.Y.S.2d 634 (Sup. Ct. Orange County 1952) (and cases cited). For good discussions of which covenants are merged and which are "collateral" see *Lambert v. Krum*, 121 Misc. 170, 200 N.Y.Supp. 452 (App. T. 2d Dep't 1923); *Christiansen v. Intermountain Ass'n of Credit Men*, 46 Idaho 394, 267 Pac. 1074 (1928); Note 84 A.L.R. 1008 (1933); 27 R.C.L. 533. A provision in the contract making a particular covenant survive will be given effect. *Desz v. Lincoln S. Bk.*, 174 Misc. 263, 19 N.Y.S.2d 663 (App. T. 2d Dep't 1940).

<sup>8</sup> *Wallach v. Riverside Bank*, 206 N.Y. 434, 100 N.E. 50 (1912).

A buyer is not entitled to a title free of all suspicion or possible defect, because there is no such title.<sup>9</sup> Behind a good record title there is always the possibility of a forgotten heir, an unknown or secreted will,<sup>10</sup> neglected dower interest, bankruptcy and so on *ad infinitum*. Neither is a perfect record title indispensable. The records may be supplemented by extrinsic evidence.<sup>11</sup> This is not to say that title may rest on parol evidence<sup>12</sup> or on unrecorded deeds,<sup>13</sup> but lost, invalid<sup>14</sup> or unrecorded deeds can be replaced, cured or otherwise bolstered.<sup>15</sup>

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<sup>9</sup> *Levy v. Iroquois Bldg. Co.*, 80 Md. 300, 30 Atl. 707 (1894) (mere possibility of suit to set aside conveyance to vendor, on ground of undue influence); *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400, 402 (1871); *Norwegian Evan. F. Church v. Milhauser*, 252 N.Y. 186, 169 N.E. 134 (1929) (possibility of heirs appearing 60 years after title passed to state by escheat); *Bacot v. Fessenden*, 130 App. Div. 819, 115 N.Y. Supp. 698 (1st Dep't 1909), (possibility of issue of woman upwards of 69 years of age). But see *Peebles v. Garland*, 252 S.W.2d 396 (Ark. 1952) (where property was devised to a daughter for life and remainder to heirs of her body. The daughter, aged 70, and medically incapable of further issue, and her son, aged 24, were held incapable of conveying marketable title during the life of the daughter); *Maupin, Marketable Title 769 et seq.*; and see cases in 68 U. of Pa. L. Rev. 75, 76 n. 8 (1919); 20 Col. L. Rev. 768 (1920). The court "must govern itself by a moral certainty, for it is impossible in the nature of things, there should be a mathematical certainty of good title." *Lyddall v. Weston*, 2 Atk. 20 (1739). Similar expressions appear in the *First African M.E. Church v. Brown*, 147 Mass. 296, 298, 17 N.E. 549, 550 (1888); *Rawle, Covenants*, 405 (5th ed. 1887).

<sup>10</sup> Under the majority rule a devisee under a probated will may vest good title in a bona fide purchaser despite a subsequent revocation of probate by reason of forgery or otherwise. *Chastain v. McKinney*, 203 F.2d 712 (6th Cir. 1953); 26 A.L.R. 266 (1923). For the relative rights of purchasers from or through decedent's heirs, and devisees under a will subsequently sought to be established, see 22 A.L.R.2d 1107 (1952); 27 Mich. L. Rev. 509 (1928).

<sup>11</sup> *Aroian v. Fairbanks*, 216 Mass. 215, 103 N.E. 629 (1913); *Maupin, Marketable Title*, 794 et seq. (3rd ed. 1921); *Note*, 57 A.L.R. 1253, 1324-1325 (1928). The practice of accepting affidavits to cure apparent defects in title has been criticized, on the ground that such affidavits are not admissible in evidence and may be unreliable because the deponent is not subject to cross-examination. See *Lieherman, "Are Affidavits a Cure for Unmarketable Title?"* 2 N.J.L. Rev. 48 (1935). Nevertheless, the practice continues, partly because of the moral value of the affidavit, but principally because the alternative is a legal proceeding.

<sup>12</sup> *Walters v. Mitchell*, 6 Cal. App. 410, 92 Pac. 315 (1907); *Campbell v. Harsh*, 31 Okl. 436, 122 Pac. 127 (1912); *Maupin, supra note 7*, at 794 et seq.; *Note*, 57 A.L.R. 1253, 1284-1286 (1928).

<sup>13</sup> See *Note*, 57 A.L.R. 1253, 1472 et seq. (1928).

<sup>14</sup> *Maupin, supra note 7*, at 839-848 collects cases on marketability based on construction of deeds, competency of parties and powers of representatives and religious corporations to convey. See also *Notes*, 57 A.L.R. 1253, 1500-1501 (1928); 38 L.R.A. (N.S.) 1, 20-24 (1912).

<sup>15</sup> See *Note*, 57 A.L.R. 1253, 1501 (1928). Where an unrecorded deed has been lost, a suit lies in equity to compel the grantor, or after his death those representing his title, to execute another deed so as to clothe the grantee with record title. *Kent v. Church of St. Michael*, 136 N.Y. 10, 32 N.E. 704 (1892); 31 A.L.R. 552 (1924). A suit also lies to compel a

A reasonable hazard of litigation makes title unmarketable.<sup>16</sup> And if validity depends upon somebody in the chain being a bona fide purchaser without notice the buyer need not accept the title.<sup>17</sup> If the title is in litigation or the subject of controversy, it is unmarketable unless the pleadings indicate the claim is invalid or the adverse claim appears to be without color.<sup>18</sup>

Lack of marketability entitles B to the return of his down payment. The criterion of a marketable title does not vary with the form of action in which it is an issue. In a situation wherein title is sufficiently doubtful to impel a court of equity to deny specific performance to the seller, the buyer may recover his down payment in an action at law.<sup>19</sup> Cases involving instalment contracts are not inconsistent with this rule. They hold that a seller's right to instalments of the purchase price, agreed to be paid before closing of title, may be enforced when due, despite some removable infirmity of title, but when the time for delivery of the deed has arrived, the seller's right to any unpaid purchase price is conditioned upon his having a marketable title.<sup>20</sup>

The foregoing is not intended to state that a denial of specific per-

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grantor to re-acknowledge a deed defective in that respect. *Leavitt v. Thornton*, 123 App. Div. 683, 108 N.Y. Supp. 162 (2d Dep't 1908). For proof of a missing deed by circumstantial evidence see Note, 67 A.L.R. 1333 (1930). A correction deed may cure errors of description in the original deed or various irregularities. See generally "Joining in Instruments as Ratification of or Estoppel as to Prior Ineffective Instrument Affecting Real Property," 7 A.L.R.2d 294-355 (1949). A grantee in a correction deed acquires equitable title as of the time of the original conveyance. *Smyth v. Rowe*, 33 Hun 422, aff'd, 98 N.Y. 665 (1885). The correction deed generally prevails over the original deed even where the former is erroneous. *People v. Tompkins-Kiel Marble Co.*, 269 N.Y. 77, 199 N.E. 10 (1935); *Builders' Mortgage Co. v. Berkowitz*, 134 App. Div. 136, 118 N.Y. Supp. 804 (2d Dep't 1909); Schwartz, *Real Estate Manual* § 236 (1937); but see 45 *Yale L.J.* 1509 (1936).

<sup>16</sup> See Notes, 57 A.L.R. 1253, 1301-1309 (1928); 38 L.R.A. (N.S.) 1, 29-30 (1912). In *Loring v. Whitney*, 167 Mass. 550, 46 N.E. 57 (1897) P had conveyed by recorded deed in trust for P's wife and daughter. The trustee refused the trust and the wife and daughter released. In an action against a vendee for specific performance, judgment was given the vendee, on the ground that heirs might establish the trust sufficiently to make title unmarketable. A right of reverter makes title unmarketable despite the improbability of its coming into being. *McAndrew v. Lanphear*, 280 App. Div. 6, 111 N.Y.S.2d 238 (4th Dep't 1952). But the "hazard of litigation" does not refer to the possibility of ill-advised litigation, but of successful litigation by a third person. *Hoffman v. Perkins*, 3 N.J. Super. 474, 67 A.2d 210 (1949).

<sup>17</sup> Maupin, *Marketable Title* 817.

<sup>18</sup> Maupin, *supra* note 17, at 798-801; Schwartz, *Real Estate Manual* §§ 306, 307 (1937); Patton, *Titles* 907 (1938); Note, 57 A.L.R. 1253, 1309-1314 (1928).

<sup>19</sup> 134 A.L.R. 1064, 1081 (1941); 102 A.L.R. 852, 873 (1936); 59 A.L.R. 189, 223 (1929); *Moore v. Williams*, 115 N.Y. 586, 22 N.E. 233 (1889).

<sup>20</sup> Cf. note 6 *supra*.

formance to a seller imports a right of recovery in the buyer in situations where marketable title is not a factor, or not a determining factor. If, for instance, a buyer has made a down payment under a parol contract of sale of realty, seller may not obtain specific performance, because of the Statute of Frauds.<sup>21</sup> Yet the buyer cannot recover his down payment, because the seller is willing to perform.<sup>22</sup> A seller may be denied specific performance, despite a technically marketable title, because of violations affecting the premises.<sup>23</sup> At times there may be situations of hardship on the buyer, possibly due to some mistake on the buyer's part and which cannot be attributed to the seller, where equity will deny specific performance to the seller though recognizing the seller's right of action at law.<sup>24</sup>

### ADVERSE POSSESSION

For a good title to be acquired by adverse possession, it is necessary that the possession be actually adverse and for a period at least as long as the statutory period plus such additional time as may be necessary by reason of contingencies of remaindership,<sup>25</sup> infancy and other disabilities. Establishment of title by adverse possession puts a burden of proof on the claimant because his possession is presumed to be subordinate to the right of the record owner.<sup>26</sup> His possession is not adverse if

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<sup>21</sup> *Hefford v. Lichtman*, 116 Misc. 692, 698, 190 N.Y. Supp. 554, 558 (Sup. Ct. Erie County 1921) (and cases cited).

<sup>22</sup> *Keystone Hardware Corp. v. Tague*, 246 N.Y. 79, 158 N.E. 27 (1927). This is the general rule though a few jurisdictions are contra; see Note, 169 A.L.R. 187; 49 Am. Jur. 564.

<sup>23</sup> Compare *Hammer v. Michael*, 243 N.Y. 445, 154 N.E. 305 (1926) with *Kaloumenos v. Bottacio*, 67 N.Y.S.2d 527 (Sup. Ct. Kings County 1946), *aff'd*, 273 App. Div. 907, 77 N.Y.S.2d 286 (2d Dep't 1948).

<sup>24</sup> See *Quincy v. Chute*, 156 Mass. 189, 191, 30 N.E. 550, 551 (1892) where the court set forth the rule:

If we assume that the contract is good at law, it does not follow that it will be specifically enforced in equity. It is a universally recognized principle that a court of equity will not decree specific performance of a contract when it would be inequitable so to do. Specific performance may be refused when a contract is hard and unreasonable, so that enforcement of it would be oppressive to the defendant, or where there has been misrepresentation by the plaintiff on a material point, or other unfair conduct, although it may not be sufficient to invalidate the contract, or where the defendant has by mistake not originating in mere carelessness entered into a contract different from that intended by him, notwithstanding that there was no unfairness on the plaintiff's part. (collecting cases).

<sup>25</sup> A remainderman's right of entry does not accrue until termination of the prior estate. Until then the statute of limitations does not run against him. *Simis v. McElroy*, 160 N.Y. 156, 163, 54 N.E. 674, 675 (1899). Compare *Gedney v. Marlton Realty Co.*, 258 N.Y. 355, 179 N.E. 766 (1932).

<sup>26</sup> *Wenzel v. Conrad Schmitt Studios*, 244 Wis. 160, 167-168, 11 N.W.2d 503, 506 (1943); 2 C.J.S. 587; N.Y. Civ. Prac. Act § 35.

under leave of the record owner,<sup>27</sup> or without claim of right.<sup>28</sup> A title good by adverse possession may or may not be marketable. In litigation between a party in possession and the record owner, the former may have no difficulty in producing evidence sufficient to establish title by adverse possession, and the presence of the record owner as a party to the litigation permits a judgment which will be binding on the latter. But the same evidence may be insufficient to establish marketability of title in litigation between a party in possession and his vendee, because in this litigation the record owner cannot be bound and the evidence then available may not be available when the vendee should be called upon to defend his title. For these reasons there is a recognized distinction, in cases involving adverse possession, between those involving record owner and claimant and those involving buyer and seller.<sup>29</sup>

Titles by adverse possession have been held marketable and unmarketable in the same jurisdictions. They are marketable when held under color of title long enough to establish title under local law and to bar any reasonably possible claimant. The cases contra involve facts too doubtful to establish a decree against the vendee. Titles by adverse possession are not favored and the seller must show that the buyer will have the means to establish the title if attacked in the future.<sup>30</sup> If the

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<sup>27</sup> *Flora v. Carbean*, 38 N.Y. 111, 115-116 (1868).

<sup>28</sup> *VanValkenburgh v. Lutz*, 304 N.Y. 95, 106 N.E.2d 28 (1952). In *Sulk v. Tumulty*, 77 N.J. Eq. 97, 75 Atl. 757 (Ch. 1910) an owner had erected a building 28 years previously which encroached a few inches on adjoining property to which he had no paper title. He relied on an inaccurate survey, believing the building was within his boundaries. The court held proof of adverse possession was insufficient to require the buyer to take title. But in those jurisdictions in which "color of title" is not a prerequisite, one is not prevented from establishing adverse possession by the fact that his deed does not include the entire property claimed. *McNeely v. Ballard*, 220 Ark. 736, 249 S.W.2d 567 (1952); *Robert v. O'Connell*, 269 Mass. 532, 169 N.E. 487 (1930); *Sherry v. Frecking*, 4 Duer 452 (N.Y. 1855); Ballantine, "Claim of Title in Adverse Possession," 28 Yale L.J. 219, 223 (1918); 2 C.J.S. 589. For a recapitulation of the statutes and the various requirements among the states, such as color of title, etc., see Taylor, "Titles by Adverse Possession," 20 Iowa L. Rev. 551, 738 (1935).

<sup>29</sup> *Simis v. McElroy*, 160 N.Y. 156, 161, 54 N.E. 674, 675 (1899); *Kielbinski v. Sitko*, 194 Misc. 408, 410, 87 N.Y.S.2d 277, 280 (Sup. Ct. Kings County 1949).

In litigation between vendor and vendee there is a similar reluctance to adjudicate the continuing vitality of restrictive covenants where all parties who might be affected by the restrictions are not before the court. See *Kittinger v. Rossman*, 12 Del. Ch. 228, 110 Atl. 677 (Ch. 1920); *Jeffries v. Jeffries*, 117 Mass. 184 (1875); *Sharpe v. Stretch*, 98 N.J. Eq. 225, 130 Atl. 231 (Ch. 1925).

<sup>30</sup> See *Keepers v. Yocum*, 84 Kan. 554, 114 Pac. 1063 (1911); *Ziegler v. Vickers*, 84 A.2d 65 (Md. 1951); *Berger v. Gerry*, 64 N.J. Eq. 263, 53 Atl. 483 (1902); *Shriver v. Shriver*, 86 N.Y. 575 (1881). Cases pro and con are collected in Maupin, *Marketable Title* 805-814; Davis, *Marketable Title in New York* § 322 et seq.; Notes, 57 A.L.R. 1253, 1331-1341 (1928); 38 L.R.A. (N.S.) 1, 26-29 (1912).

contract of sale provides for good record title, title by adverse possession is insufficient no matter how well the same is established.<sup>31</sup>

"Practical location" is a form or variety of adverse possession. If an owner erects a structure within or beyond his boundary line, and his neighbor subsequently erects an abutting structure, the line of abutment rather than the record line may become the legal boundary. The same effect may result from the location of a fence off the boundary line. The rule of practical location is not applied unless the condition has existed for a period long enough for title to ripen by adverse possession. The subject is discussed in greater detail *infra*.<sup>32</sup>

#### LAPSE OF TIME

Independent of the Statute of Limitations, and even in states where adverse possession does not render title marketable, lapse of time may solve questions. Possession of long duration may be sufficient to cure defects of title by creating presumptions sufficient to remove legal doubts and uncertainties. Because of the differences in facts the decisions are, of course, not uniform. They have involved presumptions of death and possibility of issue extinct, of payment of old mortgages<sup>33</sup> and mechanics' liens, defects in acknowledgments and other technicalities in deeds,<sup>34</sup> descriptions other than those under which grantees took possession,<sup>35</sup> lack of complete continuity between original and existing owners,<sup>36</sup> defective mortgage foreclosures,<sup>37</sup> sales under a defective power of sale<sup>38</sup>

<sup>31</sup> Hennig v. Smith, 151 N.Y. Supp. 444 (Sup. Ct. Erie County 1915) (contract to give good deed with abstract showing good and marketable title); American Law of Property, Pt 11, §§ 11, 49 (1952); Maupin, op. cit. supra note 30, at 794; 57 A.L.R. 1253, 1324 (1928).

<sup>32</sup> See p. 258 *infra*.

<sup>33</sup> Forsyth v. Leslie, 74 App. Div. 517, 77 N.Y. Supp. 826 (4th Dep't 1902); Davis, op. cit. supra note 30, at 301, 361; and see Whittier v. Gormley, 3 Cal. App. 489, 86 Pac. 726 (1906); but see generally Maupin, op. cit. supra note 30, at 866-867; Note, 57 A.L.R. 1253, 1393-1394 (1928).

<sup>34</sup> Contra: Carolan v. Yoran, 104 App. Div. 488, 93 N.Y. Supp. 935 (1st Dep't 1905), aff'd, 186 N.Y. 575, 79 N.E. 1102 (1906); Moran v. Stader, 52 Misc. 385, 103 N.Y. Supp. 175 (N.Y. City Ct. 1907).

<sup>35</sup> Taub v. Spector, 124 App. Div. 158, 108 N.Y. Supp. 723 (1st Dep't 1908); N.Y. Steam Co. v. Stern, 46 Hun 206 (N.Y. 1887). Contra: Dawidoff v. Roxana Petroleum Corp., 2 F.2d 370 (W.D. La. 1924).

<sup>36</sup> Goldman v. Miles, 129 Md. 180, 98 Atl. 531 (1916); Westfall v. Washlagel, 200 Pa. 181, 49 Atl. 941 (1901); Forsyth v. Leslie, 74 App. Div. 517, 77 N.Y. Supp. 826 (4th Dep't 1902); Bohm v. Fay, 18 Abb. Pr. 175 (N.Y. 1886).

<sup>37</sup> Barger v. Gerry, 64 N.J. Eq. 263, 53 Atl. 483 (Ch. 1902) (mortgage not assigned of record); Kip v. Hirsh, 103 N.Y. 565, 9 N.E. 317 (1886) (failure to join trustee, appointed by mortgagor to sell and pay debts).

<sup>38</sup> Binzen v. Epstein, 58 App. Div. 304, 69 N.Y. Supp. 789 (1st Dep't 1901), aff'd, 172 N.Y. 596, 64 N.E. 1118 (1902).

or attorney,<sup>39</sup> possibly erroneous judgments in partition,<sup>40</sup> doubtful construction of a will,<sup>41</sup> and the like.<sup>42</sup> After lapse of time it is presumed that parties under a duty to act have fulfilled their duties.<sup>43</sup> Apparent defects of title, then, are curable by presumption of facts free of reasonable doubt, which are not overcome by the mere conjectural possibility of facts to the contrary.<sup>44</sup> Cases involving presumption of death go both ways.<sup>45</sup> There is generally no presumption that possibility of issue is extinct.<sup>46</sup>

#### ESTOPPEL

Defects of title may also be removed by estoppel where the possible claimant is clearly estopped to set up an adverse interest. This does not obtain where the estoppel is based on facts to be proved and where the difficulty of proof may increase with the passage of time because of deaths of witnesses and the like.<sup>47</sup>

#### JUDICIAL DETERMINATION

Where marketability depends upon a question of law or an issue of fact a court may adjudicate the matter, particularly if all necessary

<sup>39</sup> *Lyman v. Gedney*, 114 Ill. 388, 29 N.E. 282 (1885); *Freedman v. Oppenheim*, 80 App. Div. 487, 81 N.Y. Supp. 110 (2d Dep't 1903).

<sup>40</sup> *Tolosi v. Lese*, 120 App. Div. 53, 104 N.Y. Supp. 1095 (1st Dep't 1907).

<sup>41</sup> *Heck v. Volz*, 14 N.Y. St. R. 409 (1st Dep't 1888), *aff'd*, 120 N.Y. 663, 24 N.E. 1104 (1890).

<sup>42</sup> *O'Connor v. Huggins*, 113 N.Y. 511, 21 N.E. 184 (1889) (doubtful propriety of issuance of letters of administration to creditor).

<sup>43</sup> *Miller v. Cramer*, 48 S.C. 282, 26 S.E. 657 (1897); *Davis*, *op. cit. supra* note 30, at 357-359.

<sup>44</sup> See generally *Maupin*, *op. cit. supra* note 30, at 814-817; Note, 57 A.L.R. 1253, 1526-1538 (1928); 38 L.R.A. (N.S.) 1, 36-38 (1912). If title is based on intestacy the possibility of discovery of a will or, if based on testacy, the possibility of discovery of a later will or posthumous children, does not cloud the title. *Schemerhorn v. Niblo*, 2 Bos. (15 N.Y. Super.) 161 (1857). *Maupin*, *op. cit. supra* note 30, at 847-848. Cf. *Keitel v. Zimmerman*, 19 Misc. 581, 43 N.Y. Supp. 676 (Sup. Ct. N.Y. County 1897).

<sup>45</sup> Presumed dead without issue: *Meyer v. Madreperla*, 68 N.J.L. 258, 53 Atl. 477 (1902 Ct. Err. & App.); *Barson v. Mulligan*, 191 N.Y. 306, 324-5, 84 N.E. 75, 82 (1908); *Cambreng v. Purton*, 125 N.Y. 610, 26 N.E. 907 (1891). No presumption of death: *Chew v. Tome*, 93 Md. 244, 48 Atl. 701 (1901); *Potter v. Ogden*, 68 N.J. Eq. 409, 51 Atl. 673 (Ch. 1905); *Cerf v. Diener*, 210 N.Y. 156, 104 N.E. 126 (1914); and see generally *Davis*, *supra* note 30, at 362-366; 21 Harv. L. Rev. 374 (1908); 25 Rocky Mt. L. Rev. 90 (1952); Note, 38 L.R.A. (N.S.) 1, 24 (1912). For a discussion of the administration of estates of absent and civilly dead persons, see 2 *Woerner*, *American Law of Administration* §§ 211, 212 (3d ed. 1923).

<sup>46</sup> *Weberpals v. Jenny*, 300 Ill. 145, 133 N.E. 62 (1921). Cf. *Fowler v. Manheimer*, 70 App. Div. 56, 75 N.Y. Supp. 17 (1st Dep't 1902), *aff'd*, 178 N.Y. 581, 70 N.E. 1098 (1904); *List v. Rodney*, 83 Pa. 483 (1877). *Contra*: *Bacot v. Fessenden*, 130 App. Div. 819, 823, 115 N.Y. Supp. 698, 702 (1st Dep't 1909); and see 22 Col. L. Rev. 486 (1922).

<sup>47</sup> See Note, 57 A.L.R. 1253, 1538 (1928).

parties are before it or if the law in question is free from reasonable doubt or conflict. Accordingly, wills and deeds may be construed and facts determined. The court will generally not rule, however, if its decision will not be conclusive and the buyer will be subject to the possibility of a different result in another tribunal.<sup>48</sup> A title is generally held marketable where the facts are such as to impel a directed verdict.<sup>49</sup> A statute will be construed if title is predicated thereon but a title dependent upon unconstitutionality of a statute is unmarketable because of the clear likelihood of future litigation.<sup>50</sup>

## ENCROACHMENTS AND PROJECTIONS

### GENERAL

An encroachment, as used in law, refers to an unauthorized extension, of a structure erected on the land of one owner, on adjacent land owned by another. The term is generally applied to a wall, foundation or other substantial part of the building or structure. The term "projection" is generally applied to an encroachment of a minor part of the building, such as eaves, cornices, ornamental parts of the building, or a few foundation stones.

Viewed horizontally, there are three types of encroachments: encroachments, by adjoining structures, on the premises under consideration; encroachments, of structures on the premises under consideration, on adjoining property; and encroachments on abutting streets or highways. Each of these will be discussed separately as they affect buyer and seller.<sup>51</sup>

The existence of encroachments creates rights and liabilities between the adjoining owners thereby affected. If a contract of sale is consummated by delivery of the deed, the buyer will become a neighboring owner and will be affected by these relations. The marketability of title—and whether the buyer may rescind or must close title—depends upon the nature of these relations. Therefore, it seems to be in order to give

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<sup>48</sup> Maupin, *op. cit.* supra note 30, at 772-773; and see generally Notes, 57 A.L.R. 1342-1375 (1928); 38 L.R.A. (N.S.) 1, 16 et seq. (1912). The ultimate burden of proof in establishing marketable title is on the seller, a rule particularly appropriate to conveyances because of the possibility of substantial loss to the buyer as against the likelihood of mere delay and inconvenience to the seller. But once the seller shows good record title the burden of overcoming this by facts *dehors* the record is on the buyer. Maupin, *op. cit.* supra note 30, at 818-819; Davis, *op. cit.* supra note 30, at 339-383.

<sup>49</sup> See *Brown v. Davis*, 15 Del. Ch. 37, 131 Atl. 142 (Ch. 1925).

<sup>50</sup> *Daniel v. Shaw*, 166 Mass. 582, 44 N.E. 991 (1896); Maupin, *op. cit.* supra note 30, at 773; 152 A.L.R. 963 (1944).

<sup>51</sup> See p. 254 *infra* et seq.

some consideration to the effect of encroachments on the rights and liabilities of adjoining owners. In this connection, encroachments and projections will be considered vertically—as overhead, grade, and sub-surface—because separate questions of procedure, remedies, and forms of action are thereby involved. Among overhead encroachments and projections are overhanging or leaning walls, bay windows, eaves, cornices, building trim and ornamentation, all of which are permanent. Also included are windows which open outward, and awnings which project only when open. Encroachments at grade are generally walls, which may project upward or downward. Sub-surface encroachments or projections generally include foundations, footings and sewers. These will be considered in the following sections.

#### ENCROACHMENTS AND PROJECTIONS AS BETWEEN ADJOINING OWNERS OVERHEAD PROJECTIONS AS EASEMENTS

Overhead projections, such as cornices and eaves, may develop into easements. Such an easement may arise through prescription<sup>52</sup> or may be created by a severance of common ownership, as where the sale of either or both of two adjacent properties in a single ownership results in an encroachment on one parcel by a structure created on the other.<sup>53</sup> The existence of such easement entitles the owner of the encroachment to continue its maintenance, and bars the owner of the land encroached upon from full use of his property. The latter may, nevertheless, build above and below the encroachment.<sup>54</sup> There is little authority relevant to the duration of this type of easement. It seems to have been assumed that the easement survives the demolition of the encroachment and that its owner may replace the encroachment with a similar structure.<sup>55</sup> Any such assumption appears doubtful to the writer in view of the rules under which party wall easements<sup>56</sup> and easements in buildings<sup>57</sup> end with the demolition of the structures with which they are connected.

<sup>52</sup> *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897); *Keats v. Hugo*, 115 Mass. 204 (1874); *Grace M.E. Church v. Dobbins*, 153 Pa. St. 294, 25 Atl. 1120 (1893).

<sup>53</sup> *United States v. Appleton*, 24 Fed. Cas. 841, No. 14,463 (C.C.D. Mass. 1833); *Havens v. Klein*, 51 How. Pr. 82 (N.Y. 1875); *Grace M.E. Church v. Dobbins*, *supra* note 52; and see p. 260 *infra*.

<sup>54</sup> *Keats v. Hugo*, 115 Mass. 204 (1874).

<sup>55</sup> *Bennett v. Scott*, 16 Del. Ch. 270, 145 Atl. 171 (Ch. 1929) was a suit in equity to compel removal of the projecting cornice of a porch, reconstructed in replacement of an older porch. The matter was held in equity pending a determination in a court of law. *Herr v. Bierbower*, 3 Md. Ch. 456 (1851) is virtually identical except that it involved an encroaching foundation.

<sup>56</sup> *Reynolds v. Fargo*, 1 Sheld. 531 (N.Y. 1874); 69 C.J.S. 15. Compare N.Y. Civ. Prac. Act § 992, discussed at p. 259 *infra*.

<sup>57</sup> *Rudderham v. Emery Bros.*, 46 R.I. 171, 125 Atl. 291 (1924), noted in 23 Mich. L.

There are few cases involving structures which project over neighboring property only when in use, such as windows which open outward. An analogy has been drawn between this situation and an owner's right to light and air. Under the general American rule, an owner, whose windows are on his property, acquires no prescriptive right to have these windows remain unobstructed by an erection on his neighbor's property. The rationale is that the maintenance of a lawful structure wholly on A's property cannot be adverse to his neighbor, B. B cannot counteract the situation without erecting an otherwise useless wall high enough to block his neighbor's windows.<sup>58</sup> A Massachusetts case<sup>59</sup> applies the same principle to windows swinging outward, and rules that the occasional opening of such windows is not such a visible and tangible interference with the use of adjoining property as to require its owner to take affirmative action to prevent the development of an easement. The analogy between the two situations is not complete because the windows when open, are an actual, though slight, intrusion. But the result is desirable and sensible in that it permits a practice which is common, useful and harmless to continue without legal jeopardy to the neighboring owner. A later Massachusetts case ordered the removal of awnings, which projected only when lowered, but other and more substantial encroachments were included in the order.<sup>60</sup> And a New York court required removal of swinging shutters, together with projecting cornices.<sup>61</sup> In cases involving swinging windows alone, two lower New York courts reached

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Rev. 73 (1924); 34 A.L.R. 606 (1925); 154 A.L.R. 82 (1945); 28 C.J.S. 719. For the duration of easements generally see 154 A.L.R. 5 (1945). And see *Cohen v. Adolph Kutner Co.*, 177 Cal. 592, 171 Pac. 424 (1918) (though easement purported to be perpetual). *Accord*, *Muzio v. Erickson*, 41 Cal. App. 413, 182 Pac. 974 (1919).

<sup>58</sup> *Pierre v. Fernold*, 26 Me. 436 (1847); *Parker v. Foote*, 19 Wend. 309 (N.Y. 1838); and see *Keats v. Hugo*, 115 Mass. 204 (1874), and cases collected in *Pica v. Cross County Construction Corp.*, 259 App. Div. 128, 132, 18 N.Y.S.2d 470, 473 (1st Dep't 1940). *Contra*: *Clawson v. Primrose*, 4 Del. Ch. 643 (1873) (questioned but not overruled in *Hulley v. Security & Safe Deposit Co.*, 5 Del. Ch. 578 (Ch. 1885)). *Cherry v. Stein*, 11 Md. 1 (1858) refuses to recognize an easement of light and air resulting from lapse of time, but *Janes v. Jenkins*, 34 Md. 1 (1870) upholds such easement, resulting from severance of common ownership of two parcels. New Jersey is out of line with the other American states, in recognizing easements of light and air. See both opinions in *Blumberg v. Weiss*, 126 N.J. Eq. 616, 10 A.2d 743 (Ch. 1940), reversed, 129 N.J. Eq. 34, 17 A.2d 823 (Ct. Err. & App. 1941), noted in 63 N.J.L.J., 141-142, 147 (April 25, 1940); 5 U. of Newark L. Rev. 316 (1940). Compare, generally, *Notes*, 26 Cornell L.Q. 339 (1941); 25 Va. L. Rev. 626 (1939).

<sup>59</sup> *Carrig v. Dee*, 14 Gray (80 Mass.) 583 (1860).

<sup>60</sup> *Ferrone v. Rossi*, 311 Mass. 591, 42 N.E.2d 564 (1942).

<sup>61</sup> *Crocker v. Manhattan Life Ins. Co.*, 61 App. Div. 226, 70 N.Y. Supp. 492 (1st Dep't 1901). *Havens v. Klein*, 51 How. Pr. 82 (N.Y. 1875) recognized a right, created by severance of commonly owned property, to maintain shutters which swung over adjoining premises.

different results. One compelled their removal from a 15-story building on the ground that an easement might otherwise come into existence.<sup>62</sup> The other refused a mandatory injunction, on the ground that occasional opening of windows would not be likely to ripen into permanent easement.<sup>63</sup> In view of the state of the law, an owner cannot prudently tolerate the existence of an overhead projection, even one of occasional nature, even if the condition is presently unobjectionable. It is not necessary for him to take steps to compel removal of the projection, if he can obtain a written instrument from the owner of the encroachment, preferably in recordable form, which acknowledges that the projection exists solely under a license revocable at the election of the then or any succeeding owner of the property encroached on. It is advisable to record any such instrument in order to perpetuate it as evidence. Any subsequent contract to sell either parcel should be expressly subject to such instrument. A prospective buyer is thereby put on notice and put to an election at that time to accept or reject the situation.

#### ENCROACHMENTS AS TRESPASS OR DISSEIZIN

The ordinary civil wrong can usually be remedied by a monetary recovery, specific performance or restitution. The presence of an encroachment or projection, existing without right, is a wrong against the owner of the property encroached on, but these wrongs do not lend themselves to a simple and adequate remedy. Self-help is an available but unattractive remedy. Damages may be recovered but damages do not remove the encroachment. Ejectment is available as a remedy in some cases but the plaintiff in ejectment may be met with preliminary technical and procedural difficulties and, even if successful, may end with a judgment which the sheriff is unable or unwilling to carry out. A mandatory injunction, requiring removal by the owner of the encroachment, is preferable when available but may also be subject to some technical or procedural difficulties (though in lesser degree than in the case of ejectment). These remedies will be discussed in detail.

*Self-help.* The wronged owner may remove the encroachments or projections by self-help, and recover his expense from the party responsi-

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<sup>62</sup> *Regensburg v. 47th St. & Lexington Ave. Co.*, 79 N.Y.L.J. 2110, cols. 2-3 (Sup. Ct. Aug. 29, 1928). Cf. *U.S. v. Appleton*, 24 Fed. Cas. 841, No. 14,463 (C.C.D. Mass. 1833) holding defendant had easement, created by severance of common ownership, to maintain door swinging over plaintiff's premises.

<sup>63</sup> *Hotel Drake Co. v. City Bank Farmers Trust Co.*, 127 N.Y.L.J. 1532, col. 2 (Sup. Ct. April 17, 1952) (defendant had offered written disclaimer of permanent rights).

ble, but is liable for damages caused by his negligence.<sup>64</sup> The difficulties and disadvantages involved—monetary expenditure, financial and physical risks in slicing off parts of walls, foundations and projections at various levels, removing pipes, sewers and highly charged wires—is reflected in the almost complete absence of cases on the point.

*Damages.* A plaintiff electing to treat the encroachment as a trespass may recover damages in an action at law.<sup>65</sup> In the case of a permanent encroachment, the damages are measured by the reduction in market value caused by the trespass.<sup>66</sup> If the encroachment is temporary the damages are measured by the expenses incurred and profits lost by reason of the encroachment.<sup>67</sup> Damages alone do not restore possession or remove the encroachment but merely make the physical situation more or less permanent. The only effect of even repeated recovery of damages is an enforced sale or private condemnation of the premises encroached on.<sup>68</sup>

*Ejectment.* Ejectment is a remedy for ouster (or disseizin) but not for mere trespass. Courts have disagreed whether an overhead projection is an "ouster" without invasion on the soil.<sup>69</sup> Plaintiffs have recovered in ejectment in the case of an overhanging wall,<sup>70</sup> overhanging roof,<sup>71</sup>

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<sup>64</sup> See *Haitsch v. Duffy*, 10 Del. Ch. 280, 283, 92 Atl. 249, 250 (Ch. 1914); *Caliri v. Corvese*, 51 R.I. 158, 153 Atl. 795 (1931); *McCourt v. Eckstein*, 22 Wis. 148 (1867); 2 *Crabb*, *Real Property* (55 Law Library) §§ 2473-2475; 2 C.J.S. 29; and cf. *Schill v. Churchill*, 11 La. App. 181, 123 So. 139 (1929). *Cutrona v. Columbus Theatre, Inc.*, 107 N.J. Eq. 281, 151 Atl. 467 (Ch. 1930) held the plaintiff under no duty to protect the balance of defendant's building.

<sup>65</sup> *Pierce v. Lemon*, 2 *Houst.* 519 (Del. 1863) (projecting cornice and water spout); *Isear v. Burstein*, 24 N.Y. Supp. 918 (N.Y. Sup. Ct. 1893) (encroaching wall); 2 C.J.S. 31; and see *Haitsch v. Duffy*, 10 Del. Ch. 280, 283, 92 Atl. 249, 250 (Ch. 1914).

<sup>66</sup> *Isear v. Burstein*, *supra* note 65.

<sup>67</sup> 2 C.J.S. 31.

<sup>68</sup> See *Norton v. Elwert*, 29 Ore. 583, 593, 41 Pac. 926, 928 (1895).

<sup>69</sup> See *Haitsch v. Duffy*, 10 Del. Ch. 280, 283, 92 Atl. 249, 250 (Ch. 1914); *Wachstein v. Christopher*, 128 Ga. 229, 230, 57 S.E. 511, 512, 11 L.R.A. (N.S.) 917 (1907); *Butler v. Frontier Telephone Co.*, 186 N.Y. 486, 489, 79 N.E. 716, 717 (1906); 2 C.J.S. 31. Compare the Wisconsin cases discussed in notes 74 and 79 *infra*, and text; and the *Norwalk* case, note 98 *infra*.

<sup>70</sup> *Sherry v. Frecking*, 4 *Duer* 452 (N.Y. 1855). The *Sherry* case involved two encroachments: (1) a wall which encroached at grade at the time plaintiff received his deed; and (2) an overhead leaning of this wall, which occurred after plaintiff received his deed. Plaintiff recovered in ejectment by reason of (2). But relief was denied for (1) because of a statute making void a conveyance of real property held adversely to the grantor, plaintiff's deed being deemed void *pro tanto*. The governing statute has since been reversed. N.Y. *Real Prop. Law* § 260. Compare the *Norwalk* case, *infra*, note 98, and the discussion of the statutes in various states in N.Y. *Leg. Doc.* (1941) No. 65(G).

<sup>71</sup> *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365 (1888).

projecting eaves,<sup>72</sup> and for a telephone line passing over plaintiff's land but unsupported by any structure on plaintiff's premises.<sup>73</sup> On the other hand, ejectment has been denied as a remedy for projecting gutters, eaves and cornices, on the ground that ejectment does not lie where entry cannot be made. It has also been denied in respect to property of which the sheriff cannot give possession, as where the court deemed the sheriff unable to take possession of open space.<sup>74</sup>

Courts are similarly divided on the availability of ejectment as a remedy for sub-surface encroachments.<sup>75</sup> Plaintiffs have recovered in ejectment in the case of encroaching foundations, on the ground that a sub-surface ouster makes this remedy appropriate.<sup>76</sup> But ejectment has been refused, in the case of a sub-surface sewer, on the ground that a trespass and not an ouster was involved and that ejectment does not lie for anything that is not tangible or capable of being delivered to the plaintiff by the sheriff under a writ of possession.<sup>77</sup> Though Wisconsin has given ejectment as a remedy for encroaching foundations,<sup>78</sup> the fact that a plaintiff built his foundation to the boundary line, despite the encroachment, was held to bar ejectment. The stated ground was that the plaintiff had elected to treat the intrusion as a trespass and thereby waived the right to maintain ejectment. This appears to be equivalent

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<sup>72</sup> *McDivitt v. Bronson*, 101 Neb. 437, 163 N.W. 761 (1917) (holds "ouster" unnecessary under Nebraska Code). The case also involved a more substantial encroachment. Defendant's possible right to maintain the encroachment, because of a severance of common ownership, was not mentioned in the opinion.

<sup>73</sup> *Butler v. Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716 (1906).

<sup>74</sup> *Vrooman v. Jackson*, 6 Hun 326 (N.Y. 1876); *Aiken v. Benedict*, 39 Barb. 400 (N.Y. 1863); and see *Crocker v. Manhattan Life Ins. Co.*, 61 App. Div. 226, 229, 70 N.Y. Supp. 492, 494 (1st Dep't 1901). *Rasch v. Noth*, 99 Wis. 285 (1898) does not purport to decide if ejectment is available in the case of encroaching eaves generally. It refused to allow ejectment where the plaintiff had built to his boundary line, on the ground that plaintiff's full use of his property negated the existence of an ouster and made defendant's act a mere "intrusion" for which, it held ejectment does not lie. For another example of this Wisconsin doctrine, see text *infra*, at note 79.

<sup>75</sup> *Woodbine*, "Encroachment Below Ground or Well Above the Surface—Is Ejectment an Adequate Remedy?" 27 *Yale L.J.* 265 (1917). A foundation encroaching on adjoining property, built tightly against a neighboring structure, may make title unmarketable but constitute sound waterproof construction.

<sup>76</sup> *Wachstein v. Christopher*, 128 Ga. 229, 57 S.E. 511 (1907); *Hirschberg v. Flusser*, 87 N.J. Eq. 588, 101 Atl. 191 (Ch. 1917); *McCourt v. Eckstein*, 22 Wis. 148 (1867); and see *Kiernan v. Mayor, etc. Jersey City*, 76 N.J. Eq. 114, 74 Atl. 139 (Ch. 1909); *Hahl v. Sugo*, 169 N.Y. 109, 62 N.E. 135 (1901).

<sup>77</sup> *Harrington v. City of Port Huron*, 86 Mich. 46, 48 N.W. 641, 13 L.R.A. 664 (1891); but cf. *Kiernan v. Mayor, etc. Jersey City*, *supra* note 76.

<sup>78</sup> *McCourt v. Eckstein*, 22 Wis. 153 (1867); and see *Beck v. Ashland Cigar & Tobacco Co.*, 146 Wis. 324, 130 N.W. 464 (1911); *Fisher v. Goodman*, 205 Wis. 286, 237 N.W. 93 (1931).

to a ruling that plaintiff's full use of his property laterally precluded the existence of an ouster.<sup>79</sup>

Ouster presents no problem where the encroachment is at grade. Ejectment is available for an encroaching wall,<sup>80</sup> and in some cases the sheriff physically removes the encroachment.<sup>81</sup> But in many cases the sheriff cannot or will not effect a physical removal.<sup>82</sup> Slicing off parts of walls or foundations and removal of high tension wires or high pressure pipes exposes the sheriff to excessive risk to himself and the defendant's remaining property.<sup>83</sup> Ejectment may, therefore, merely put plaintiff in possession of an encroaching wall, still standing, which prevents plaintiff from using the premises for his own construction. Furthermore, recovery of a judgment in ejectment, which the sheriff was unable to execute, has been held to exhaust plaintiff's remedies, legal and equitable, on the ground that a failure to demand both in one action barred a subsequent proceeding in equity to compel removal.<sup>84</sup>

*Equity.* Equitable remedies avoid the technical difficulties and practical disadvantages surrounding actions at law in ejectment and for damages and offer an advantage, unavailable at law, in the form of preventive relief before commission of a trespass.<sup>85</sup> Equitable relief has not been entirely free from preliminary technical difficulties. Where law and equity remain distinct, the limited jurisdiction of equity may require a postponement of equitable relief until questions of law are first determined. In this situation, a defense based on a right of prescription or by adverse possession requires a court to stay the proceeding in equity until this defense is adjudicated in a court of law.<sup>86</sup> Although a manda-

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<sup>79</sup> Rahn v. The Milwaukee Elec. Ry. & Lt. Co., 103 Wis. 467, 79 N.W. 747 (1899); Zander v. Valentine Blatz Brew Co., 95 Wis. 162, 70 N.W. 164 (1897). Compare Rasch v. Noth, supra note 74.

<sup>80</sup> Johnson v. Minn. Tribune Co., 91 Minn. 476, 98 N.W. 321 (1904); and see Cromwell v. Hughes, 144 Mich. 3, 107 N.W. 323 (1906); Leprell v. Kleinschmidt, 112 N.Y. 364, 19 N.E. 812 (1889).

<sup>81</sup> See Haitsch v. Duffy, 10 Del. Ch. 280, 283, 92 Atl. 249, 250 (Ch. 1914).

<sup>82</sup> Rothaermel v. Amerige, 55 Cal. App. 273, 203 Pac. 833 (1921); Bowie v. Brahe, 2 Abb. Pr. 161 (N.Y. 1885); and see Herr v. Bierhower, 3 Md. Ch. 456, 458 (1851); Baron v. Korn, 127 N.Y. 224, 228, 27 N.E. 804, 805 (1891); Norton v. Elwert, 29 Ore. 583, 593, 41 Pac. 926, 928 (1895).

<sup>83</sup> See Woodbine, supra note 75.

<sup>84</sup> Hahl v. Sugo, 169 N.Y. 109, 62 N.E. 135 (1901). Cf. Rothaermel v. Amerige, 55 Cal. App. 273, 203 Pac. 833 (1921). Contra: Hirschberg v. Flusser, 87 N.J. Eq. 588, 101 Atl. 191 (Ch. 1917); and see Haitsch v. Duffy, 10 Del. Ch. 280, 284, 92 Atl. 249, 250 (Ch. 1914).

<sup>85</sup> Baron v. Korn, 127 N.Y. 224, 229, 27 N.E. 804, 805 (1891).

<sup>86</sup> Bennett v. Scott, 16 Del. Ch. 270, 145 Atl. 171 (Ch. 1929); Herr v. Bierhower, 3 Md. Ch. 456 (1851).

tory injunction, compelling removal of encroachments, has been refused on the ground that ejectment gives adequate relief at law<sup>87</sup> and is the exclusive remedy,<sup>88</sup> most cases give the plaintiff an election to treat the invasion either as a disseizin for which ejectment is available, or to have equitable relief.<sup>89</sup> The conceptual difficulties and practical disadvantages of either damages<sup>90</sup> or ejectment<sup>91</sup> as remedies have led many courts to rule that mandatory injunction is available in this situation<sup>92</sup> and that the inadequacy of legal relief vests equity with sufficient jurisdiction for this purpose.<sup>93</sup> As a result, the modern cases generally hold, with little exception, that a mandatory injunction is the proper remedy to compel an owner to remove encroachments, and that it is equitable and easier to put the burden of removal on the party who erected the encroachment.<sup>94</sup> Accordingly, mandatory injunctions have been granted for the removal of encroachments at grade, of walls and buildings,<sup>95</sup> of sub-surface encroachments, principally foundations,<sup>96</sup> and of overhanging encroachments<sup>97</sup> and overhanging projections, such as cornices, building ornamentation, eaves and troughs.<sup>98</sup> Inasmuch as the

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<sup>87</sup> *Kiernan v. Mayor, etc. Jersey City*, 76 N.J.Eq. 114, 74 Atl. 139 (Ch. 1909).

<sup>88</sup> *Beck v. Ashland Cigar & Tobacco Co.*, 146 Wis. 324, 130 N.W. 464 (1911); overruled as to this point, *Fisher v. Goodman*, 205 Wis. 286, 237 N.W. 93 (1931).

<sup>89</sup> *Haitsch v. Duffy*, 10 Del. Ch. 280, 282-3, 92 Atl. 249, 250 (Ch. 1914); *Fisher v. Goodman*, 205 Wis. 286, 237 N.W. 93 (1931) (and cases cited).

<sup>90</sup> See p. 249 *supra*.

<sup>91</sup> See p. 251 *supra*.

<sup>92</sup> *Fisher v. Goodman*, 205 Wis. 286, 288-9, 237 N.W. 93, 94-5 (1931); see *Woodbine*, *supra* note 75, at p. 267; 43 C.J.S. 532.

<sup>93</sup> See cases collected in Note, 28 A.L.R.2d 679, 694-696 (1953). It is regarded as immaterial that this deprives defendant of a jury trial. *Norton v. Elwert*, 29 Ore. 583, 41 Pac. 926 (1895).

<sup>94</sup> See the comprehensive Note, 28 A.L.R.2d 679 (1953); 2 C.J.S. 532.

<sup>95</sup> *Baron v. Korn*, 127 N.Y. 224, 27 N.E. 804 (1891); *Stowers v. Gilbert*, 156 N.Y. 600, 51 N.E. 282 (1898); *Blake v. McCarthy*, 115 N.Y. Supp. 1014 (Sup. Ct. Monroe County 1909); *Norton v. Elwert*, 29 Ore. 583, 41 Pac. 926 (1895).

<sup>96</sup> *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N.E. 534 (1909); *Hirschberg v. Flusser*, 87 N.J.Eq. 588, 101 Atl. 191 (Ch. 1917); *Mulrein v. Weisbecker*, 37 App. Div. 545, 56 N.Y. Supp. 240 (1st Dep't 1889); *Petony v. Pennsylvania R.R.*, 231 Pa. St. 464, 80 Atl. 1052 (1911); *Baugh v. Bergdoll*, 227 Pa. St. 494, 76 Atl. 207 (1910); *Pile v. Pedrick*, 167 Pa. St. 296, 31 Atl. 646 (1895); *Fisher v. Goodman*, 205 Wis. 286, 237 N.W. 93 (1931); and see *Herr v. Bierbower*, 3 Md. Ch. 456 (1851); *Rahn v. The Milwaukee Elec. Ry. & Lt. Co.*, 103 Wis. 467, 79 N.W. 747 (1899).

<sup>97</sup> *Kafka v. Bozio*, 191 Cal. 746, 218 Pac. 753 (1923).

<sup>98</sup> *Norwalk Heating & Lighting Co. v. Vernam*, 75 Conn. 662, 55 Atl. 168 (1903); *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897); *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N.W. 475 (1882); *Petony v. Pennsylvania R.R.*, 231 Pa. St. 464, 80 Atl. 1052 (1911); *Huber v. Stark*, 124 Wis. 359, 102 N.W. 12 (1905). The *Norwalk* case involved an overhanging encroachment which was in existence at the time of the conveyance to plaintiff. Defendant claimed plaintiff's deed was void to the extent of the premises en-

parties are in equity, some defenses may be available to a defendant which might not be invoked at law. Where the encroachment is trivial, relief is denied under the *de minimis* rule.<sup>99</sup> Acquiescence, laches and estoppel may be a defense.<sup>100</sup> The plaintiff's consent to the encroachment bars relief in equity but not if under a revocable license, after the license has been revoked.<sup>101</sup> Where the encroachment was intentional, the defendant's expense of removal is immaterial.<sup>102</sup> At times, a mandatory injunction may be withheld under the rule of balancing the equities,<sup>103</sup> and also where the encroachment was unintentional,<sup>104</sup> but this is not invariable. Defendants have been compelled to remove comparatively slight encroachments at substantial expense, despite innocent error in original construction.<sup>105</sup>

A few cases refuse to compel an owner to remove an encroachment which was erected by his predecessor in title.<sup>106</sup> These cases do not question the right of the wronged owner to have the encroachment removed. All of them recognize his right to proceed by self-help. One entered a mandatory order against the former owner who had erected the encroachment,<sup>107</sup> and the others would presumably have done the same if the former owner had been a party defendant. One of these is

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croached on, by reason of a statute making void a conveyance of property held adversely to the grantor. Equitable relief was given the plaintiff on the ground that an overhanging projection was no "ouster" within the meaning of the statute. Compare the Sherry case, supra note 70, and the discussion of conveyances of lands held adversely in N.Y. Leg. Doc. (1941) No. 65(G).

<sup>99</sup> *McKean v. Alliance Land Co.*, 200 Cal. 396, 253 Pac. 134 (1927); *Rothaermel v. Amerige*, 55 Cal. App. 273, 203 Pac. 833 (1921); *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897); *DiGeso v. Jeffer*, 121 N.Y.L.J. 715, col. 4 (Sup. Ct. Feb. 25, 1949); and see *Mulrein v. Weisbecker*, 37 App. Div. 545, 56 N.Y. Supp. 240 (1st Dep't 1899); and cases collected in 28 A.L.R.2d 679, 709-710 (1953).

<sup>100</sup> 28 A.L.R.2d 679, 713-719 (1953). But there is substantial authority to the effect that delay short of the statutory period is no defense to a mandatory injunction. See *Ferrone v. Rossi*, 311 Mass. 591, 596, 42 N.E.2d 564, 567 (1942) (and cases cited); *Ackerman v. True*, 175 N.Y. 353, 67 N.E. 629 (1903).

<sup>101</sup> *Petony v. Pennsylvania R.R.*, 231 Pa. St. 464, 80 Atl. 1052 (1911); and see generally 28 A.L.R.2d 679, 710-713 (1953).

<sup>102</sup> *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N.E. 534 (1909); see Note, 28 A.L.R.2d 679, 704-709 (1953).

<sup>103</sup> See cases in 28 A.L.R.2d 679, 699-702 (1953).

<sup>104</sup> *Id.* at 702-705.

<sup>105</sup> *Baugh v. Bergdoll*, 227 Pa. St. 494, 76 Atl. 207 (1910); *Pile v. Pedrick*, 167 Pa. St. 296, 31 Atl. 646 (1895).

<sup>106</sup> *Hodgkins v. Farrington*, 150 Mass. 19, 22 N.E. 73 (1889); *Cutrona v. Columbus Theatre, Inc.*, 107 N.J.Eq. 281, 151 Atl. 467 (Ch. 1930); *Caliri v. Corvese*, 51 R.I. 238, 153 Atl. 795 (1931); 2 C.J.S. 30-31. The same rule has been applied to a violation of a setback restriction. *Salter v. Beatty*, 101 N.J.Eq. 86, 137 Atl. 848 (Ch. 1927).

<sup>107</sup> *Cutrona v. Columbus Theatre, Inc.*, supra note 106.

inconclusive. In a case in which the plaintiff was willing to tolerate the encroachment until he was ready to use the space, a decree was reversed, as contrary to law, which ordered the successive owner to remove. But the court also permitted the entry of a decree below letting the encroachment remain until it should interfere with the plaintiff's use, and further providing for its removal at that time by the successor owner.<sup>108</sup> These results are not consistent, and it is difficult to believe that an otherwise non-existent liability may be created solely by the plaintiff's willingness to wait. These cases do not appear to represent a general trend. To the extent that they may, their results are unfortunate. Liability in personam, of either individual or corporation, can too frequently be evanescent. Furthermore, A should not be permitted to maintain his property on B's land, and interfere with B's ownership, regardless of who placed A's property there. Unless an obligation to remove a structure, which encroaches an adjoining property, runs with the land and binds subsequent owners, the remedies of a wronged owner are seriously circumscribed.

#### ENCROACHMENTS AND PROJECTIONS AS BETWEEN VENDOR AND VENDEE ENCROACHMENTS ON PREMISES UNDER CONSIDERATION

A substantial encroachment *on* the premises under consideration, by a structure located on adjoining property, makes title unmarketable. Encroachments of an inch or two have been held sufficient for this purpose<sup>109</sup> but smaller encroachments have been held unsubstantial.<sup>110</sup> In this connection, a distinction is readily apparent between this type of encroachment and an encroachment *by* the premises under consideration. If a building encroaches on adjoining property, a prospective buyer may succeed to an obligation to remove the encroachment. This entails expense, defacement of his property and possible liability for negligence. But the mere existence of such encroachment does not interfere with the use of the property. If the encroachment is *on* the premises, its existence necessarily reduces the usable area of the property.<sup>111</sup> There is no

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<sup>108</sup> Caliri v. Corvese, *supra* note 106.

<sup>109</sup> Pasternack v. Alter, 95 N.J. Eq. 377, 123 Atl. 885 (Ch. 1924); King v. Knapp, 59 N.Y. 462 (1875); Reynolds v. Wynne, 121 App. Div. 272, 105 N.Y. Supp. 849 (2d Dep't 1907); Klim v. Sachs, 102 App. Div. 44, 92 N.Y. Supp. 107 (2d Dep't 1905); Elinsky v. Berger, 87 App. Div. 584, 84 N.Y. Supp. 483 (2d Dep't 1903); Place v. Dudley, 41 App. Div. 540, 58 N.Y. Supp. 671 (1st Dep't 1899).

<sup>110</sup> Merges v. Ringler, 34 App. Div. 415, 54 N.Y. Supp. 280 (1st Dep't 1898), *aff'd*, 158 N.Y. 701, 53 N.E. 1128 (1899); Gold v. Calderazzo, 100 Misc. 598, 166 N.Y. Supp. 928 (Sup. Ct. Kings County 1917).

<sup>111</sup> See p. 256 *infra*.

hard and fast rule determining if an encroachment is "substantial" for this purpose. It depends on the circumstances and amount of interference with the use and enjoyment of the premises.<sup>112</sup> Encroachment of foundation stones, as much as five inches at some points but easily removable by a few hours' or days' labor, have been held immaterial.<sup>113</sup> The same was held with respect to a retaining wall of loose stones which had migrated five inches, but which could easily be pushed back.<sup>114</sup> And in a case wherein an adjoining wall encroached for a few inches on the rear line of premises under consideration, a judgment for the buyer was reversed and remanded, on the ground of a lack of evidence that this condition had depreciated the value of the premises or rendered them less convenient for use or occupancy.<sup>115</sup> On the other hand, the nature of the encroachment and the amount of interference it causes may be immaterial in the face of a controlling contractual provision. Several New Jersey cases involve a seller's covenant that there are no encroachments either by or on the premises to be sold. They hold title unmarketable by reason of encroachments that might otherwise be deemed immaterial.<sup>116</sup> Some cases draw a distinction between an action at law, and a suit or counterclaim in equity for specific performance. Two cases, for instance, recognize a buyer's right to recover damages, by reason of slight encroachments, on the ground that at law the seller is held strictly to the terms of his contract. But they indicate the possibility of different results if the seller had invoked equity by a counterclaim for specific performance.<sup>117</sup> And in a case wherein the defendant-seller did so counterclaim, specific performance was given the seller, despite an encroachment of 4 - 5 inches at the rear of the premises, with a \$78 abatement in the purchase price.<sup>118</sup> The result virtually compels

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<sup>112</sup> *Merges v. Ringler*, supra note 110; *Ungrich v. Shaff*, 119 App. Div. 843, 105 N.Y. Supp. 1013 (1st Dep't 1907).

<sup>113</sup> *Ungrich v. Shaff*, supra note 112; *Geffin v. Schneider*, 105 N.Y. Supp. 1035 (Sup. Ct. N.Y. County 1906).

<sup>114</sup> *Ungrich v. Shaff*, supra note 112.

<sup>115</sup> *Weintraub v. Siegel*, 133 App. Div. 677, 118 N.Y. Supp. 261 (1st Dep't 1909). Cf. *Sauter v. Frank*, 67 Misc. 657, 124 N.Y. Supp. 802 (Sup. Ct. N.Y. County 1910).

<sup>116</sup> *Jawitz v. Caldwell Inv. Co.*, 103 N.J. Eq. 61, 142 Atl. 181 (Ch. 1928); *Kohoot v. Gurbisz*, 101 N.J. Eq. 757, 139 Atl. 223 (Ch. 1927); *Wyatt v. Bergen*, 98 N.J. Eq. 502, 130 Atl. 595 (Ch. 1924), aff'd, 98 N.J. Eq. 738, 130 Atl. 597 (Ct. Err. & App. 1925).

<sup>117</sup> *Vogt v. Shumate*, 213 Ky. 503, 281 S.W. 514 (1926); *Place v. Dudley*, 41 App. Div. 540, 58 N.Y. Supp. 671 (1st Dep't 1899).

<sup>118</sup> *Sauter v. Frank*, supra note 115. In view of the fact that the purchase price of land, building and a liquor business was but \$5300, the encroachment was deemed to have a trifling effect on the buyer's inducement in entering the contract of sale. Cf. *Doherty v. Egan Waste Co.*, infra note 123.

a seller to ask for specific performance in these circumstances, whether he appears as plaintiff or defendant.

If a sufficient encroachment exists, it is immaterial that its existence is without right and that the buyer may effect its removal by ejectment. The buyer is entitled to possession, not merely the right to possession.<sup>119</sup> Nor need the buyer rely on oral assurances that the encroachment will be removed.<sup>120</sup> If the burden of removal is less onerous, title may be marketable, as in the case of one of a row of attached brownstone houses, presumably built at the same time, with all the walls correctly located but with capstones, stoops and newel posts all encroaching a few inches on the west. The right to encroach had not been established by adverse possession and the court assumed that removal could be effected at any time without difficulty.<sup>121</sup>

#### ENCROACHMENT BY PREMISES UNDER CONSIDERATION

If A owns Blackacre, his title thereto is not bad by reason of a structure thereon which encroaches on adjoining premises. A's title is unmarketable, however, if the encroachment jeopardizes a buyer's peaceful possession by exposing the buyer to the possible necessity of removing the encroachment. This is distinguishable from the situation where a structure on adjoining property encroaches on Blackacre. In the latter case there is a failure of title to Blackacre.<sup>122</sup> If the encroachment is by Blackacre, marketability depends upon two factors—(1) Is the encroachment substantial? and (2) May the encroachment, if substantial, remain undisturbed?

Encroachments of less than one inch on adjoining premises have been held within the *de minimis* rule and too small to affect marketability of seller's title. It should be noted, however, that where the alleged encroachment is only a fraction of an inch, surveyors are likely to disagree and the decisions may be based in part upon a doubt of the existence of any encroachment at all.<sup>123</sup> A greater encroachment may possi-

<sup>119</sup> King v. Knapp, 59 N.Y. 462 (1875).

<sup>120</sup> Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315 (1907); King v. Knapp, 59 N.Y. 462 (1875); Ziebarth v. Manion, 161 Wash. 201, 296 Pac. 561 (1931).

<sup>121</sup> Van Horn v. Stuyvesant, 50 Misc. 432, 100 N.Y. Supp. 547 (Sup. Ct. N.Y. County 1906).

<sup>122</sup> Volz v. Steiner, 67 App. Div. 504, 508, 73 N.Y. Supp. 1006, 1008-1009 (1st Dep't 1902); Eastman v. Horne, 141 App. Div. 12, 125 N.Y. Supp. 553 (2d Dep't 1910), aff'd, 205 N.Y. 486, 98 N.E. 758 (1912).

<sup>123</sup> Traxler v. Katz, 116 Cal. App. 226, 2 P.2d 553 (1931); MacDonald v. Bach, 51 App. Div. 549, 64 N.Y. Supp. 831 (1st Dep't 1900), aff'd, 169 N.Y. 615, 62 N.E. 1097 (1902); Merges v. Ringler, 34 App. Div. 415, 54 N.Y. Supp. 280 (1st Dep't 1898), aff'd, 158 N.Y. 701, 53 N.E. 1128 (1899); Keitel v. Zimmerman, 19 Misc. 581, 43 N.Y. Supp.

bly be disregarded where the encroaching structure is dilapidated and of no practical use without reconstruction.<sup>124</sup>

Encroachments, on adjoining premises, from a minimum of about an inch and a half are sufficiently substantial to excuse a buyer from performance.<sup>125</sup> In this situation the only question is whether or not there is a right to maintain the encroachment without molestation. If a buyer gets good title to the land, plus a right to maintain the structures thereon, he gets all his due, and the seller's title is marketable.<sup>126</sup> A right to maintain an encroachment on adjoining property may arise in the following situations:

1. *Agreement with Adjoining Owner.* An agreement between adjoining owners, expressly permitting the maintenance of an encroachment so long as the encroaching structure stands, is sufficient to make a seller's title marketable.<sup>127</sup> The same result may follow, in the case of an encroaching wall, by an agreement making the wall a party wall.<sup>128</sup>

2. *Adverse Possession or Prescription.* If the encroachment has been sufficiently long standing to remain undisputed so long as the structure

676 (Sup. Ct. N.Y. County 1897); *Sasserath v. Metzgar*, 27 N.Y. Supp. 959 (N.Y. Super. Ct. 1893). In *Doherty v. Egan Waste Co.*, 91 N.J. Eq. 400, 111 Atl. 499 (Ch. 1920) title was held marketable, despite the encroachment on adjoining property of a few clapboards, but a small abatement in purchase price was allowed.

<sup>124</sup> See *Schemman v. Bloch*, 97 N.J.L. 404, 117 Atl. 389 (Sup. Ct. 1922), aff'd, 98 N.J.L. 571, 119 Atl. 926 (Ct. Err. & App. 1923); *Weil v. Radley*, 31 App. Div. 25, 27, 52 N.Y. Supp. 398, 399 (1st Dep't 1898), aff'd, 163 N.Y. 582, 57 N.E. 1128 (1900).

<sup>125</sup> *Blum Bldg. Co. v. Guarino*, 6 N.J. Misc. 245, 140 Atl. 881 (Ch. 1928); *Bier v. Walbaum*, 102 N.J.L. 368, 131 Atl. 888 (Ct. Err. & App. 1926); *McPherson v. Schade*, 149 N.Y. 16, 43 N.E. 527 (1896); *Stokes v. Johnson*, 57 N.Y. 673 (1874); *Stevenson v. Fox*, 40 App. Div. 354, 57 N.Y. Supp. 1094 (1st Dep't 1899), aff'd, 167 N.Y. 599, 60 N.E. 1121 (1901); *Meadows v. Michael*, 35 App. Div. 213, 120 N.Y. Supp. 319 (1st Dep't 1909), appeal dismissed, 204 N.Y. 585, 97 N.E. 1109 (1912); *Krasnow v. Topp*, 128 App. Div. 156, 112 N.Y. Supp. 546 (2d Dep't 1908); *Bergman v. Klein*, 97 App. Div. 15, 89 N.Y. Supp. 624 (2d Dep't 1904); *Snow v. Monk*, 81 App. Div. 206, 80 N.Y. Supp. 719 (1st Dep't 1903); *Nolan v. Harned*, 13 App. Div. 155, 43 N.Y. Supp. 329 (2d Dep't 1897); *Hennig v. Smith*, 151 N.Y. Supp. 444 (Sup. Ct. Erie County 1915); *Moser v. Ellis*, 106 N.Y. Supp. 1075 (Sup. Ct., N.Y. County 1907); *Arnstein v. Burroughs*, 27 N.Y. Supp. 958 (Sup. Ct. N.Y. County 1893); *Smyth v. McCool*, 22 Hun 595 (N.Y. 1880); and see *Johnson v. Bridge*, 60 Cal. App. 629, 213 Pac. 512 (1923).

<sup>126</sup> *Schaefer v. Blumenthal*, 169 N.Y. 221, 62 N.E. 175 (1901); *Eastman v. Horne*, 141 App. Div. 12, 125 N.Y. Supp. 553 (2d Dep't 1910), aff'd, 205 N.Y. 486, 98 N.E. 758 (1912); *Merges v. Ringler*, 34 App. Div. 415, 420, 54 N.Y. Supp. 280, 283-284 (1st Dep't 1898), aff'd, 158 N.Y. 701, 53 N.E. 1128 (1899); *Volz v. Steiner*, 67 App. Div. 504, 73 N.Y. Supp. 1006 (1st Dep't 1902).

<sup>127</sup> *Eastman v. Horne*, supra note 126.

<sup>128</sup> *Gamorsil Realty Co. v. Graef*, 128 Misc. 596, 220 N.Y. Supp. 221 (Sup. Ct. Bronx County 1926); but cf. *Richman v. Camorsil*, 120 Misc. 648, 200 N.Y. Supp. 166 (Sup. Ct. Bronx County 1923).

stands, title is marketable.<sup>129</sup> But, as in other cases where the marketability is predicated upon adverse possession or prescription,<sup>130</sup> the nature of the possession and sufficiency of its duration are always open to question. The burden of showing adverse possession and the existence of parties in being who could and were bound to assert their rights is on the vendor.<sup>131</sup> An encroachment of twenty years was held insufficient where the premises encroached on were owned by infants.<sup>132</sup> Twenty-eight years was held insufficient where the encroachment began without claim of right.<sup>133</sup> And an encroachment of fifteen years or more (sufficient under the controlling statute) was held insufficient, on the ground that any adjudication would be without effect on the adjoining owners, who were not parties to the suit.<sup>134</sup> But even a good right by adverse possession is insufficient where the buyer is entitled to marketable title of record. In a case recognizing the sufficiency of title by adverse possession under proper proof and circumstances, it was held that a contract for abstract of title and survey "showing good and marketable title" required title to be marketable on the abstract, and that title by adverse possession was insufficient in the circumstances.<sup>135</sup>

3. *Practical Location.* If A erects a structure extending beyond his record boundary and partly on B's land, and B thereafter erects a structure abutting A's building, the boundary may be held to have been practically located by the parties on the line where the structures abut, instead of the record boundary line.<sup>136</sup> In the circumstances, a right to maintain encroachments has been held established by practical location. It will be noted, however, the cases so holding either involve encroachments so insubstantial as to come under the *de minimis* rule<sup>137</sup> or of sufficient duration to predicate a right of maintenance by adverse pos-

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<sup>129</sup> Poetzsch v. Mayer, 115 Misc. 422, 189 N.Y. Supp. 695 (Sup. Ct. N.Y. County 1921).

<sup>130</sup> See p. 242 supra.

<sup>131</sup> Wilhelm v. Federgreen, 2 App. Div. 483, 38 N.Y. Supp. 8 (1st Dep't 1896), aff'd, 157 N.Y. 713, 53 N.E. 1133 (1899).

<sup>132</sup> Wilhelm v. Federgreen, supra note 131.

<sup>133</sup> Sulk v. Tumulty, 77 N.J. Eq. 97, 75 Atl. 757 (Ch. 1910).

<sup>134</sup> J. O. Construction & Dev. Co. v. Cuendet, 279 App. Div. 203, 108 N.Y.S.2d 782 (1st Dep't 1951).

<sup>135</sup> Hennig v. Smith, 151 N.Y. Supp. 444 (Sup. Ct. Erie County 1915). Compare p.

<sup>136</sup> The existence of abutting structures is not essential to the application of practical location, although this is common in the case of building encroachments. In other situations a fence is usually sufficient. Reid v. Farr, 35 N.Y. 113 (1866); Baldwin v. Brown, 16 N.Y. 359 (1857).

<sup>137</sup> MacDonald v. Bach, 51 App. Div. 549, 64 N.Y. Supp. 831 (1st Dep't 1900), aff'd, 169 N.Y. 615, 62 N.E. 1097 (1902).

session or prescription.<sup>138</sup> The doctrine has been denied application in the absence of twenty years acquiescence and in other situations where there is no right of maintenance by adverse possession or prescription.<sup>139</sup> It appears, then, that "practical location" is merely a variety of adverse possession or prescription.

4. *Statutory Right.* New York Civil Practice Act § 992 is expressly applicable to an "Action to recover real property" (ejectment). It relates to the exterior wall of a structure, located in any city, which encroaches not more than six inches on adjoining property and which abuts the wall of a building located on the premises encroached upon. The statute:

(1) limits the right to recover possession to a period of one year after completion of the encroaching structure;

(2) limits the right to recover damages to a period of two years; and provides that on satisfaction of a judgment for damages, title to the strip encroached on shall pass to the defendant; and

(3) provides that a failure to sue in ejectment or for damages within the time limited shall give the party in possession an easement therein so long as, but not longer than, the encroaching structure shall stand.

The statute has been assimilated to the rule of practical location, discussed in the preceding paragraph.<sup>140</sup> Although the statute is literally applicable only to an action of ejectment or for damages, it has been held a defense to a suit for a mandatory injunction to compel removal of the encroaching wall.<sup>141</sup> Inasmuch as the statute relates to a wall which encroaches, and abuts another wall, it has no application to an encroachment on vacant land.<sup>142</sup> The abutting buildings, however, need not be of the same depth and it is sufficient that the encroaching wall abuts for

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<sup>138</sup> *Harrison v. Platt*, 35 App. Div. 553, 54 N.Y. Supp. 842 (1st Dep't 1898), aff'd, 158 N.Y. 712, 53 N.E. 1126 (1899); *Katz v. Kaiser*, 10 App. Div. 137, 41 N.Y. Supp. 776 (1st Dep't 1896), aff'd, 154 N.Y. 294, 48 N.E. 532 (1897). In both cases the encroachment had been in existence over thirty years.

<sup>139</sup> *Nolan v. Harned*, 13 App. Div. 155, 43 N.Y. Supp. 329 (2d Dep't 1897); *Stevenson v. Fox*, 40 App. Div. 354, 57 N.Y. Supp. 1094 (1st Dep't 1899), aff'd, 167 N.Y. 599, 60 N.E. 1121 (1901); and see dissenting opinion in *Wilhelm v. Federgreen*, 2 App. Div. 483, 487, 38 N.Y. Supp. 8, 12 (1st Dep't 1896), aff'd, 159 N.Y. 713, 53 N.E. 1133 (1899). Practical location is not applied in other situations unless the condition in question has existed for a period commensurate with that required for adverse possession. See *Sherman v. Kane*, 86 N.Y. 57, 73 (1881) and cases cited note 136 supra.

<sup>140</sup> *Bergman v. Klein*, 97 App. Div. 15, 89 N.Y. Supp. 624 (2d Dep't 1904); *Feingold v. Joseph E. Marx Co.*, 191 Misc. 42, 74 N.Y.S.2d 869 (Sup. Ct. N.Y. County 1947), aff'd, 273 App. Div. 959, 79 N.Y.S.2d 307 (1st Dep't 1948).

<sup>141</sup> *Carroll v. Bullock*, 207 N.Y. 567, 101 N.E. 438 (1913); *Natale v. Mazzuki*, 278 App. Div. 591, 102 N.Y.S.2d 259 (2d Dep't 1951).

<sup>142</sup> *Bergman v. Klein*, supra note 140.

only part of its distance.<sup>143</sup> The statute appears to be applicable where the encroachment exists in that part of the wall given over to an airshaft.<sup>144</sup> When the statute applies, title to the encroaching premises is marketable.<sup>145</sup>

5. *Severance of Common Ownership.* Reference has already been made to the effect of severance of commonly owned property on the right of the grantor, grantee and other successors in ownership, to continue the situation existing at the time of the severance. As has been said, "the houses must be taken as they were at the time of the conveyance." Accordingly, severance may create a party wall with the various incidents thereof,<sup>146</sup> beam rights and other easements.<sup>147</sup> The same rule is applicable to building encroachments, and the conveyance of part of premises in single ownership gives rise to a right to maintain an encroachment created by the severance. This right has been recognized in favor of the first grantee, as an implied grant,<sup>148</sup> and has also been recognized in favor of the grantor, as an implied reservation.<sup>149</sup> In either situation title is marketable. An easement of this type relates to an obvious condition, because otherwise it cannot come into existence. Almost invariably, therefore, a grantee of the servient parcel is bound by the easement. *Smith v. Lockwood*<sup>149a</sup> represents the exceptional situation. There, O, owner of Parcel A-B, erected a building on A which encroached on B. Next, he mortgaged A to X and then sold B to Y. The mortgage of A included, by implication, the right to maintain the projection on B. But Y, as purchaser of B, was not chargeable with knowledge of a mortgage recorded against A. Furthermore, before the conveyance Y could only observe O in possession of the entire premises.

<sup>143</sup> Feingold v. Joseph E. Marx Co., supra, note 140.

<sup>144</sup> See *Blumenfeld v. Kaminsky*, 82 N.Y.L.J. 1311, col. 2 (Sup. Ct. Dec. 12, 1929).

<sup>145</sup> *Volz v. Steiner*, 67 App. Div. 504, 73 N.Y. Supp. 1006 (1st Dep't 1902); *Abraham v. Wechsler*, 120 Misc. 811, 200 N.Y. Supp. 471 (Sup. Ct., N.Y. County 1923), aff'd 210 App. Div. 876, 206 N.Y. Supp. 877 (1st Dep't 1924); and see *Blumenfeld v. Kaminsky*, supra, note 144.

<sup>146</sup> 3 *Tiffany*, Real Property § 782 (3rd ed. 1939); 69 C.J.S. 10-11.

<sup>147</sup> See p. 246 supra.

<sup>148</sup> *Frizzell v. Murphy*, 19 App. D.C. 440 (1902); *Whitman v. Home Guardian Co.*, 135 Misc. 598, 238 N.Y. Supp. 301 (Sup. Ct. Madison County 1929); and see 3 *Tiffany*, Real Property § 782.

<sup>149</sup> *Hurley v. Guzzi*, 328 Mass. 293, 296; 103 N.E.2d 321, 323 (1952) (collecting cases); *Schaefer v. Blumenthal*, 169 N.Y. 221, 62 N.E. 175 (1901); *Katz v. Kaiser*, 10 App. Div. 137, 41 N.Y. Supp. 776 (1st Dep't 1896); *Grotenstein v. Kaplan*, 90 Misc. 403, 153 N.Y. Supp. 614 (App. T. 2d Dep't 1915); and cf. *Grace v. M.E. Church*, 153 Pa. St. 294, 25 Atl. 1120 (1893).

<sup>149a</sup> 100 Minn. 221, 110 N.W. 980 (1907). See also 174 A.L.R. 1241, 1249 et seq. (1948).

Even in the absence of a right to maintain an encroachment on adjoining premises, title is marketable if the buyer has consented to take subject to the condition in question.<sup>150</sup>

An encroachment is generally understood to be an unauthorized extension of a structure over neighboring premises. Yet a driveway may also encroach, in the sense of being partly on the land of another. In a Pennsylvania case, the defendant-seller widened the driveway running along the side of his house, so that a strip between five and one-half and six feet in width was on the adjoining property. At this point he erected a retaining wall. Plaintiff visited the premises with his lawyer and subsequently signed a contract to buy the property for \$47,500, of which he paid \$5,000 on account. The contract of sale described by metes and bounds merely the property defendant owned. In an action to recover the down payment, judgment was given the defendant, on the basis of a jury finding that there had been no misrepresentation.<sup>151</sup> The physical condition was apparently not regarded as a misrepresentation. The court noted the description showed four straight lines, whereas the driveway bulged. Had the plaintiff been more fortunate the bulge would have been within, rather than without the lot lines. Generally, it is sufficient if the vendor offers a deed to the property with the same description as that contained in the contract.<sup>152</sup> And the buyer might have learned the facts if he had done one of three rather uncommon things, *i.e.*, examined a survey, or taken careful measurement of the premises before signing the contract of sale, or obtained a representation in the contract of sale, that the driveways were included in the premises described. Many another buyer and his lawyer would have been similarly misled, and the result appears to put too great a strain on *caveat emptor*.<sup>152a</sup>

#### STREET ENCROACHMENTS

An encroachment on an abutting street is like an encroachment on other adjoining property in that it does not prevent full use of the

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<sup>150</sup> See *Kreshover v. Berger*, 135 App. Div. 27, 28, 119 N.Y. Supp. 737, 738 (1st Dep't 1909); and p. 267 et seq. *infra*.

<sup>151</sup> *Woldow v. Dever*, 374 Pa. 370, 97 A.2d 777 (1953). Compare *Younger v. Caroli*, 251 Mich. 533, 232 N.W. 378 (1930), noted in 29 Mich. L. Rev. 509 (1931). Quare, if defendant in the *Woldow* case could have obtained specific performance in the circumstances? If seller had incorrectly pointed out the premises to be sold, buyer's right to rescission would be clear. *Bentley v. Smith*, 2 Keyes 342 (N.Y. 1866).

<sup>152</sup> *Burckhalter v. Roach*, 142 Ga. 344, 348, 82 S.E. 1059, 1061 (1914); *Good Report Realty Co. v. Pine*, 237 App. Div. 26, 27, 260 N.Y. Supp. 649, 650 (2d Dep't 1932).

<sup>152a</sup> For a discussion of the modern tendency away from *caveat emptor*, see Keeton, "Rights of Disappointed Purchasers," 32 Tex. L. Rev. 1, 3 et seq. (1953).

premises under consideration and is of no disadvantage to the owner if the encroachment may remain without molestation. Street encroachments are discussed separately because the right of maintenance, as against the municipality, differs from the rights subsisting as between adjoining owners.

It has been customary in many cities to build stoops, stairways, bay windows, balconies or other incidental parts of buildings beyond the building line. The term "stoop line", as distinguished from building line, will often be encountered, as indicative of this practice. The custom has often been tolerated or permitted by the municipality and the existence of such encroachments has, accordingly, been deemed immaterial to marketability of title. But growing density of population and the spread of business into former residential areas may change municipal policy. In the City of New York a reversal of municipal policy resulted in so substantial a change in the law that a brief history of the New York law is necessary if only to indicate which cases have been overruled.

If a street encroachment may remain, by virtue of some statute, ordinance or provision of a building code, at least so long as the building stands, title to the premises is marketable.<sup>153</sup> In one case title was perfected by an ordinance, enacted after the contract of sale, which abandoned the part of the street on which the seller's building encroached.<sup>154</sup> If the encroachment is so slight as to be removable at little expense and with little effect on the building, title is likewise marketable even though there may be no recognized municipal policy or controlling law.<sup>155</sup> But where the municipality may compel removal,<sup>156</sup> or an existing ordinance makes removal mandatory,<sup>157</sup> title is unmarketable. The possi-

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<sup>153</sup> *Mendoza v. Glorioso*, 167 La. 701, 120 So. 57 (1929); *Harrington v. Kadrey*, 105 N.J. Eq. 389, 148 Atl. 3 (Ch. 1929); *Scheinman v. Bloch*, 97 N.J.L. 404, 117 Atl. 389 (Sup. Ct. 1922), aff'd, 98 N.J.L. 571, 119 Atl. 926 (Ct. Err. & App. 1923); *Waterman v. Taub*, 3 N.J. Misc. 216, 127 Atl. 676 (Sup. Ct. 1925), aff'd, 102 N.J.L. 472, 131 Atl. 924 (Ct. Err. & App. 1926); cf. *Marchant v. McDonald*, 37 N. Mex. 171, 20 P.2d 276 (1933).

<sup>154</sup> *Larkin v. Koether*, 101 N.J. Eq. 176, 137 Atl. 849 (Ch. 1927), aff'd, 102 N.J. Eq. 329, 140 Atl. 920 (Ct. Err. & App. 1928).

<sup>155</sup> *Mertens v. Berendsen*, 213 Cal. 111, 1 P.2d 440 (1931); *Trexler v. Katz*, 116 Cal. App. 226, 2 P.2d 553 (1931). But see *Doutney v. Lambie*, 78 N.J. Eq. 277, 78 Atl. 746 (Ct. Err. & App. 1911) where a New Jersey court refused to pass on New York rule discussed infra at p. 245.

<sup>156</sup> *Vassar Bldg. Co. v. Wuensch*, 100 N.J. Eq. 147, 135 Atl. 88 (Ch. 1926); *White Way Co. v. Heinle*, 6 N.J. Misc. 742, 142 Atl. 667 (Sup. Ct. 1928).

<sup>157</sup> *Bier v. Walbaum*, 102 N.J.L. 368, 131 Atl. 888 (Ct. Err. & App. 1926); *Morra v. Laurel Realty Co.*, 100 N.J.L. 125, 125 Atl. 8 (Ct. Err. & App. 1924) (decided on technical pleadings, rather than facts which seller might possibly have established); *Trice v. Kayton*, 84 Va. 217, 4 S.E. 377 (1887) (breach of covenant); *Re Goldenberg*, 56 Ont. L. Rep. 414 (1925) (cites no controlling law).

bility of encroachments may be covered by a provision in the contract of sale and such stipulation will ordinarily control regardless of whether any encroachments subsequently discovered are such as would otherwise be deemed immaterial.<sup>158</sup>

The rule in New York has undergone a substantial change with respect to street projections<sup>159</sup> but has been consistent throughout with respect to street *encroachments*. A substantial structural encroachment on the street, as by a front wall, has always made title unmarketable.<sup>160</sup> The early cases were liberal with respect to projections or encroachments of incidental parts of buildings and those which might be classed as architectural or ornamental projections, on the ground that these were maintainable under license or statute and were unlikely to be disturbed by municipal action. Thus, a stoop fifteen feet on the street,<sup>161</sup> water tables projecting seven inches,<sup>162</sup> newel posts and stoops four inches,<sup>163</sup> bay windows seven and one-half inches,<sup>164</sup> show windows sixteen to seventeen inches,<sup>165</sup> the outer surfaces of channeled or fluted piers two inches on the street,<sup>166</sup> were all held immaterial.

Then the *Ackerman*<sup>167</sup> and *Rice*<sup>168</sup> cases directed removal of project-

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<sup>158</sup> *Isserman v. Welt*, 101 N.J. Eq. 634, 139 Atl. 237 (Ch. 1927); *Goldstein v. Ehrlich*, 96 N.J. Eq. 52, 124 Atl. 761 (Ch. 1924); *Heymann v. Steich*, 114 N.Y. Supp. 603 (Sup. Ct. Kings County 1908), *aff'd*, 134 App. Div. 176, 118 N.Y. Supp. 1113 (2d Dep't 1909), *aff'd*, 201 N.Y. 578, 95 N.E. 1130 (1911); and see contractual provisions respecting stipulations, p. 266 *infra et seq.*

<sup>159</sup> The New York law is exhaustively considered in Fink, "The New York Law on Encroachments and Obstruction Upon Streets and Highways," 14 St. John's L. Rev. 1 (1939). Subsequent to the publication of this article N.Y. Gen. City Law § 38a, discussed, *infra* at p. 265 was enacted.

<sup>160</sup> *Ravine Point Co. v. Kott*, 254 N.Y. 580, 173 N.E. 875 (1930) (4 inches); *Kohn v. Meyer*, 73 N.Y.L.J. 303, col. 3 (Sup. Ct. April 22, 1925); *Perlman v. Stellwagen*, 115 Misc. 6, 187 N.Y. Supp. 845 (Sup. Ct. Bronx County 1921) (2 inches); *Smithers v. Steiner*, 13 Misc. 517, 34 N.Y. Supp. 678 (N.Y. Super. Ct. 1895) (2 1/2 to 3 1/2 inches); and see *Klim v. Sachs*, 102 App. Div. 44, 45, 92 N.Y. Supp. 107, 108 (2d Dep't 1905).

<sup>161</sup> *Levy v. Hill*, 70 App. Div. 95, 75 N.Y. Supp. 19 (1st Dep't 1902), *aff'd*, 174 N.Y. 536, 66 N.E. 1112 (1903). *Accord*, *Broadbelt v. Loew*, 15 App. Div. 343, 44 N.Y. Supp. 159 (1st Dep't 1897), *aff'd*, 162 N.Y. 642, 57 N.E. 1105 (1900).

<sup>162</sup> *Webster v. Kings County Trust Co.*, 145 N.Y. 275, 39 N.E. 964 (1895); 556 & 558 Fifth Avenue Co. v. The Lotos Club, 129 App. Div. 339, 113 N.Y. Supp. 886 (1st Dep't 1908). The projections had been in existence for twenty and thirty years, respectively.

<sup>163</sup> *Van Horn v. Stuyvesant*, 50 Misc. 432, 100 N.Y. Supp. 547 (Sup. Ct. N.Y. County 1906).

<sup>164</sup> *Broadbelt v. Loew*, *supra* note 161.

<sup>165</sup> See *Klim v. Sachs*, 102 App. Div. 44, 45, 92 N.Y. Supp. 107, 108 (2d Dep't 1905).

<sup>166</sup> *Empire Realty Co. v. Sayre*, 107 App. Div. 415, 95 N.Y. Supp. 371 (1st Dep't 1905).

<sup>167</sup> *Ackerman v. True*, 175 N.Y. 353, 67 N.E. 629 (1903). The *Ackerman* case also involved a substantial building encroachment. This may have obscured for a while its effect on architectural and ornamental projections.

<sup>168</sup> *City of New York v. Rice*, 198 N.Y. 124, 91 N.E. 283 (1910) (ornamental wall).

ing bay windows and ornamental projections as public and private nuisances. These cases were predicated on the inalienability of city streets and the lack of any governmental power to permit permanent encroachments thereon. These cases did not arise between vendor and vendee and their effect on marketability of title was delayed. Thereafter, one lower court upheld title despite projection of bay windows two feet five inches,<sup>169</sup> and the Court of Appeals upheld title, though it abated the purchase price, despite cornice projections of two and one-half feet and smaller projections by building trim.<sup>170</sup> However, the Court of Appeals re-examined the law in the *Acme*<sup>171</sup> case which involved substantial projections by bay windows (one foot), a stoop (four feet) and a portico (one foot). It was argued that these projections were maintained under permissive ordinance and could not be nuisances. The Court concluded, however, that the change in municipal policy made for a possible revocation of permission, the result of which would convert projections into nuisances and, accordingly, title was held unmarketable. In subsequent cases involving similar projections, though smaller in degree, several lower courts followed the *Acme* case,<sup>172</sup> but others continued to apply the old rule on the ground of unlikelihood of municipal interference or the ready removability of the projections.<sup>173</sup> One case required a buyer to take title to a theatre with two balconies, two pilasters

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<sup>169</sup> *Ebert v. Hanneman*, 69 Misc. 223, 125 N.Y. Supp. 237 (Sup. Ct. Kings County), aff'd, 142 App. Div. 898, 126 N.Y. Supp. 1127 (2d Dep't 1910).

<sup>170</sup> *Leerburger v. Watson*, 75 Misc. 3, 134 N.Y. Supp. 818 (Sup. Ct. N.Y. County 1911), aff'd, 157 App. Div. 915, 142 N.Y. Supp. 1127 (1st Dep't 1913), aff'd, 213 N.Y. 662, 107 N.E. 1080 (1914).

<sup>171</sup> *Acme Realty Co. v. Schinasi*, 215 N.Y. 495, 109 N.E. 577 (1915).

<sup>172</sup> *Jennings v. Bauman*, 214 App. Div. 361, 212 N.Y. Supp. 334 (2d Dep't 1925), aff'd, 243 N.Y. 532, 154 N.E. 593 (1926); *Levy v. Dick*, 116 Misc. 145, 190 N.Y. Supp. 238 (Sup. Ct. Kings County 1921) (substantial building encroachment also involved); *Klimas v. Brumbach*, 116 Misc. 299, 190 N.Y. Supp. 307 (Sup. Ct. Queens County 1921); *Jackson v. Rentrop*, 70 N.Y.L.J. 542, col. 2 (Sup. Ct. Nov. 13, 1923). The *Jennings* and *Levy* cases deemed it immaterial whether the city had an easement in the street or owned the street in fee.

<sup>173</sup> *Sheridan v. McLaughlin*, 172 App. Div. 314, 158 N.Y. Supp. 406 (1st Dep't 1916); *Gellunan v. Herrmann*, 118 Misc. 290, 193 N.Y. Supp. 174 (Sup. Ct. Erie County 1922); *Celestial Realty Co. v. Childs*, 100 Misc. 532, 166 N.Y. Supp. 921 (Sup. Ct. N.Y. County 1917), rev'd on other grounds, 182 App. Div. 85, 169 N.Y. Supp. 597 (1st Dep't 1918). In *Ancel Realty Corp. v. Young*, 194 Misc. 59, 60, 86 N.Y.S.2d 754, 755 (Sup. Ct. Kings County 1949) the court wrote: "The court is satisfied that the encroachments of the water table, pilasters and door caps are not of the character or degree sufficient to justify a rejection of title by the purchaser, the premises having been built in 1894." The case relies on authorities antedating the *Acme* decision (note 171 supra) and apparently the statute cited in note 178, infra. This statute, however, is limited to encroachments by walls and does not relate to the projections involved in the *Ancel* case.

and a marquee projecting on the street, giving the seller a choice of accepting an abatement in the purchase price or delivering a surety company bond covering a possible forced removal of the encroachments.<sup>174</sup> Another case, somewhat similar factually, refused specific performance to a seller despite the seller's offer to remove the projections and refused to compel the buyer to take a building whose ornamental embellishments would be substantially altered.<sup>175</sup>

By reason of this state of the law, most printed forms of contract of sale currently in use in the City of New York now make the sale subject to "encroachments of stoops, areas, cellar steps, trim and cornices, if any, upon any street or highway."<sup>176</sup> Sometimes a further exception is made respecting variations between fences, retaining walls and the like, and the lines of record title.

In order to perfect title, several statutes were enacted with respect to the City of New York or parts of the City. An 1896 statute, applicable to New York County, permits then existing street encroachment of a front wall, no more than four inches, or of bay and oriel windows not more than twelve inches, unless the City should commence an action for removal within a year after the effective date of the statute. An 1899 statute increased the permissible length of wall encroachments to ten inches.<sup>177</sup> An 1897 statute, applicable to the old City of Brooklyn, makes similar provision with respect to building encroachments, no more than four inches, on streets.<sup>178</sup> N.Y. Gen. City Law § 38-a, effective April 29, 1941, provides:<sup>179</sup>

1. If the front wall of a building, erected before January 1, 1920, encroaches no more than 6 inches on the street, its removal may not be compelled, unless an action for this purpose should be brought within a year after the effective date of the statute.<sup>180</sup>

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<sup>174</sup> *Schwartz v. Fox Metropolitan Playhouses, Inc.*, 235 App. Div. 637, 254 N.Y. Supp. 1064 (2d Dep't 1932).

<sup>175</sup> *Lencrif Realty Corp. v. Cappalen*, 75 N.Y.L.J. 1397, col. 3 (Sup. Ct. July 1, 1926), aff'd, 220 App. Div. 828, 222 N.Y. Supp. 842 (1st Dep't 1927), aff'd, 247 N.Y. 566, 161 N.E. 184 (1928).

<sup>176</sup> Absent careful draftsmanship there may be difficulty in reconciling this and comparable clauses with other parts of the contract of sale. See p. 269 *infra*.

<sup>177</sup> N.Y. Laws 1896, c. 610, effec. May 13, 1896; N.Y. Laws 1899, c. 646, effec. May 25, 1899; N.Y. City Admin. Code § 82d 6-7.0(a).

<sup>178</sup> N.Y. Laws 1897, c. 473, effec. May 17, 1897; N.Y. City Admin. Code § 82d 6-7.0(b).

<sup>179</sup> Other relevant provisions of the N.Y. City Administrative Code are C26-216.0 (prohibits projections by buildings erected or altered after Jan. 1, 1938, except as otherwise specifically permitted); C26-217.0 (any permitted projections must be removable); C26-218.0 (permits 1 foot footings 8 feet below sidewalk); C26-219.0 (permits specified projections); 82d 6-8.0 (provisions applicable to Bronx and Kings Counties).

<sup>180</sup> If the building was erected before Jan. 1, 1920, a subsequent alteration which

2. If such wall was erected after January 1, 1920 and any party interested in the property has notified the City of such encroachment, no action to compel removal may be brought unless the City has started an action to compel removal within one year thereafter.<sup>181</sup>

3. If the City fails to bring timely action under "1" or "2" above, the owners or encumbrances on the property are deemed to have an easement to maintain the encroachment so long as the wall stands but no longer.

This statute represents current municipal policy. But in view of the inalienability of public streets and the rule that time does not run against the sovereign, the validity of these statutes cannot be regarded as free from doubt.<sup>182</sup>

#### CONTRACTUAL PROVISIONS RESPECTING ENCROACHMENTS

If a house is situate on ample grounds, obviously within the boundary lines, it will be clear that the house does not encroach on adjoining property. But even in this simple case a garage or fence may encroach, or structures on the adjoining premises may encroach on the property under consideration. In tightly-built city areas, discovery of encroachments is much more difficult. For this purpose the naked eye or steel tape are of little use. An accurate survey is necessary, but a survey may no longer be reliable as soon as a structure on either property is altered. A buyer may, understandably, expect the seller to know the condition of his property but in many cases neither knows if encroachments exist. Often the matter is not left to chance but is covered expressly in the contract of sale.

In some places a buyer's clause may be found in contracts of sale whereby the seller covenants that the buildings on the premises are entirely within the boundary lines, as described, and that there are no encroachments on the premises. This provision has been held to permit a buyer to reject title by reason of any encroachment by or on the premises or on the street, regardless of its size.<sup>183</sup> This clause is effec-

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reduces the encroachment leaves title marketable. *Whittier Est. Inc. v. Manhattan Savings Bank*, 181 Misc. 662, 48 N.Y.S.2d 111 (App. T. 1st Dep't 1944), aff'd, 268 App. Div. 1037, 52 N.Y.S.2d 951 (1st Dep't 1945).

<sup>181</sup> This section is applicable to a building erected after both Jan. 1, 1920 and the effective date of the statute. *Matter of City of New York*, 275 App. Div. 948, 89 N.Y.S.2d 779 (2d Dep't), aff'd, 300 N.Y. 600, 90 N.E.2d 63 (1949); *City of New York v. Venezia*, 193 Misc. 249, 81 N.Y.S.2d 545 (Sup. Ct. Kings County 1948).

<sup>182</sup> See dissenting opinion in *556 & 558 Fifth Avenue Co. v. The Lotos Club*, 129 App. Div. 339, 344, 113 N.Y. Supp. 886, 889 (1st Dep't 1908). The rule that the statute of limitation does not run against the sovereign is applicable to municipalities. 55 C.J.S. 939, 947.

<sup>183</sup> *Veters v. Walsh*, 14 La. App. 323, 124 So. 687 (1929); *Jawitz v. Caldwell Inv. Co.*, 103 N.J. Eq. 61, 142 Atl. 181 (Ch. 1928); *Kohoot v. Gurbisz*, 101 N.J. Eq. 757, 139 Atl.

tive but perhaps too much so in the case of harmless trivial encroachments which are passed regularly by careful examiners and conservative money lenders. Trifling encroachments are objectionable only to a buyer who has some ulterior reason for rejecting title. This clause might make virtually all titles unmarketable in the older parts of the City of New York and perhaps other cities. Quaere, however, how this clause would operate if a building encroached on adjoining property as of right, as in the case of an easement or by adverse possession? If the right to maintain was free from dispute, title might conceivably be upheld on the ground that, absent illegality, there is no "encroachment." If the right to maintain was subject to any reasonable doubt, title would presumably be held unmarketable.<sup>184</sup>

If the buyer expects that a driveway or any other matter or facility will be included in the sale, he should satisfy himself that these are within the premises described in the contract, rather than on adjoining property. If he cannot assure himself of this before signing the contract of sale he might well insist on a covenant to this effect in the contract.<sup>185</sup>

The seller can sell only what he has, and from his point of view the best contractual provision is one which requires the buyer to take the premises in their existing state. If the seller does not know the survey conditions and has no survey, he will endeavor to include in the contract a clause reading:

Subject to any state of facts an accurate survey would show.

This clause is often referred to as a "general survey exception." If the seller has a survey but one not brought up to date, the clause he prefers reads:

Subject to the state of facts shown on a survey of the premises made by ..... and dated ..... and to any other state of facts which a more recent survey would show.

A general survey exception makes title marketable despite substantial encroachments, as in the case of a carriage house encroaching on adjoining property eight inches on one side and two inches on another,<sup>186</sup> or

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223 (Ct. Err. & App. 1927); *Security Bond & Mtge. Co. v. Weiss*, 100 N.J. Eq. 156, 135 Atl. 329 (Ch. 1926), aff'd, 101 N.J. Eq. 307, 137 Atl. 919 (Ch. 1927); *Isserman v. Welt*, 101 N.J. Eq. 634, 139 Atl. 237 (Ch. 1927); *Wyatt v. Bergen*, 98 N.J. Eq. 502, 130 Atl. 595 (Ch. 1924), aff'd, 98 N.J. Eq. 738, 130 Atl. 597 (Ct. Err. & App. 1925); *Goldstein v. Ehrlick*, 96 N.J. Eq. 52, 124 Atl. 761 (Ch. 1924); *Herring v. Esposito*, 94 N.J. Eq. 348, 119 Atl. 765 (Ch. 1923). Compare the text at notes 196-198 *infra*.

<sup>184</sup> *Isserman v. Welt*, *supra* note 183 (despite municipal ordinance). Compare p. 242 *supra*.

<sup>185</sup> See *Woldow v. Dever*, 374 Pa. 370, 97 A.2d 777 (1953) discussed on p. 261 *supra*.

<sup>186</sup> *McCarter v. Crawford*, 245 N.Y. 43, 156 N.E. 90 (1927).

the front walls of a building one to three inches on the street.<sup>187</sup> There may be some limit to the size of encroachments a general survey exception permits. It is conceivable that if the encroachments are sufficiently shocking a court may permit rescission on the ground of mutual mistake.

It is not clear if a general survey exception is limited to encroachments or covers shortages in dimensions. Title was held good in cases involving general survey exceptions, despite slight variances in dimensions, where the dimensions were indicated as approximate;<sup>188</sup> and despite substantial variances in a large unimproved tract, where the courses were indicated as "more or less" and were monumented, and the seller had exhibited an accurate survey to the buyer before execution of the contract of sale.<sup>189</sup> But, on the other hand, a general survey exception was held not to require a buyer to take a smaller lot than that agreed on. In one case the lot described in the contract as approximately 20 feet by 95 feet, in actuality had a width of but approximately eighteen and one-quarter feet in front and fifteen and three-quarters feet in the rear.<sup>190</sup> Another case involved a contract which made the sale subject to a specified survey which showed that an adjoining building encroached five inches on a gore. Seller had no title to this gore. It was held that the contract clause did not excuse seller's lack of title to the premises encroached on.<sup>191</sup> It is, therefore, advisable, when using the general survey exception, to indicate expressly if dimensions as well as encroachments are to be covered thereby.

A general survey clause is usually objectionable to a buyer because with this clause he cannot tell what he is buying. He may suggest an addition which would change the general exception to read:

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<sup>187</sup> See *March v. Marasco*, 165 App. Div. 348, 350, 150 N.Y. Supp. 792, 794 (1st Dep't 1914). The extent of the encroachments appears only in the Record on Appeal. Other street encroachments involved in the *March* case were: cellar steps 1 foot 5 inches; guard rails 1 foot 3 inches and 10 feet; show and bay windows 1 foot; cellar steps 1 foot 6 inches. *Olive v. Suffes*, 123 N.Y.S.2d 842 (Sup. Ct., Richmond County 1953) applies the same rule to a fence extending 8 feet beyond the described premises and a garage encroaching an undisclosed distance, but within the fence.

<sup>188</sup> *Sheil v. Samarogen Realty Co.*, 223 App. Div. 820, 228 N.Y. Supp. 425 (1st Dep't 1928).

<sup>189</sup> *Dailey v. Ralco Const. Corp.*, 117 N.Y.L.J. 2208, col. 1 (Sup. Ct. June 4, 1947) (one course being 141 feet, instead of 159 feet as recited). The existence of a recent survey in this case was apparently insufficient to overcome the habit of using old descriptions.

<sup>190</sup> *Meehan v. Newman Improvement Co.*, 262 N.Y. 682, 188 N.E. 119 (1933).

<sup>191</sup> *Kaplan v. Bergman*, 122 App. Div. 876, 107 N.Y. Supp. 423 (2d Dep't 1907). In *King v. Knapp*, 59 N.Y. 462 (1875) buyer recovered his down payment, made at an auction sale, by reason of an encroachment of 10 inches, increasing to 16 inches at 30 feet and then decreasing to 2 inches. Interlined in the dimensions in the contract of sale was "more or less" but this was not announced. The suppression of this was held to justify rejection by the buyer.

Subject to any state of facts an accurate survey would show *provided the same do not make title unmarketable.*

The effect of this clause as so changed is to make title unmarketable by reason of any encroachment sufficiently substantial to make title unmarketable if there were no relevant stipulation.<sup>192</sup> In other words, the addition nullifies the entire clause and makes its inclusion useless. If neither party knows the conditions in existence, the risk of possible encroachments must be assumed by one of them. If the seller has a survey, but not a recent one, and suggests the second clause quoted above, the buyer may suggest an addition so that the provision will read:

Subject to the state of facts shown on a survey of the premises made by . . . . . and dated . . . . . and any other state of facts which a more recent survey would show, *provided such other state of facts does not make title unmarketable.*

This clause, as so amended, obligates the buyer to take subject to the conditions shown on the survey specified but nullifies the stipulation in so far as it relates to changes made in the premises subsequent to the survey.

Under general rules of construction a contract is to be construed as a whole and the parts thereof are to be reconciled in order to carry out the presumed intention of the parties. In so far as a survey clause is part of a contract of sale, its construction may be affected by other provisions in the contract. In one case a buyer claimed unsuccessfully that title was unmarketable by reason of a stoop encroachment. The contract of sale was:

Subject to encroachments of stoop, areas and cellar steps or appurtenances thereto on street, and subject also to any state of facts an accurate survey of said premises may disclose that does not render title unmarketable.

The court held "that does not render title unmarketable" modified "state of facts" but not "subject to encroachment of stoops, areas . . .," partly because the singular verb "does" indicated a singular subject, e.g. "survey".<sup>193</sup> The buyer, accordingly, had to take subject to the stoop encroachment regardless of what effect this encroachment might have

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<sup>192</sup> J. O. Construction & Dev. Co. v. Cuendet, 279 App. Div. 203, 108 N.Y.S.2d 782 (1st Dep't 1951). The clause was given this effect in a case involving violation of a setback restriction. Golden Development Co. v. Weyant, 295 N.Y. 845, 67 N.E.2d 255 (1946). Compare Pyramid Motor Freight Co. v. Thorman Baum & Co., 114 N.Y.S.2d 614 (Sup. Ct. N.Y. County 1948) (title marketable where building, resting entirely on own columns, lacked easterly wall and used wall of adjoining building for enclosure.)

<sup>193</sup> 401 East 72nd St. Realty Co. v. Ebling Realty Co., 222 App. Div. 388, 226 N.Y. Supp. 58 (1st Dep't 1928), aff'd, 248 N.Y. 545, 162 N.E. 518 (1928).

on marketability in the abstract. Another case held title unmarketable because of street encroachments, despite a contract of sale which referred to the property as that designated by numbered parcels on a specified plan and incorporated that plan in the contract by reference. The plan showed the encroachments. But the court seized upon another provision, requiring such title as would be insured by a specified title company.<sup>194</sup> The latter provision is generally held to mean title insurance without exception.<sup>195</sup> But in view of the specific incorporation of the plan, it would appear that the contract could be harmonized only by holding that the reference to the plan modified the provision for unqualified title insurance. The result nullifies the reference to the plan. These cases indicate the necessity of drafting related clauses with sufficient clarity to show what weight is to be accorded to each.

A buyer who agrees to take subject to a specified survey is bound by the conditions specified or those shown on the survey.<sup>196</sup> But such agreement makes title unmarketable if the encroachments are in fact greater.<sup>197</sup> Once the parties have made their own rules, the seller is held to these rules.<sup>198</sup>

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<sup>194</sup> *Korb v. Spray Beach Hotel Co.*, 24 N.J. Super. 151, 93 A.2d 578 (1952).

<sup>195</sup> *Beinhauer v. Morris*, 142 App. Div. 398, 126 N.Y. Supp. 511 (1st Dep't 1911); and see *Friedman v. Handelman*, 275 App. Div. 926, 86 N.Y.S.2d 692 (Sup. Ct. N.Y. County), rev'd, 300 N.Y. 188, 90 N.E.2d 31 (1949); *Gilchrest House, Inc. v. Guaranteed Title & Mtge. Co.*, 277 App. Div. 788, 97 N.Y.S.2d 226 (2d Dep't 1950), aff'd, 302 N.Y. 852, 100 N.E.2d 46 (1951).

<sup>196</sup> *Kreshover v. Berger*, 135 App. Div. 27, 119 N.Y. Supp. 737 (1st Dep't 1909). A clause making the sale subject to a specified survey does not excuse the seller from a shortage in area. *Kaplan v. Bergman*, 122 App. Div. 876, 107 N.Y. Supp. 423 (2d Dep't 1907); and see text at notes 188-191 supra.

<sup>197</sup> *Fineman v. Callahan*, 222 App. Div. 752, 225 N.Y. Supp. 401 (2d Dep't 1927); *Heymann v. Steich*, 114 N.Y. Supp. 603 (Sup. Ct. Kings County), aff'd, 134 App. Div. 176, 118 N.Y. Supp. 1113 (2d Dep't 1909), aff'd, 201 N.Y. 578, 95 N.E. 1130 (1911).

<sup>198</sup> Compare text at note 185; and see pp. 237, 255 supra.