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A Story

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I have been admonished not to make a speech or an address or deliver a lecture on any theory of law. One of your student body, with marked degree of care and filial devotion, has limited my appearance here this evening to an informal talk on some practical subject that will be helpful to students as they graduate and enter the work of their chosen profession. It must be interesting and not difficult to digest—in a word, it must be just right, as your minds are too much occupied during the day to labor over intricate subjects presented by speakers in the evening. I have been given a very difficult assignment. For, like the lady who instructed the tailor to make a dress for her daughter, it must be neither too long nor too short—but just enough to cover the subject.

I have concluded to tell you a story. The title will be "Zoning," or "The Story of a Lot of Ground." Its success depends on your knowledge of certain principles, which find their way into the law, without explanation or elaboration. It will be necessary for you to grasp the legal situations and quickly frame in your minds the remedy that you would apply.

The plot of the story, as well as that of ground, is laid in most any city in the United States. The time is the present and the actors are yourselves, individually.

John Smith, a graduate of a recognized law school, Editor of the Law Review, his mind filled with all the

*An address delivered before the Law Society of Harvard Law School, Monday evening, December 10, 1928.

knowledge of the law, anxiously waiting for an opportunity to demonstrate his complete mastery of its intricate details, started west to locate in the City of G—, I—. There he intended to open an office and practice his profession. On reaching this city, where he was acquainted, he applied for admission to the bar to the local examining board for the county, and was referred to the state board, where he successfully passed the state bar examinations, and on presentation of his certificate from the state board, was duly admitted to the county bar. Having located an office, and being possessed of a comparatively small sum of money, he decided to invest it in a venture that was reasonably sure, not likely to depreciate quickly in value and would yield an income sufficient to pay the carrying charges and enable him to pass through the dark period of early professional life. Accordingly he concluded his best chance lay in purchasing a lot of ground; with his ready cash he would pay the purchase price, or part of it, and with the aid of borrowed capital complete the purchase and erect a building. He expected, with good reason, that the revenue from the rest would produce sufficient to meet his requirements.

After visiting various sections of the city, he selected an inoffensive lot of ground, situated well within city lines. Ascertaining that the lot was owned by the estate of James Jones, and that John Slick, a realtor, was to make the sale as agent for the estate, Smith got in touch with Slick, made known his wishes, told him substantially all he intended to do, and inquired concerning the price of the lot. He was informed by the agent the price was $50,000, of which $20,000 would be required as hand-money, the balance to be paid when the deal was closed. Also, that the title was good and there were no encumbrances against the lot. Twenty thousand dollars represented all the money Smith had. In order to complete his arrangement, secure the balance of the money and build, Smith must arrange for the necessary funds through a loan. This he arranged through a trust company; it had a department which loaned money as needed for building operations, the procedure

being to record the agreement, thus fixing the rights of the parties through the record notice, the trust company to advance the money as needed, placing a supervisor over the work and the trust company making directly all disbursements. Thereafter, a first mortgage covering completed building and property was to be given.

Smith returned to the agent, and an agreement was entered into by which Smith agreed to buy and Slick, agent for the estate, agreed to sell the land to him "in fee simple, clear of all encumbrances," with a warranty of title. Slick was to furnish an abstract of title which would be subject to the approval of Smith, and if there were any encumbrances affecting the marketability of the land, Smith could disaffirm the sale and the hand-money was to be returned to him with interest, together with any expense connected with the purchase. It was stipulated that the deferred payment should be due one year thence, and bear interest. This gave Smith ample time to complete his project.

Shortly after the agreement was executed, Smith was furnished an abstract of title. Wishing to be careful, he proposed to check up the abstractor's work and verify his fee simple holding. As there was no title-examining company in that city or county, and as he did not care to disclose his unfamiliarity with such work, he did not hire a lawyer familiar with the subject; having implicit confidence in his own legal ability, he undertook the task of checking up the abstract himself.

He went to the recorder's office, where deeds are recorded, and carefully examined all the deeds from grantors back to the Commonwealth; this search included in the line of title all wills, proceedings in the orphans' court, register of wills or probate, or other courts having control of the administration of estates. Through the recitals in the deeds and proceedings in court he found words necessary to convey a fee simple title to the land from the Commonwealth to the present grantor. There were no reservations or exceptions, and, as far as this record title disclosed, Smith was getting a fee.

He then looked for mortgages, examining carefully the index of mortgages to ascertain if any grantor had given a mortgage that had not been paid, or, being paid, not marked satisfied. Not finding any, he looked for judgments, examining the judgment docket to find if there were any unsatisfied judgments which had been entered against any grantor within the statutory period. A search back ten years did not reveal any. The municipal lien docket was then examined to ascertain if the city, within ten years or so, had constructed any sewers, paved the street or laid any water lines in front of his property, the cost of which may be imposed upon the abutting property owner, and a lien for that cost entered in this docket. Discovering none, the tax lien docket or the tax office was next examined. He found no taxes assessed against the property unpaid, and the property in the hands of any grantor had not been sold for taxes unpaid. Smith then wrote the United States Federal Court for the district in which the land was located for a list of liens against his grantor or grantors for the last ten years. He found none. There was no such thing as a title insurance company in G—, hence the title could not be insured.

Having made what he conceived to be a careful examination of the title, he proposed to go ahead with his deal, fully satisfied that he had not disappointed his legal education in the comprehensive examination of the title. Plans and specifications were prepared by an architect for a four story building to contain storerooms and apartments, which would completely cover his lot, and a contract was let for excavating for the foundation. Workmen for the contractor went on the ground and started work. They had scarcely started when the corner policeman demanded from the foreman his permit to build; he was referred to Smith, the owner. The officer soon located Smith, who was not as yet submerged with legal business, and asked for the permit. "Permit! Permit for what?" asked Smith. "Why, a permit to erect your building on this lot." "I didn't know I had to get a permit." "Yes," said the officer, "you must have a permit, and each policeman is required

to report building operations in his district and see the permit. You better go down to City Hall; if you are entitled to a permit, you will get it." Smith at school had heard something of permits, but there was drifting in his mind the idea that his agreement gave him fee simple ownership; therefore, the need of a permit had not occurred to him. But, out of deference to the constituted authorities, he visited City Hall and asked the head of the Bureau of Building for a permit. By questioning, the officer learned that he owned a lot of ground 40 x 150, and wished to erect a combination store-room and apartment-house covering the lot, the plans of which he exhibited. "Oh," said that good-natured official, "you must see the Zoning Board." Smith was annoyed. He knew through independent examination at school that a Zoning Board had something to do with land in cities. He reflected there are so many subdivisions of subjects in the law's compass it was impossible to acquire through study a detailed knowledge of each one and came to realize that the law school merely opens the door through which graduates may pass, equipped with a general scientific knowledge that leads to a discovery of the law on a given state of facts.

However, believing it to be a mere matter of form, he applied to the Zoning Board for authority to build. He made known his ownership of the lot, street and number of the location, and his contemplated purpose. He produced his plans, and the board refused the application to build for the reason that this lot was in a residential district which did not permit, first, a combination store and dwelling-house on any lot; second, any building to occupy the entire lot of land. In vain did Smith insist that his lot for residence purposes was worth less than the hand-money paid, and, if the decision of the board stood, he was ruined; that in the same block on the same side of the street there was a store, and within a short distance a larger apartment house. Why, he argued, could he not build on a lot owned in fee, without reservation or exception, on which he had been taught he could build anything so long as he did not harm his neighbor? For answer, the presi-

dent of the board handed Smith a copy of the Zoning ordinance.

He read the ordinance, but was too much distracted to understand it. He did discover from the Zoning map that his lot was located in the "C" residential district, which permitted a one-family residence to be built, or a church or a library, with certain restrictions as to these buildings. But why could he not, in the same street, do as others had done? After some thought, he controlled his pride and did as many other lawyers had done, and what is always a good thing for any young lawyer to do, consulted an older lawyer, Mr. X, a middle-aged man of wide experience, a kindly gentleman interested in young men. To him the story was told. Smith admitted he knew little or nothing of the zoning law, its origin, purpose, effect or practice under it. In fact, he did what every client should do—told his counsel everything about his case.

"Is there any relief under the circumstances of my case?" asked Smith. "Why should owners," he continued, "be needlessly harassed in the use of land owned in fee?" "What is the zoning law anyway, and why should the State permit cities to pass ordinances affecting the use of land? I thought the government couldn't take your property without paying for it."

"Well, my boy," said his friend, "zoning laws relate only to cities or congested centers of population; fifty years ago there was apparently no necessity for them. It is quite true in that period, under the plan of municipal aesthetics, there was an effort to discourage unsightly things, and a belief that 'outward beauty was but a manifestation of inward grace!' But no zoning law or government interference through a systematic regulation was ever attempted, and if it had been attempted, the courts would have condemned them. Its coming had been anticipated, to some extent, by many laws affecting certain uses of property, such as the writ of injunction and the law of nuisances, as you know; but these were wholly inadequate for the broad scope these new general regulations assumed under present-day legislation.

"As time advanced, and civilization marched forward with rapid stride, industry, science and art progressed beyond the wildest dream of those who presided over our destinies fifty years ago. The inevitable followed. Industrial concerns, because of the availability of labor, centered in cities, if industry itself was not responsible for such cities. This growth caused large numbers of our rural population, as well as the influx of foreign immigrants, to congregate in such centers. Business pushed forward, crowding house-owners or making their residences unusable as homes. Industrial and business places spotted the territory used for residence purposes, causing much annoyance and discomfort to these owners, as well as loss of property value. Traffic on the streets became more and more difficult to move. The great congestion and impediment to traffic came not only from industry, but from the modern huge office buildings, the modern apartment-house and the introduction of the automobile. The difficulty of obtaining proper police protection from crime, proper sanitation, the increase in fire hazard, the danger to pedestrians, the impossibility of securing convenient or fairly comfortable homes in which working people might live—all these created such a disturbance in city life, as made it imperative for the government no longer to view with indifference the tribulations of city life; it became a matter of great concern to the security of the state."

"All this may be true," said Smith, "but why not let the people provide their own remedy, as they have been doing for a hundred years?"

"No private person," continued Mr. X, "or combination of persons, could undertake or impose regulations that would bring about satisfactory results in city life. In spots land might be conveyed subject to building and other restrictions, but these are soon lost sight of or their abuse makes them of no value. The law of injunction or nuisance was inadequate. Even if private persons had a limited power to regulate, they could not insure the quality of regulation, and where individual effort is concerned, it is always met with fierce conflict from others. This mass

of population having come together as a community, each of its members must place his individual fortune with the mass; the government alone can give relief and make effective the protection necessary to the situation. If it neglects to do what it should do, it cripples the well-being and improvement of the community as a whole.

"The government must depend on the common sense of the community to aid in its interference in the use of property. Of course, it is not to be forgotten that the immense desire of people is to act as freely as possible, but this desire must be subjected to an undoubted right in the government to regulate for the best interest of the great majority. As a rule, people do not like to lose their freedom of action, even if it is for their own good.

"Having this situation confronting it, it became necessary for the government to devise some means to protect the residence owner, insure the continued growth of the city along industrial lines, gradually build up the health of the community, and secure a more general welfare and greater safety to the public. For illustration, take the modern office building of today, fifteen or twenty stories high, with a population in it equaling a small-sized borough; from twenty-five hundred to six thousand persons are employed in each building; at the noon hour all of these, within a very short space of time, are precipitated onto the highway. If two or more of these buildings are close together as you find them, the demand on the highway is only intensified; you have within a few blocks a small city. All this concentration of people must be at the expense of health, safety and general welfare."

Here Smith interjected, but his friend stopped him. "You are going to say you cannot, by these laws, stop business and industrial development. Why not let the gradual development take care of itself, as it has done in the past? You might do this, of course, but the development since the late war has been so great that customary growth and advance cannot keep step with what you term normal readjustments. Then zoning regulations systematize de-

velopment, cause a minimum of loss in property value, and secure many other benefits meanwhile."

"But this is nothing more than rankest paternalism in government," shouted Smith. "Quite true, quite true; you may say so; but this is not our first embarkation in paternalism, you must remember. We have enacted laws to cure certain phases of social injustice. In the field of industry, the state requires guard-rails about machinery for the protection of workmen; it has promulgated rules for the relief and care of those engaged in mining coal; it forbids the employment of children under a certain age; makes compulsory compensation to injured workmen; limits the hours of labor and regulates the price and character of service to be furnished by our great public utilities. These laws forecast just such regulation as zoning laws, and the end of paternalism is not yet. These regulations are enforced through commissions or departments; they are undoubtedly parental efforts of government, and they may, as you say, come from an excess of affection of the governing authorities." "All they do is to establish bureaucracies in government," sullenly rejoined Smith. "Not quite, but close to it," said Mr. X.

"Let me repeat, zoning legislation is for the purpose of lessening congestion in streets, securing greater safety from fire hazards, panic and other dangers, providing more light and air to the resident owner, preventing overcrowding of land, facilitating transportation, providing suitable homes for working people, preventing unnecessary noises and spreading of noxious odors, gases or smoke. It reduces street accidents by segregation of building and industry, affords more adequate police protection and stabilizes property values. I don't pretend it does all this automatically, but these are put forward by the proponents of this legislation as the ultimate end of the acts. They are to be worked out through the common sense and good judgment of the people entrusted with their administration. "Well," said Smith, "how is it brought about, say, here in G—?"

"The legislature passes an act authorizing cities having a given population to enact a zoning ordinance. You must remember, of course, that this power is not exercised under the theory of eminent domain. Under that power a city may build parks, memorial halls, monuments and highways, widen streets for traffic and build ornamental court-yards, playgrounds and the like, but it has to pay for the taking; nor is the authority under the taxing power, though the money of the taxpayer is used for eminent domain or aesthetic purposes. But much that has been accomplished through taxation and eminent domain is used as a reason to justify zoning laws. As I have stated, the authority comes through an exertion of the police power in the interest of health, safety and general welfare.

In the last twelve years, the legislatures of forty-three states have enacted zoning laws, and 459 cities having a population of more than 30,000,000, have been zoned. Many of the states have adopted the standard zoning act of the department of commerce at Washington.

"After the legislature delegates the necessary power, the city enacts a zoning ordinance, as G— did. Its zoning ordinance divides the land within it into districts, called 'use districts,' because the property in the particular section, usually between given streets, can be used only for designated purposes. There are three general divisions for which land may be used: residence, business or commercial and industrial. Residence districts are further subdivided into three sub-districts, say A, B and C, and each of these district classifications specifies the character of building to be placed therein, running from an apartment-house and store to a one-family residence. Business or commercial districts are again subdivided, and the uses to which land therein may be put are enumerated in the act. There is quite a list of them. The third, or industrial, is usually divided into light manufacturing and heavy manufacturing. There is a fourth classification which some cities adopt where there is no restricted section; you can build anything therein. These divisions are merely illustrations, naturally; each city has its own forms. A map of the city shows the

lines of these various districts. The ordinance cannot make arbitrary divisions into the classes named, you understand, but you may have the same class in different parts of the city. Mr. Smith, your lot is located in Residence District 'C'; you may go out a mile and quite possibly find a similar district 'C'. Between the two may be Residence District 'B' or some other districts.

"In addition to the classifications mentioned, you have two others that cover all districts. These classifications limit the height in feet and bulk of the building and the area of ground that it may cover or that must surround it. You can build on your lot, Mr. Smith, in the 'C' district, a single-family dwelling covering not over 40 per cent. of the surface. You must leave so many feet in front, on the sides and in the rear; that is, area. You find this defined by set-back lines, meaning the house must be set back so many feet from the street, or referred to as front-yard cases."

"But look here", said the younger man; "there is a store on the same block and an apartment-house that is larger than the one I want to build. What right have they to allow them to do what I can't do?"

"Let's see," said his friend; "you want to build in residence district 'C' a combination apartment-house and store-room four stories high, covering the entire lot. The ordinance forbids that erection. Notwithstanding the ordinance, you claim an unjust classification as it relates to your particular lot of ground, because in the same block, facing the same street as your lot, there are buildings being used for store-room and apartment-house purposes. These were built and so used before the adoption of the ordinance. Is that the case? Well, this presents a serious question, and, so far as I am informed, it has not been decided in our state."

"Yes," exclaimed Smith; "what can I do about it?"

"Your next step is an appeal to the Zoning Board of Appeals. This is the body the legislature has created to safeguard individual rights by providing a quick, convenient remedy against an arbitrary or unreasonable exercise of the police power in specific cases. Its function is to see if the

action of the zoning board was reasonable. An appeal to that body is your only remedy. I may observe that the decision of the Euclid case, in the United States Supreme Court, settles the constitutional question of zoning laws as a structural measure. It holds zoning laws are lawful exertions of the police power by the state. But there is this important distinction which seems to have been lost sight of. That court did not declare each zoning law, in detail, constitutional or every decision under the zoning law. Each case must be left to its particular facts to stand the test of constitutionality. Now your case presents special facts. Go to the Board of Appeals; I wish you luck. Good day." Then, under his own breath, "The impetuousness of youth and education; they will wander into dark places without a chaperon."

Smith took an appeal to the board, basing his right on an unreasonable exercise of police power, particularly the equality clause of the 14th Amendment to the Federal Constitution. The board held that other buildings coming under what is styled "nonconforming uses in a district," or uses forbidden by the ordinance, are none the less lawful and may be continued if such uses were in existence before the adoption of the ordinance. Their opinion went on to say that such right in favor of another owner in the same district was not a discrimination or illegal classification that would condemn the ordinance, and the mere fact these uses still continued did not prevent the enforcement of the zoning ordinance as regards future uses of the rest of the land in the district. Finally, they held the limitation on height and vacant area to surround the building was not unreasonable, and appellant Smith, having bought his lot with full knowledge, as he was presumed to have, that the zoning law embraced his lot, could not complain of any of these restrictions or of a loss in value. Smith, believing the classification unfair, carried his appeal to the Supreme Court and lost. That court sustained the action of the board.

Smith was now assuredly in a sorry plight. His troubles had multiplied. Apparently, he had a useless lot

on his hands, a claim against him by the contractor and another claim by the trust company that had agreed to furnish the money. He went to see Slick, the agent for the estate, the man who sold him the lot, and told him his troubles, but the agent's name did not belie his character. Smith must pay the price. It was worse than ruin, and Slick, the agent, was ready to close the deal, or close in on Smith as the final payment date was fast approaching.

The business of the law had not assumed such flattering proportions as Smith had dreamed about while at school. He had used all his money and borrowed to take his appeal and now conduct his litigation. He had no other source of income. Yet Smith was a born fighter. He would not give up. No true lawyer ever gives up when in the losing stream of a contest if there is the slightest hope for ultimate success. In the clearness of desperation, this thought struck him: "I was to get a fee simple title, free of encumbrances, from Slick. Why is the zoning ordinance not an encumbrance on my title?" The more he thought of the proposition the stronger it became imbedded in his mind. After again consulting his lawyer friend, he concluded that he would cancel the agreement, demand a return of the hand-money from Slick, and damages on account of the contract, to be measured by the cost of his breach with the trust company and with the excavation men. He soon ascertained from his contractor and the trust officer what sum of money would compensate them for the loss of their contracts, and, in each case, it did not exceed their actual expenses. He then went to the agent's office and demanded from Slick the return of the hand-money, as well as payment of the damages he had sustained. This, of course, was refused. His next step was to force Slick's hand by instituting a bill in equity to cancel the contract, and, as incidental relief, to compel the return of the purchase price paid. The decedent of the estate for which Slick had been agent, had lived in Pennsylvania, and the executors were domiciled in Pittsburgh; so Smith, not wishing to take any chances on the question of service, went to Pittsburgh and entered suit. There he engaged legal counsel of note, and

a bill for cancellation of the contract was duly filed. It averred the contract and the failure of the defendants to perform their part of it, inasmuch as they were not able to give a fee simple, because of the encumbrance in the shape of a zoning ordinance; that Slick, as agent, had also misrepresented the facts that led up to Smith's engagement in the contract with respect to the condition of the title; and that the ordinance was an encumbrance affecting the title. He prayed for cancellation of the agreement, the return of the hand-money and the repayment of such expenses as he would be compelled to pay out, and such further relief as the court might think proper. The answer of the executors of the estate admitted Slick's authority to make the contract, denied that the title was not in fee or that there was any encumbrance affecting the title as such. And to complicate matters, they filed a cross-bill, averring that Smith had entered into a contract with them by which he had agreed to buy the land, that they were ready to perform and give him a deed as called for by that contract. They prayed for a decree of specific performance, as the settlement date had passed since Smith instituted his bill for cancellation. To this cross-bill an answer was filed, denying their right to specific performance. A hearing took place before a judge, sitting as a chancellor, where considerable evidence was taken. The details of the transaction, by the testimony there adduced, were clearly outlined to the trial court. The dark cloud of defeat again hung over Smith. The trial court decided that, while the zoning ordinance materially restricted the use of the land and was undoubtedly an encumbrance, it was not such an encumbrance as affected a fee simple grant. In other words, if A contracts with B to convey a fee, the existence of such ordinance would not destroy or injure the availability of the title as a fee. This was so decided because the zoning ordinance was of such public nature that its successful execution should not be impeded by technical rules of law. They also held the title was a fee, denied Smith's right to the return of the purchase money he had paid and ordered him to complete his purchase price, a thing utterly impossible

under the circumstances, as Smith could not raise the money. Smith unable to comply with this decree, believed his failure would be such a contempt that would mean his incarceration in jail. He was more agitated than ever, but he was reassured by associates in Pittsburgh that in those states which did not recognize imprisonment for debt no imprisonment would follow his failure to comply with the order. A more serious proposition was the final determination of the legal question. Accordingly, an appeal to the Supreme Court was their final and only hope.

The case was set for argument in the Western District of that state, and was heard by that court shortly after the appeal was taken. The point stressed at argument was that the title was not a fee simple because the zoning ordinance was a cloud on the title. During the argument it developed from the testimony before the chancellor that when Smith went to Slick, the agent, and told him his desire, Slick knew the lot for residence purposes was not worth over $20,000; for this reason he asked that sum as hand-money. For business purposes, the lot was worth $50,000. He also admitted that, as a lawyer, he had heard of the zoning decisions in other states and knew that this lot was in a district that did not permit Smith to build a store-room and apartment-house. But, as there were other buildings in that use, Smith might obtain a permit for his building from the Zoning Board. Of this Slick was doubtful. At any rate, he was not called on to tell him. His commission was 5 per cent. of the purchase price. The lower court held this not fraud in law.

The seven justices, during the argument. showed by questions they had a sympathetic feeling for Smith and believed he had been badly overreached by his fellow-lawyer. They indicated the lower court's conclusion with respect to the zoning ordinance might be correct. Accordingly, as is their practice, the Chief Justice turned the case over to one of the judges for a very close examination, with instructions to report back to the court with his opinion covering the matter. A very careful study of the case was made, and a curious thing in connection with the contract

attracted the judge's attention. It was a new idea in connection with the case, as it was a new point in law. He decided to write his report and to submit to the court his view of this new proposition. The contract provided for a fee simple title, and evidently it was in fee. It provided, further, that an abstract of title should be submitted to Smith, and he was to approve it. The abstract had been submitted to Smith, and he approved it. Then the agreement contained this peculiar language: If there were any encumbrances affecting the marketability of the land which Smith could not approve, he could disaffirm the title. Smith, held the court, by agreement of the parties, was to act in the capacity of an arbitrator, an umpire or a judge, whose decision on this question was to be final, so far as the purchase of this property was concerned. In deciding whether there were encumbrances, Smith was not held to record encumbrances, as such; the agreement did not so provide. Anything *dehors* the record that affected the land could be so considered. Of course, he could not act capriciously or without just cause; he could not report as encumbrances matters that clearly did not exist and which were not of that character. The vendor was required to furnish, not only a good title, but one within the terms of the contract. Did the estate do this?

Said the court: "The land was to be in 'fee simple,' and if there were 'liens or encumbrances affecting the marketability of the land', the title was to be disapproved. In other words, if Smith found encumbrances that had a tendency to affect the sale of the land, he could cancel the agreement. The question, then, was not merely whether the zoning ordinance affected the title, though, as an encumbrance on the title, it would undoubtedly result in a failure to secure the land's market value, but the clause in the contract must be ascertained by considering the extent this zoning ordinance affected the marketability of the land. Would it have a tendency to impair the sale value of the land? Smith's evidence showed that it did to the extent of $30,000. The contract under consideration did not make the court below nor this court the judge to decide that

question. Smith was to do that. Not marketability of the title as a fee, but marketability of the land was affected by the zoning ordinance. The court below was right in saying that ordinarily a zoning ordinance would not be an encumbrance on the title, and under the circumstances surrounding the land in question it was not such an encumbrance as would affect the fee quality of the land; but Smith was not to decide that question, but whether the zoning ordinance affected the marketability of the land itself. Marketability of the land has a wider signification than marketability of title—a question so often passed upon by the courts of every State. Smith's decision on this question, made in good faith, presented an insuperable barrier against the defendants' securing specific performance of this contract. The parties had solemnly agreed that Smith should be the sole person to decide that question. By his bill for cancellation of the contract, his undisputed notification to the agent, he has decided the question. He has performed his duty as an arbitrator, and Slick's testimony on cross-examination clearly sustained his decision. He demands cancellation and a return of the purchase price paid by him, with expenses. He should receive both. The judgment of the court below is reversed, and it is ordered that a decree be entered annulling and cancelling the contract, and that the defendant be ordered to pay to Smith $20,000, with interest from the date that it was received, and in addition the sum of $5,000 to cover all necessary expenses incurred on account of the contract."

And Smith got his money back.

JOHN W. KEPHART

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