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Real Property

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Ours is an era during which a whole year's worth of developments rule-wise can be brought up on a desktop screen already broken down by subject and subdivided into discrete topics. In high-tone academic neighborhoods this causes pundits to impose upon this already ordered material a new twist, re-ordering it around themes derived from economics, sociology, or even street corner opinion polling. Bean counting and number crunching are felt necessary, and understandably so, if one is to add something "intellectual" to what the machines have spewed out. The life of an old-fashioned lawyer has become hard indeed in this Republic, because simple pragmatism has fallen into disrepute. A critical look at some cases taken at their own face value is not calculated to win any prizes. It's a bit of a dog's life for pragmatists, as a matter of fact. But this suggests a theme which may afford a few insights into some property law cases.

I. SLEEPING DOGS

Imagine if you will lot *A* fronting on a street and, behind it and away from the street, contiguous lot *B*. *X* acquired lot *B* and only later did he acquire lot *A*. Soon enough *X* ran into a land financing predicament and lot *A* was conveyed to *D* by way of a referee's deed. Then *X* conveyed lot *B* to someone, someone whose administrators later leased and then conveyed the lot to *P*. Express easements seem to have been a device quite alien to any of the conveyancers involved in this scenario, so in this sense lot *B* was a landlocked one. Still, a roadway did traverse lot *A* and appears to have been the access to lot *B*. When he first leased the interior lot, *P* obtained *D's* permission to use the roadway. Obviously, the trouble started after *P* purchased lot *B* when, some years later, the permission to cross lot *A* was revoked.

Here, of course, *X* had once owned both lots *A* and *B*, there existed a visible path across *A*, *X* had in effect conveyed away lot *A* without reserving an easement of access to lot *B*, and that easement was strictly necessary if lot *B* was to be accessible at all. The judges

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have always been willing, given strict necessity, to imply into *X's* deed to *D* the reservation of an easement and this was the answer in the apparently mundane case of *Carlo v. Lushia*.[1] Observe, however, that *X* had first purchased lot *B*, the landlocked parcel. But more of this anon.

Imagine now, if you will, a road running east and away from a north-south highway to the west. On paper this road was the boundary between a north and a south lot located a short distance east of the highway. In reality the road had been abandoned by the public authorities after the very point it reached these two lots. The owner of a large parcel on the east side of these two lots thought to develop it, not an insurmountable problem given access to it still further to the east. Even so, the use of the abandoned road would make for a quicker route to the north-south highway to the west. Soon enough, the developer began to improve the "road" across the land where the two lots adjoined. Faced with an action by these landowners seeking to enjoin this project, the developer began to rehearse a claim to an implied easement that had arisen when the road was abandoned. Suffice to say, the judges quickly put paid to this claim by noting that the developer had not illustrated that the servient parcels had at any time been in common ownership with the developer's parcel. Absent common ownership, of course, one cannot posit a grantor who overlooked to include express easements in the deeds. But again, *Daetsch v. Taber* [2] appears to be a pretty prosaic exercise.

What now about lot *B*, the landlocked one, back in our first scenario? Recall that when *X* first acquired it, he had yet to acquire lot *A* and the use of the roadway across that parcel. *X* had presumably bought himself a landlocked parcel. But in *Carlo* it turned out that *X* had acquired lot *B* from an institutional landowner that owned and still owned adjoining property. Indeed, *X* would seem to have acquired an implied easement over his vendor's remaining land since a right of passage was strictly necessary were lot *B* not to be landlocked. Thus, suggested the owner of lot *A*, *P* had succeeded to this easement and so no necessity now existed to cross lot *A*. All well and good, except that when *X* acquired lot *A* and access to the street, the strict necessity for an easement across his institutional vendor's land had terminated and so had that original implied easement.

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1. 144 A.D.2d 211, 534 N.Y.S.2d 524 (3d Dep't 1988).
2. 149 A.D.2d 864, 540 N.Y.S.2d 554 (3d Dep't 1989).

In any inventory of trivia the case of *Golden Hammer Auto Body Corp. v. Consolidated Rail Corp.*[3] ought not to be overlooked. An entrepreneur acquired a piece of real estate upon which to conduct what is described as an automobile repair business. This entrepreneur immediately commandeered, levelled, and fenced-in some apparently empty adjoining land, turning this land into a pound for the motor vehicles he was repairing. The entrepreneur could now show more than twenty years exploitation of this adjoining land, a *fait accompli* which left the claim to have rights in the land by the original owner so feeble that it could not survive summary judgment treatment.

Sed quaere, can a person knowing full well she does not own a neighboring piece of land occupy it in the fashion of a bandit princess and gain title to it? Whether the judges will actually allow the use of adverse possession doctrine to patent a flagrant wrongdoer's title to her winnings is a topic which has excited the professoriat upon occasion.[4] But then again, would judges in the case of a landlocked parcel conjure up an ultimate *realpolitik* necessity and mark out a right-of-way across some neighbor's land in the event that the parcel could not be shown ever to have been part and parcel of some adjoining one? In this instance the academics seem to suggest that the judges lack the necessary nerve.[5] Academics do concern themselves with these sorts of "what ifs." Judges seem content to leave conundrums, like sleeping dogs, well enough alone.

II. Fighting Dogs

A landlord in New York would be a fool to lease property to a tenant who had a dog which, in front of the landlord, had already demonstrated the slightest inclination to bite someone. The landlord in such a situation would owe a duty to take measures to protect third persons from being bitten, and would find himself a defendant were the animal to so do. A landlord is, after all, in control of the situation before the lease is executed and can choose to exclude the dog or to impose some regimen of oversight upon its tenant owner.[6] But now,

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3. 151 A.D.2d 545, 542 N.Y.S.2d 320 (2d Dep't 1989).

4. *See, e.g.*, Hemholz, *Adverse Possession and Subjective Intent*, 61 Wash. U.L.Q. 331, 341-49 (1983).

5. *See, e.g.*, Bruce, Ely & Bostick, Cases and Materials on Modern Property Law 357 (2d ed. 1989).

6. Strunk v. Zoltanski, 62 N.Y.2d 572, 468 N.E.2d 13, 479 N.Y.S.2d 175 (1984). In *Strunk*, the Court of Appeals imposed a duty upon a landlord to take adequate care via

what if a landlord not in possession of the premises discovers that a sitting tenant has acquired a pit bull? Better yet, what if the landlord pays a visit and is treated to a demonstration of the dog's prowess, as might be the case if the dog were then and there to annihilate a neighbor's cat? What is a landlord to do? If the tenant is a month-to-month one, the landlord would be well advised to order the tenant forthwith to get rid of the dog or vacate the premises at the end of the next month, this because the landlord has this very control over the situation in the instance of short term tenants.[7]

III. NITPICKING DOGS

Minimalist manners might suggest giving a commercial tenant five days of grace during which to cure any default in an installment of rent, after which the landlord could terminate the tenancy for the very reason that the uncured default existed. But should a landlord actually elect to put an end to the leasehold, the same minimalist manners might suggest giving the tenant a reasonable window of opportunity during which to make a graceful exit. A lease, for example, might provide that in the event any default in rent was not cured within five days, the landlord at any time thereafter might give notice

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"pertinent provisions in a lease or otherwise to protect persons who might be on the premises from being attacked" by a tenant's animal if the landlord knew or had reason to know of that animal's vicious propensities. *Strunk*, 62 N.Y.2d at 574, 468 N.E.2d at 14, 479 N.Y.S.2d at 176. The court stated that where a landlord leased property to the owner of a vicious animal, the landlord "could be found affirmatively to have created the very risk which was reasonably foreseeable and which operated to injure [the] plaintiff." *Id.* at 575, 468 N.E.2d at 15, 479 N.Y.S.2d at 177. Judge Kaye, in dissent, characterized the new duty articulated by the court as "absolute liability deriving from the simple fact that the landlord knew at the time of the leasing that the tenant kept a dog with 'vicious propensities,' " which effectively renders landlords absolute insurers of the conduct of dogs over which they have no control. *Id.* at 579, 581, 468 N.E.2d at 16, 18, 479 N.Y.S.2d at 179, 180 (Kaye, J., dissenting).

7. Cronin v. Chrosniak, 145 A.D.2d 905, 536 N.Y.S.2d 287 (4th Dep't 1988). Applying *Strunk*, the Fourth Department held that defendants Andrew Brown and Diane Chrosniak had not provided sufficient evidence on a motion for summary judgment to prove that they had no notice of the vicious propensities of their tenant's pit bull. Defendants admitted knowing that the tenant had the dog, but denied any knowledge of the dog's unsavory nature. The plaintiffs introduced affidavit evidence that both the defendants and neighbors knew of prior acts of viciousness performed by the dog in question. *Cronin*, 145 A.D.2d at 906, 536 N.Y.S.2d at 288. Thus, a triable issue of fact was presented and summary judgment would have been improper. The court emphasized that the tenants were on a month-to-month lease as additional support for the fact that the landlords had sufficient control over the tenants to have required the vicious animal to be removed. *Id.* at 907, 536 N.Y.S.2d at 288.

to the tenant that the lease expired on a date set in the same notice, a date which had to be one at least five days after the date of the notice. Suppose now, however, that a tenant were to make good arrears in rent after the five-day grace period but before the landlord had served the notice of termination? Might not the procedure created to structure a graceful exit turn out to be the genesis of a second period of grace?

TSS-Seedman's, Inc. v. Elota Realty Co.[8] enabled the Court of Appeals, memorandum-style, to answer this question in a thrice. Because the lease could not be terminated until the expiration of the number of days set in the notice, the notice was necessary to set running this countdown to doomsday. But if the rent were paid before the notice was sent, there would no longer exist any reason for sending it. Absent any *raison d'etre*, the notice would be ineffective. All of which perplexed Judge Titone, who was persuaded that the graceful exit period had been converted into an extension of the grace period proper, or, as it were, a post-grace grace period.

IV. Gay Dogs

Imagine now a city in which the rental units in some apartment buildings are still subject to very rigorous rent controls, the legacy of ancient wartime emergency measures. A well behaved tenant in one of these units has something close to a nonfreehold life estate because he or she has to be offered renewals of the lease, and the controls over rent make this an offer not likely to be refused. If a tenant were to die leaving behind in the digs a live-in spouse or family member, this survivor could suddenly be transmogrified into a mere licensee in the building and be subject to eviction. But the rent control regime contains a provision that these particular survivors cannot be evicted. In this sense, a spouse or a family member succeeds to the advantageous status of the deceased tenant and can live out his or her days in place. But this raises a problem if the concept of family member is not defined, and the survivor should turn out to be a longstanding gay lifepartner.

The question whether such a partner could succeed to, nay, inherit so to speak, the status of tenant might suggest a look-see at the laws governing intestacy for guidance. That regime is based upon traditional notions of marriage and blood kinship, and so the choice

8. 72 N.Y.2d 1024, 531 N.E.2d 646, 534 N.Y.S.2d 925 (1988).

of it as a source of inspiration is actually tantamount to a decision as to the meaning of family member. But is one really dealing with anything approaching the dignity of an "estate of inheritance" or is one met with a jurisprudential bandaid adopted to protect widows and brothers from suddenly finding themselves ousted from what was their home? If the concept is a mere property expedient, perhaps property law would be a better source to which to look for an answer.

Property lawyers tend to be enamored of the estate system, and oddly enough, an estate system of sorts exists in this same city with regard to apartment rents. Some apartments, the rent controlled ones, are subject to very tight controls, but there co-exists a lesser regime of rent stabilization. There exist also apartment blocks in which the free market test of supply and demand governs rents. From a tenant's perspective, perhaps, the hierarchy descends downward from rent controlled, through rent stabilized, to free market units. The policy of the state is said to favor stabilization over control, but only as a half-way house on the way to a completely free market. This way of looking at the scene suggests that extensions in the life of rent controlled leases contradict the larger policy scheme. Perforce, the word family ought narrowly to be read, limiting it to relationships based upon old fashioned property law notions of blood and marriage.

If this seems attentuated, recall that property lawyers do like tidy and consistent rules. It so happens that there is a no eviction provision in the rent stabilization regime, but this one explicitly defines family member in terms of blood and marriage. An urge for consistency might suggest that the notion of family member ought to be the same in both regimes. But, as is often the case, the selection of either the hierarchical analogy or the tidiness praxis as sources of inspiration for formulating an answer dictates the tenor of that answer.

In a sense, the choices of the source of analogical law thus far rehearsed enable one to avoid dealing with the flesh and blood person claiming to be entitled to the status of family member. Rules are rules. Still, in this day and age, is a gay lifepartner "family"? But it is law being interpreted here, not social questions being resolved *ad hoc*. Even so, the notion of a real live person might cause one to recall that the no eviction provision was put into the rent control system to insulate the survivor from the shock of dispossession. That shock, however, is product of the fact that the survivor has lived in the unit. Indeed, a cousin twenty-times-removed who lived in would be entitled to the status of continuing tenant, but not a geographically distant

brother or sister. Living-in counts for more than closeness of blood. Indeed, the difference between a cousin twenty-times-removed and a gay lifepartner blood-wise dissolves into nothing of consequence. A permanent gay partner appears to be as much a family member as a remote cousin and as entitled to the protection of the no eviction provision. But again, the starting line for the analysis may contain this inexorable result.

One might suspect that all of these approaches, despite their appearance of legal reasoning, mask the fact that the question at base is whether or not a gay lifepartner in this day and age ought to be entitled to family status if the text being debated does not impose the traditional answer. Whatever one's answer to this might be as an abstract proposition, the problem is complicated by an ancillary one: should judges take the initiative to modernize the term family or leave it to the legislators?

One might decide that a permanent gay partner is entitled to be treated as family, if for no other reason than that this style of family has become commonplace. Norms, after all, are the ultimate source of the normative. But one might still feel a bit shy as a judge to "make new law" in this regard. But judges do not always make law in the grand manner; often at state level they do little more than play the far more modest role of de facto administrative agency and try to fill in the gaps in vague statutes. It would be absurd to think that an agency promulgating a regulation to amplify the words family member would not include permanent gay lifepartners within the parameters of family. The court must do so. But again, this substructure setting the grounds for how the question ought to be approached tends to produce the particular answer.

Imagine now three judges deciding that family includes a permanent gay lifepartner because, from the shock of dispossession perspective which is the very reason for the no eviction clause, they are the equivalent of family. But imagine three other judges, looking at the question from the perspective of systems analysis, concluding that the rent control system requires a traditional definition of family. Imagine then a seventh judge deciding that, because an administrative agency would fine-tune the word family to encapsulate permanent gay lifepartners, the court as *ersatz* agency must do the same.

A construct like ours may afford some basis for reflecting upon what the Court of Appeals did in fact do in the case of *Braschi v. Stahl*

Associates Co.[9] But a simple model of the decisionmaking process could never do justice to the several ironies involved. The regime being interpreted was actually a regulatory and not a statutory one. A regulatory agency did exist within the system. The case did not come to the court after a decision on the merits below. The question was whether or not a gay lifepartner denied a preliminary injunction against eviction presented a question which was immediately reviewable. That required deciding whether the decision below was bottomed on a question of law and whether, if it did present a question of law, that question was presented clearly enough to enable the appellate judges to assay the right answer to it then and there. Very much divided among themselves as to the right answer to this question of law, the court was able to produce only a plurality result. Some of the thrust and counterthrust remarks in the several opinions suggest that the judges could all too easily begin to emulate the habit of judges in a higher court to inject a personal element into the process. It is an opinion that every lawyer owes a duty to read. Indeed, it is an opinion the several judges need to read and reflect upon.

V. Dog Days

The law of easements and adverse possession still seems to enable judges to chop logic and dispose of cases by citing rules. Whatever incongruities may subsist within these bodies of rules are not allowed to reach the surface. But with landlord and tenant lore the judges cease to play the role of logician and begin to act like something of a collective nanny. Dogs ought to be kept on a tight leash and landlords are simply going to have to do their part. Commercial leases are not one night stands but long-term relationships, relationships which ought to be kept intact even if it necessitates some constructive renderings of clauses that might otherwise lead to their cancellation. Oddly enough, this isn't that incongruous. Boundary disputes simply need answers and a litmus based on Euclidean-like rules works efficiently to resolve them. We live in an epoch of strict tort when somebody has to be responsible, and, with pit bulls about, landlords can expect landlord and tenant law to mirror this larger fact. Modern notions of contract are bottomed on relationships, not black letter law, and commercial landlords and tenants would be advised to so learn. Thus, by and large, the property cases rehearsed herein present

9. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

no surprises, unless someone still believes that there still exists a Camelot in which property law is a self-contained regime.

The difficulty arises when new players have to be incorporated into the rules of these several games and it is necessary to own-up to the fact that they are indeed new people. Adverse possession law seems to have worked very nicely by never facing up to the fact that thieves might be numbered among the winners. But when these people are new because, unlike aliens, they are us but set apart by a new morality, and one cannot avoid the challenging question whether they can play the game like us, then like any human institution, courts may be expected not to perform at their best. But again, property cases reflect the tensions of the larger society, hardly anything new. Indeed, if one were in search of some larger meaning behind the property cases this year, one must come away disappointed, unless one has come sufficiently of age to have learned that there are no larger meanings.