Winter 1980

Property

E. F. Roberts
Cornell Law School, efr4@cornell.edu

PROPERTY

E.F. Roberts*

I. INTRODUCTION

The law of property rehearsed this *Survey* year acts out its brief life on an intellectual stage dominated by the scenery of economic hard times. The influence of the setting upon the star of this little piece must give one chance to pause.

II. LEGISLATION

Some legislation enacted during the *Survey* year can be characterized as conventional property law, concerned as it was with finely tuning the consumer protection mechanisms now an integral part of landlord and tenant law. Thus the doctrine of retaliatory eviction was codified,[1] the outlawry of fine print in leases clarified,[2] and the place of deposit for security fixed firmly in banking institutions having a New York nexus.[3] The emerging energy crisis was reflected in a modest way when provision was made for recording solar easements.[4]

Much of the legislation this year is taken up with the regulation of the economics of the market in real property, but with a marked concern for the social dimension of that market. The legal interest rate on mortgage loans was increased from eight and one-half to nine and one-half percent and then pegged to a floating rate bottomed on the interest paid on federal Treasury securities.[5] At the same time, redlining, or as bankers put it, geographic discrimination in making mortgage loans, was prohibited.[6] This latter measure expands upon the initiative begun in the Community Reinvestment

---

* Edwin H. Woodruff Professor of Law, Cornell Law School.

1. 1979 N.Y. Sess. Laws ch. 693 (adding N.Y. REAL PROP. LAW § 223-b).

2. 1979 N.Y. Sess. Laws ch. 474 (amending N.Y. CPLR 4544 (McKinney Supp. 1978) to cover either illegible *or* small print).

3. 1979 N.Y. Sess. Laws ch. 402 (amending N.Y. GEN. OBLIG. LAW § 7-103 (McKinney 1970)).

4. 1979 N.Y. Sess. Laws ch. 705 (adding N.Y. REAL PROP. LAW § 335-b). For a look at what the future bodes, see A. WALLANTEIN, BARRIERS AND INCENTIVES TO SOLAR ENERGY DEVELOPMENT (N.E. Solar Energy Center 1979); PROCEEDINGS OF A WORKSHOP ON SOLAR ACCESS LEGISLATION (N.E. Solar Energy Center 1979).

5. N.Y. BANKING LAW § 14-a (McKinney Supp. 1979). The new sliding scale is pegged at two percent above the federal figure, but the state figure can only be adjusted upward quarterly at no more than a quarter of one percent. *Id.* § 14-a(3).

6. N.Y. BANKING LAW § 9-P (McKinney Supp. 1979).

Act,[7] wherein federal financial regulatory agencies were charged to "encourage" lending institutions to meet the needs of local communities.[8] Redlining in fire insurance underwriting was also prohibited.[9] Meanwhile, special provision was made to protect New York City's senior citizens from eviction when apartment complexes were converted to condominium or cooperative status.[10]

III. Case Law

A. Real Estate Brokers

Duncan & Hill Realty, Inc. v. Department of State[11] illustrated anew the potential for conflict between real estate brokers and lawyers. Suffice to report, a broker representing a buyer made considerable additions to a purchase offer form in order to spell out the terms of his client's purchase money mortgage proposal. The broker later modified this proposal in order to match the seller's counter offer, confusing the figures in the process. Only after the transaction had been reduced to a writing approved by the seller's attorney did the broker refer his client to a lawyer. The buyer did not go through with the purchase, and the seller did not attempt to hold him to the agreement. The broker, however, retained the buyer's $200 deposit which the form entitled him to do if the buyer failed to keep his part of the bargain. The buyer complained to the Secretary of State, who suspended the license of the real estate firm represented by the broker. The suspension was based on a finding that the broker had demonstrated untrustworthiness and incompetence due to his unlawful practice of law and illegal retention of the deposit.[12] The deposit was returned to the buyer and the suspension, by its very terms, no longer obtained.[13] The controversy, in so far as the buyer was concerned, was at an end.[14] It became the subject matter of a case report only because the brokerage firm resorted to an article 78 proceeding against the Secretary of State in order "to remove the cloud of an official determination that it has demonstrated untrust-

7. 12 U.S.C. §§ 2901-2905 (Supp. I 1977).

8. *Id.* § 2901(b).

9. 1979 N.Y. Sess. Laws ch. 503 (adding N.Y. Ins. Law §§ 115a, 168-e).

10. 1979 N.Y. Sess. Laws ch. 432 (adding N.Y. Gen. Bus. Law § 352-eeee).

11. 62 A.D.2d 690, 405 N.Y.S.2d 339 (4th Dep't), *appeal dismissed,* 45 N.Y.2d 821, 381 N.E.2d 608, 409 N.Y.S.2d 210 (1978).

12. *Id.* at 695, 405 N.Y.S.2d at 342.

13. *Id.* at 703, 405 N.Y.S.2d at 346.

14. *Id.* at 696, 405 N.Y.S.2d at 342.

worthiness and incompetence in drafting the contract in question and in its actions in connection therewith."[15]

A computer analysis would readily produce a New York rule which allows real estate brokers to prepare simple purchase and sales contracts.[16] The broker, in this instance, had over-stepped the line when he prepared the detailed terms of the purchase money mortgage proposal.[17] Even so, the Secretary of State had overpenalized the firm for this unauthorized practice of law when, all things considered, a censure would have sufficed.[18] The Secretary, after all, had been "lax" in the past about unlawful practice, and his record of enforcement was "feeble and erratic."[19] Be that as it may, it would appear that modifying the penalty put an end to this episode. This was not the case, however. Presented with a question of principle, the Fourth Department took this opportunity to deliver a doctrinal excursus on the whole problem and to enunciate future patterns of proper practice.

A careful reading of the cases by the court revealed that brokers indeed had been granted, not the right, but the privilege to prepare simple contracts.[20] This entitlement had been bottomed on two grounds: the personal interest of the broker himself in the transaction, and the need to expedite real property sales transactions.[21] This case caused the court to question how any sales contract could be characterized as simple when it often involved "the most important legal transaction that the average person will ever undertake—the purchase of a home."[22] This suggested that even the most simple contract "involves very substantial legal rights which deserve the advice and guidance of a lawyer."[23] Instead of a rule which seeks to expedite the creation of binding agreements, the law would be better advised to provide "a little delay for reflection and legal advice, so as to guard against a thoughtless drafting of a hastily

15. *Id.*
16. *See id.*
17. *Id.* at 701, 405 N.Y.S.2d at 346.
18. *Id.* at 703, 405 N.Y.S.2d at 346.
19. *Id.*
20. *Id.* at 696, 405 N.Y.S.2d at 342 (citing People v. Title Guar. & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919); People v. Title Guar. & Trust Co., 191 A.D. 165, 181 N.Y.S. 52 (2d Dep't), *aff'd*, 230 N.Y. 578, 130 N.E. 901 (1920); Wollitzer v. Title Guar. & Trust Co., 148 Misc. 529, 266 N.Y.S. 184 (Sup. Ct., Queens Co. 1933), *aff'd mem.*, 241 A.D. 757, 270 N.Y.S. 968 (2d Dep't 1934)).
21. *Id.* at 698, 405 N.Y.S.2d at 343.
22. *Id.*
23. *Id.*

conceived contract."[24] Indeed, the personal interest of the broker was actually another reason to insist that, "insofar as the contract entails legal advice and draftsmanship, only a lawyer . . . be permitted to prepare the document . . . ."[25]

The court noted that not only did the broker in this instance go too far in modifying the form, but the form in use amongst members of the Real Estate Board of Rochester did not comply with models recommended by the American Bar Association, the Monroe County Bar Association, or the National Conference of Lawyers and Realtors.[26] The common denominator of these forms was the boldface print at their top warning potential signatories that they might want to seek legal advice before they committed themselves to a legally binding contract.[27] Concomitantly, the American Bar Association and the National Association of Real Estate Boards had created a set of guidelines which, while prohibiting any legal drafting by brokers, allowed them to fill in forms approved by both the local bar and real estate organizations.[28]

Employing this material, the court adopted the posture of a Dutch uncle and instructed brokers how they ought properly to conduct their affairs:

> [R]eal estate brokers and agents must refrain from inserting in a real estate purchase offer or counter-offer any provision which requires the exercise of legal expertise. Thus it is not proper for such a broker to undertake to devise the detailed terms of a purchase-money mortgage or other legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given. A real estate broker may readily protect himself from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses one of the recommended purchase offer forms referred to above, or one recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National

---

24. *Id.*

25. *Id.* at 698, 405 N.Y.S.2d at 343-44.

26. *Id.* at 698, 405 N.Y.S.2d at 344.

27. *Id.* at 698-99 n.4, 405 N.Y.S.2d at 344 n.4 (whereat an acceptable form was reproduced).

28. *Id.* at 697 n.2, 405 N.Y.S.2d at 343 n.2 (citing 7 MARTINDALE-HUBBELL LAW DIRECTORY, STATEMENTS OF PRINCIPLES WITH RESPECT TO THE PRACTICE OF LAW *Realtors* 83M (1978)).

> Association of Real Estate Brokers . . . has no need to worry about the propriety of his conduct in such transactions.[29]

Thus spoke the justices of the Fourth Department.

If one believes still that this is a classic common-law jurisdiction, one might spend a pleasant afternoon deciding whether this canon was the *ratio decidendi* necessary to justify the decision of the actual issue presented in this case or an illustration of obiter dictum. Instead, perhaps, the canon can best be understood as the enunciation of guidelines within which the judges expected the local bar association and real estate board to reach an accommodation by jointly agreeing on acceptable forms and practices. Read this way, the case may exemplify the post-common-law practice radically pioneered in *Roe v. Wade.*[30] Or, paradoxically, the case may illustrate a return to pre-common-law practice, wherein the sovereign was called upon to settle jurisdictional disputes between two guilds.

When it comes to regulating the restrictive practices of guilds, careful note should be taken of *McLain v. Real Estate Board of New Orleans, Inc.*,[31] now pending before the Supreme Court. The crucial question is whether price-fixing of fees by real estate brokers in connection with the sales of residential homes is sufficiently implicated in interstate commerce to come within the reach of the Sherman Act.[32] The Fifth Circuit noted that the practices of lawyers in this regard were addressed in *Goldfarb v. Virginia State Bar,*[33] but there, lawyers' title services were the necessary visa for home buyers to enter the interstate mortgage money market.[34] Brokers did not involve themselves in the interstate market, reasoned the Fifth Circuit panel, because, having once brought together a buyer and seller, their role ended and did not extend to the interstate aspects of the transaction.[35]

The Fifth Circuit decision has much to commend it as a model of common-law process, involving as it does considerable attention to pleading problems[36] and an effort to draw a neat line immunizing

---

29. *Id.* at 701, 405 N.Y.S.2d at 345.
30. 410 U.S. 113 (1973).
31. 583 F.2d 1315 (5th Cir. 1978), *cert. granted,* 441 U.S. 942 (1979).
32. *See id.* at 1318; 15 U.S.C. §§ 1-7 (1976).
33. 421 U.S. 773 (1975).
34. 583 F.2d at 1322 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 784-85 (1975)).
35. *Id.*
36. *Id.* at 1324. *See also* Bryan v. Stillwater, 578 F.2d 1319 (10th Cir. 1977). This confusion between dismissal for lack of subject matter jurisdiction and failure to state a claim suggests that rule 12(b), FED. R. CIV. P. 12(b), contains the ghost of the ancient quarrel whether a special or general demurrer is appropriate.

local affairs from the pervasive reach of interstate commerce.[37] Real estate brokers presumably are necessary intermediaries making straight the path into the mortgage market for would-be home buyers, and it remains to be seen whether, in a practical sense, they are not inextricably a cog in that vast interstate machinery.

B. Landlord and Tenant

When the first standard edition of professors Casner's and Leach's property casebook was published in 1951,[38] implied warranty was featured as part of landlord and tenant lore only in the exceptional case of the short term lease of furnished premises.[39] Published in 1969, the second edition of the same work included *Pines v. Perssion,*[40] the Wisconsin decision which established the notion that an implied warranty of habitability obtained in every residential lease.[41] After *Javins v. First National Realty Corp.,*[42] decided in 1970, it became evident that

> [s]hortly all landlords of residential units will function subject to an implied duty to keep their buildings in a state of repair commensurate with the standards set by building or housing codes. . . . Residential leases have become contracts pure and simple and merit first year law school treatment, if anywhere, in a general course in contracts.[43]

Since then, implied warranty doctrine has become standard fare, the cases having become legion and statutes not uncommon.[44] Justice Tobriner's 1974 opinion in *Green v. Superior Court*[45] rehearsed the replacement of the versatile rural tenant by the relatively helpless urban apartment dweller, the general demise of ca-

---

37. 583 F.2d at 1322 (citing the difference between a cab that regularly carries passengers between railway terminals, as being in interstate commerce, and a cab that carries passengers to many locations, including, upon occasion, between two railway terminals, as noted in United States v. Yellow Cab Co., 332 U.S. 218, 231-33 (1947)).

38. A. CASNER & B. LEACH, CASES AND TEXT ON PROPERTY (1951).

39. *See* Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942), *reprinted in* A. CASNER & B. LEACH, *supra* note 38, at 437.

40. 14 Wis. 2d 590, 111 N.W.2d 409 (1961), *reprinted in* A. CASNER & B. LEACH, CASES AND TEXT ON PROPERTY 501 (2d ed. 1969).

41. *Id.* at ___, 111 N.W.2d at 412.

42. 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

43. Roberts, *The Demise of Property Law,* 57 CORNELL L. REV. 1, 1-2 (1971) (footnotes omitted).

44. See the materials collected in Pugh v. Holmes, 253 Pa. Super. Ct. 76, ___ n.2, 384 A.2d 1234, 1237 n.2 (1978).

45. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

veat emptor in favor of consumer protection, and the need to adopt property rules which would enforce legislative efforts to impose quality controls on rental accommodations.[46] "Thus, in keeping with the contemporary trend to analyze urban residential leases under modern contractual principles, we now conclude that the tenant's duty to pay rent is 'mutually dependent' upon the landlord's fulfillment of his implied warranty of habitability."[47] This opinion became the pattern out of which many subsequent ratiocinations were cut.[48]

The Court of Appeals of New York, in *Park West Management Corp. v. Mitchell,*[49] perceived the same trend toward characterizing the residential lease as a contract and rehearsed again the evolution of society from an agrarian economy, explicable in terms of property law, into one in which rentals of shelter can best be analogized to sales within the context of the Uniform Commercial Code.[50] The issue, however, was not whether to create judicially an implied warranty of habitability. After a lower court had discovered the idea,[51] the Legislature decreed that every residential lease contained a warranty securing tenants against conditions "dangerous, hazardous or detrimental to their life, health or safety."[52] This warranty, moreover, could not be waived or modified by the parties themselves.[53] The issue in *West Park Management* was whether the warranty obtained when the conditions which triggered it were caused by a third party.[54]

The scene which catalyzed the issue can be summarized in a thrice. The workers at Park West Village hit the bricks in a strike called by a local union. The tenants had to carry out their garbage, which then only accumulated on the curb when municipal employees refused to cross the picket line to collect it. The odor and flourishing rats soon caused the municipal authorities to declare a health emergency. This seventeen day strike caused the tenants considerable inconvenience, and lower courts determined that the statute

46. *Id.* at ___, 517 P.2d at 1171-75, 111 Cal. Rptr. at 707-11.
47. *Id.* at ___, 517 P.2d at 1181, 111 Cal. Rptr. at 717.
48. *See, e.g.,* Pugh v. Holmes, 253 Pa. Super. Ct. 76, ___, 384 A.2d 1234, 1240 (1978); Teller v. McCoy, ___ W. Va. ___, ___, 253 S.E.2d 114, 118 (1978).
49. 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310 (1979).
50. *Id.* at 322-25, 391 N.E.2d at 1291-92, 418 N.Y.S.2d at 313-14.
51. *See* Tonetti v. Penati, 48 A.D.2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975).
52. N.Y. REAL PROP. LAW § 235-b(1) (McKinney Supp. 1978).
53. *Id.* § 235-b(2).
54. 47 N.Y.2d at 326, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315.

entitled them to withhold ten percent of the month's rent.[55] The Court of Appeals agreed with this result, because "the statute places an unqualified obligation on the landlord to keep the premises habitable . . . [so that] work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty . . . ."[56]

The landlord's argument that it should not be liable for events beyond its control drew an interesting response in the appellate division. Justice Sandler expressed doubt whether the landlord could characterize a strike as something that did not involve culpability on his part.[57] In another case which arose out of the same seventeen day strike, appellate term expressed more than doubt on this score: "Landlord was not an innocent victim of the subject strike; he was a participant . . . ."[58] What, then, if the facts were that the furnace broke during the winter, and, despite heroic efforts on the part of the landlord to fix it, the tenants went without heat for seventeen days? The same result obtains: "[T]he landlord's good faith attempts to provide the service or correct the defective condition do not constitute a defense."[59]

True, the implied warranty doctrine can be seen as just another way to enforce housing codes or provide a remedy where codes are sparse.[60] If this is the purpose, the question remains whether proprietors of rundown buildings can afford to make the desired renovations without passing on their costs to the tenants. This suggests the possibility that "the tenant may then find that he has been given more luxury than he can afford."[61] This question arises at a time

---

55. Park West Management Corp. v. Mitchell, 62 A.D.2d 291, 297, 404 N.Y.S.2d 115, 119 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310 (1979).

56. 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.

57. 62 A.D.2d at 295, 404 N.Y.S.2d at 118 (Sandler, J.).

58. Goldner v. Doknovitch, 88 Misc. 2d 88, 90, 388 N.Y.S.2d 504, 506 (App. T., 1st Dep't 1976).

59. Leris Realty Corp. v. Robbins, 95 Misc. 2d 712, 715, 408 N.Y.S.2d 166, 168 (N.Y.C. Civ. Ct., N.Y. Co. 1978).

60. *See* Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 328, 391 N.E.2d 1288, 1294, 418 N.Y.S.2d 310, 316 (1979). Also see the explanation for the new retaliatory eviction statute, 1979 N.Y. Sess. Laws ch. 693 (adding N.Y. REAL PROP. LAW § 223-b): "This legislation is intended to prevent landlords from threatening tenants with eviction for complaining of violations thereby remaining immune from compliance with housing codes and the New York State Warranty of Habitability Statute enacted in 1975." 1979 McKINNEY'S SESS. LAW NEWS A-438 (executive memorandum) (citing N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1979)).

61. Teller v. McCoy, ___ W. Va. ___, ___ n.6, 253 S.E.2d 114, 133 n.6 (1978) (Neely, J., concurring in part and dissenting in part).

when there is considerable debate whether middle income tenants need some form of subsidy.[62] More worrisome, taking together the spectre of rent control, rising real estate taxes, and now an implied warranty doctrine that puts further pressure on landlords to settle labor disputes, one has to wonder how near is the private rental market ark to its economic Plimsoll line.

IV. Reflections

Perhaps one ought to wonder whether the recent realization that a lease is a contract adds much to the world's reservoir of wisdom. Contracts may still be entitled to a law school course calculated to sharpen the wits of novice lawyers, but the relevance of *Slades Case*[63] to the modern world of codified commercial transactions might be questioned. Yet both the professoriat and the judiciary employ these words and phrases in their articles and opinions.

We know, or at least think we know, about the law as it is encapsulated in case reports and synthesized in law review articles. But do we know all that much about the real workings of the market-place? A Sunday afternoon drive ought to reveal to the observant traveler that the signs posted by real estate brokers are becoming everywhere more standardized, revealing a trend toward affiliations on a national level and suggesting that their activities are no longer more local than those of the large law firms which have offices in a dozen cities across the nation. If the actual activities of real estate brokers have escaped notice in the cases and articles, how much more ignorant must we be about the entire market in rental housing? Our official resume of society may, or may not, reflect the civil or real society it purports to govern. This is what should give us chance to pause.

62. *See* Reinhold, *Relief for Middle-Income Renters Debated Bitterly by U.S. Experts,* N.Y. Times, July 30, 1979, § A, at 1, col. 5.

63. 4 Co. Rep. 91a, 76 Eng. Rep. 1072 (K.B. 1602).