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Property

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PROPERTY

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A survey can either restate the obvious or attempt to add a critical dimension to the law's uncertain progress. The obvious can be gleaned merely by scanning the orange-covered paperback indices which go with the official advance sheets and in which the cases are condensed in the best headnote hunter's style. This exercise presupposes a reader possessed of an interest in something more than the obvious, and one who enjoys a critique of a few key cases, precisely for the challenge of making an independent judgment of whether New York property law has progressed during the past *Survey* year.

I. LEGISLATION

The typical lease contains a clause wherein the tenant covenants neither to assign nor to sublet without the landlord's written consent, and "[t]he law in New York is clear that . . . such consent may be refused for any or even no reason."[1] In 1975, this hornbook certainty was diluted by an exception created in favor of residential tenants in dwellings containing four or more units.[2] These tenants were given "the right" to sublease in all cases, subject to the advance, written consent of the landlord. Should the landlord unreasonably withhold consent, the tenant may secure a release from the balance of the term.[3] In 1976, this exception was enlarged to include assignments.[4]

The legislature has also provided that relief in a summary proceeding action to recover possession of real property may include a judgment for the fair value of use and occupation of the premises

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1. Arlu Assocs. v. Rosner, 14 App. Div. 2d 272, 273, 220 N.Y.S.2d 288, 289 (1st Dep't 1961) (assignment); *accord*, Dress Shirt Sales, Inc. v. Hotel Martinique Associates, 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963) (sublease).

2. Ch. 146, [1975] N.Y. Sess. Laws, *as amended*, N.Y. REAL PROPERTY LAW § 226-b (McKinney Supp. 1976).

3. *Id.*

4. N.Y. REAL PROPERTY LAW § 226-b (McKinney Supp. 1976). Commercial tenants commonly are able to bargain to modify leases to stipulate that the landlord shall not unreasonably withhold his consent to an assignment or sublease. The cases catalyzed by such caveat clauses may not afford much of a basis upon which to build a canon defining what is reasonable in the residential market. *See, e.g.*, Grossman v. S. E. Nichols Co., 43 App. Div. 2d 674, 350 N.Y.S.2d 603 (1st Dep't 1973), *aff'd*, 35 N.Y.2d 985, 324 N.E.2d 888, 365 N.Y.S.2d 531 (1975) (partners assigned leases to corporate successor).

for the period of occupancy during which no rent was due.[5] Thus, when a landlord moves against a holdover tenant he elects to treat as a trespasser, it will no longer be necessary to bring a separate action to recover damages for use and occupancy.[6]

II. Case Law

A. Conveyancing

Disputes over arcane principles of the conveyancer's art often mask more profound issues. An example is the Court of Appeals decision in *Dolphin Lane Associates v. Town of Southampton*.[7] The controversy began when a landowner sued to have portions of a municipal zoning scheme declared unconstitutional.[8] It was resolved, however, on the preliminary question of where the landowner's private property ended and the public domain began.

The *locus in quo* was bounded on the south by a beach and on the north by a bay. Both bodies of water were tidal, so there was no question that the parcel ran at either extremity to the average high-water line.[9] The issue, however, was how to determine the high-water mark.[10] The municipality actually tried to persuade the trial judge to discard the rule that parcels bounded by a beach run down to the high-water line, and to redefine "beach" to include all of the sand back to the top edge of the sand dunes. This the judge refused to do, because he perceived that such a sudden and retrospective change in a rule of property would itself amount to a taking of property without due process of law.[11]

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5. N.Y. Real Property Actions and Proceedings Law § 741(5) (McKinney Supp. 1976).

6. The amendment of section 741(5) of the Real Property Actions and Proceedings Law was advocated by the appellate division in order to avoid circuity of action. Seminole Housing Corp. v. M & M Garages, Inc., 47 App. Div. 2d 651, 364 N.Y.S.2d 26 (2d Dep't 1975).

7. 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975).

8. Dolphin Lane Assocs. v. Town of Southampton, 72 Misc. 2d 868, 339 N.Y.S.2d 966 (Sup. Ct., Suffolk Co. 1971).

9. 37 N.Y.2d at 295, 333 N.E.2d at 359, 272 N.Y.S.2d at 53; *see* Marba Sea Bay Corp. v. Clinton Street Realty Corp., 272 N.Y. 292, 5 N.E.2d 824 (1936).

10. Dolphin Lane Assocs. v. Town of Southampton, 72 Misc. 2d 868, 884, 339 N.Y.S.2d 966, 984 (Sup. Ct., Suffolk Co. 1971).

11. *Id.* at 876, 339 N.Y.S.2d at 975-76. The trial judge relied upon certain language by Mr. Justice Stewart to sustain this conclusion:

> "As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to

Along the bay on the north side, however, vegetation predominated, making it difficult to locate the high-water line. The vegetation was comprised of two species of grass: *Spartina alternaflora*, which thrives only in soil regularly inundated by salt water tides, and *Spartina patents*, which cannot withstand more than an occasional saturation in salt water. The trial judge accepted the municipality's "scientific" test, ruling that the location of the high-water mark should be fixed along the boundary *between* the two grasses.[12] Since previous practice had fixed the high-water line at the point where vegetation *began*, the result of this new method was to push the public domain further inland. It was on this point that the Court of Appeals reversed the trial judge, thereby reaffirming the traditional line-of-vegetation test.[13]

Although the Court was willing to admit that the scientific approach might be "intellectually fascinating," it objected that this change in method "would do violence to the expectations of the parties".[14] The established practice had been so generally accepted that it had ripened into a rule of property which a court could not retrospectively change.[15] The Court concluded that "innovation should be left to the Legislature."[16]

It is evident that, in the tradition of *Board of Education v. Miles*,[17] the Court was wary of "mere procedures" that drastically

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take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so."

Id. at 876, 339 N.Y.S.2d at 975, *quoting* Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

12. 72 Misc. 2d at 885-86, 339 N.Y.S.2d at 984-85.

13. Dolphin Lane Assocs. v. Town of Southampton, 37 N.Y.2d 292, 297, 333 N.E.2d 358, 360, 372 N.Y.S.2d 52, 54 (1975).

14. *Id.* at 296, 333 N.E.2d at 359, 372 N.Y.S.2d at 54.

15. *Id.* at 297, 333 N.E.2d at 360, 372 N.Y.S.2d at 55. The Court invoked the principle of *Heyert v. Orange & Rockland Utilities, Inc.*, stating:

"Whatever the rule might be if this were a case of first impression, it is certain that thousands of deeds . . . have been made on this rule, which has existed since the common law began in this State. . . . It has ripened into a rule of property which cannot be changed retrospectively without altering the substance of prior land grants."

Id., *quoting* Heyert v. Orange & Rockland Util., Inc., 17 N.Y.2d 352, 363, 218 N.E.2d 263, 269, 271 N.Y.S.2d 201, 209 (1966). Professor W. Barton Leach diagnosed this as the "Medes-and-Persians syndrome." W. LEACH, PROPERTY LAW INDICTED! 7 (1967).

16. 37 N.Y.2d at 296, 333 N.E.2d at 360, 372 N.Y.S.2d at 54. This, according to Professor Leach, exemplifies the "Pontius Pilate syndrome." W. LEACH, *supra* note 15, at 6.

17. 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965). For a discussion of the *Miles* case see Kharas & Koretz, *Property, 1965 Survey of N. Y. Law*, 17 SYRACUSE L. REV. 247, 254-55 (1966) and Roberts, *A Eulogy For The Old Property*, 20 ME. L. REV. 15, 23-31 (1968).

impinge on the dimensions of perceived real property rights. While an explicit discussion of the scientific problem might have itself been intellectually fascinating, the Court's approach saved it from getting involved in the intricacies of what is elsewhere becoming a matter of increasing controversy.[18]

B. Consumer Protection

Very late last year, the legislature enacted a statute that declared that residential leases contain an implied warranty of habitability.[19] The Second Department had already promulgated a similar doctrine by common-law decision,[20] and, it is said, "many Judges of the Civil Court of the City of New York" had already recognized the doctrine as "accepted policy . . . for a number of years."[21] Initially devoid of guidelines as to what situations it was to cover,[22] the statute has been interpreted to authorize an affirmative action for damages.[23] It has also been applied to a personal injury claim that

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18. *See, e.g.*, County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973), *cert. denied*, 419 U.S. 872 (1974). In this condemnation case, the dimensions of a shoreline parcel became crucial to the calculation of what was being taken. The Hawaii Supreme Court appears to have suddenly adopted a new method of fixing the location of the high-water mark:

> We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka [inland]; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth.

Id. at ___, 517 P.2d at 62. This was done because "[p]ublic policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." *Id.* at ___, 517 P.2d at 61-62. Peculiarly enough, the outraged landowner brought an action in the federal court to block the authorities from proceeding pursuant to the state decision. He survived a motion to dismiss, despite objections that either res judicata or the abstention doctrine precluded such a suit, and despite the denial of certiorari. The district court stated:

> [P]laintiffs have made a prima facie showing that the Hawaii Supreme Court's action in formulating its new "presumption of law" regarding the vegetation line, without ever affording the parties an opportunity to contest this new finding of law by the presentation of argument and evidence upon rehearing, transgressed the due process clause of the Fourteenth Amendment.

Sotomura v. County of Hawaii, 402 F. Supp. 95, 99 (D. Hawaii 1975). For a case with a different result, see Department of Natural Resources v. Mayor & Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975), where the court refused to expand the public domain, as a matter of law, to include the area between the high-water mark and the vegetation line at the top of the beach.

19. N.Y. REAL PROPERTY LAW § 235-b (McKinney Supp. 1976).

20. Tonetti v. Penati, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975).

21. Groner v. Lakeview Management Corp., 83 Misc. 2d 932, 373 N.Y.S.2d 807, 808 (N.Y.C. Civ. Ct., N.Y. Co. 1975).

22. For a critique of the statute see Roberts, *Property, 1975 Survey of N.Y. Law*, 27 SYRACUSE L. REV. 387, 399 & n.78 (1976).

23. Groner v. Lakeview Management Corp., 83 Misc. 2d 932, 373 N.Y.S.2d 807, 808

originated before its enactment on the theory that it was merely declarative of what was already the common law of New York.[24] Thus, the early returns confirm the suspicion that the statute is bound to generate some interesting judicial glosses.

The decision in *People v. Parker*[25] has put to rest a controversy that began in 1970 concerning the retroactivity of a reform measure. In that year, the General Obligations Law was amended to require landlords of every apartment house with six or more units to place tenants' security deposits in interest-bearing accounts.[26] When some landlords kept monies already received in non-interest-bearing accounts, the Attorney General sued to compel retroactive compliance. That the statute spoke in terms of what the landlords "shall" do persuaded the appellate division that it did not reach these preexisting accounts. The point was rendered moot, however, when the Court of Appeals affirmed the dismissal of the action on the sole ground that the Attorney General lacked standing to sue.[27] The General Obligations Law was amended again to give the Attorney General standing to enforce compliance with the statute's security deposit provisions.[28] Relitigating the matter, he prevailed on the merits. The case contains an element of déjà vu, however, for while the Court discerned the legislative intent to have the statute apply to all deposits, the brief memorandum opinion tracks, almost to the letter, the dissent written by Judge Jasen when the controversy was before the Court three years earlier.[29]

The basis of an attorney's accountability for his work-product was questioned in *Boecher v. Borth*.[30] The lawyer had entered into a retainer agreement to examine the title to premises to be purchased by his client, and to establish that the title was marketable and free and clear of liens and encumbrances. Relying upon the lawyer's advice that the title was clear, the client purchased the

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(N.Y.C. Civ. Ct., N.Y. Co. 1975).

24. Kaplan v. Coulston, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (N.Y.C. Civ. Ct., Bronx Co. 1976).

25. 38 N.Y.2d 743, 343 N.E.2d 761, 381 N.Y.S.2d 43, *aff'g* 47 App. Div. 2d 611, 364 N.Y.S.2d 5 (1st Dep't 1975).

26. N.Y. GENERAL OBLIGATIONS LAW § 7-103(2-a) (McKinney Supp. 1976).

27. State v. Parker, 30 N.Y.2d 964, 287 N.E.2d 618, 335 N.Y.S.2d 827 (1972), *aff'g* 38 App. Div. 2d 542, 327 N.Y.S.2d 277 (1st Dep't 1971).

28. N.Y. GENERAL OBLIGATIONS LAW § 7-107 (McKinney Supp. 1976).

29. *Compare* People v. Parker, 38 N.Y.2d 743, 343 N.E.2d 761, 381 N.Y.S.2d 43 (1975), *with* State v. Parker, 30 N.Y.2d 964, 965-66, 287 N.E.2d 618, 619, 335 N.Y.S.2d 827, 828 (1972) (Jasen, J., dissenting).

30. 51 App. Div. 2d 598, 377 N.Y.S.2d 781 (3d Dep't 1976).

premises. When the client attempted to sell the premises more than four years later, the title proved to be unmarketable, and he was forced to spend $2,400 to obtain a quitclaim deed to a previously undiscovered remainder interest. On the basis of the retainer agreement, three judges found that the lawyer was subject to the six-year contract statute of limitations rather than the three-year period governing malpractice claims.[31] Two judges dissented, reasoning that the so-called contract added nothing to the lawyer's common-law duty—the breach of which gives rise to a malpractice action.[32]

C. Covenants

The case of *Eagle Enterprises, Inc. v. Gross*[33] required the Court of Appeals to return to its classic decisions in *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*[34] and *Nicholson v. 300 Broadway Realty Corp.*[35] to decide whether an affirmative convenant was enforceable against a subsequent grantee. A developer had conveyed a parcel within a subdivision, promising in the deed to provide water from a well, located elsewhere during the summer, for a fee. In return, the purchaser promised to take the water and pay the fee. Another clause in the deed provided that the covenants recited therein ran with the land and were binding on successors in interest on both sides. Defendant, successor to the purchaser, converted the house into a year-round dwelling, dug a well for himself on the parcel, and refused to accept or pay for water offered by the developer's successor.

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31. *Id.* at 598, 377 N.Y.S.2d at 783.

32. *Id.* at 599, 377 N.Y.S.2d at 784 (Larkin, J., dissenting). In adopting a discovery rule to govern the length of time a lawyer remains liable for negligent certification of a real estate title, the Supreme Judicial Court of Massachusetts drew an interesting analogy to support its decision: "The certification of title by an attorney is widely regarded as an alternative to title insurance, which would provide protection far beyond two years." Hendrickson v. Sears, ___ Mass. ___, ___, 310 N.E.2d 131, 136 (1974). It may be of some interest to note that the author of this opinion was Justice Robert Braucher, formerly Professor Braucher, and co-author of a casebook. R. BRAUCHER & A. SUTHERLAND, COMMERCIAL TRANSACTIONS (4th ed. 1968).

See also Chicago Title Ins. Co. v. Eynard, 81 Misc. 2d 931, 367 N.Y.S.2d 399 (N.Y.C. Civ. Ct., N.Y. Co.), *aff'd*, 84 Misc. 2d 605, 377 N.Y.S.2d 895 (App. T., 1st Dep't 1975), *noted in* Roberts, *Property, 1975 Survey of N.Y. Law*, 27 SYRACUSE L. REV. 387, 391 (1976).

33. 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976).

34. 278 N.Y. 248, 15 N.E.2d 793 (1938) (homeowners' association, as successor to developer, able to enforce promise to contribute for upkeep of common areas against successor to original homebuyer).

35. 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959) (covenant to supply heat to building next door runs with land even though an affirmative covenant).

When suit was brought to collect the fee, the question was whether the promise ran with the land to bind the incumbent homeowner. Privity of estate was manifest between the parties, as was the intent of both the original grantor and grantee to have the promise run. Nevertheless, the burden contained in the promise could not run unless the promise was one which touched and concerned the land.[36]

How do you tell whether a promise touches and concerns land? This "third prong of the tripartite rule"[37] was precisely the problem, since the New York courts deny the existence of any "rule which would operate mechanically to resolve all situations which might arise."[38] Rather, it is necessary to ascertain whether the promise substantially alters the rights normally associated with ownership. In *Neponsit*,[39] for example, in exchange for the promise to pay a maintenance levy, the homeowner obtained an easement in common over public areas that he otherwise would not have enjoyed. His fee had ownership rights connected with it that substantially affected the value of owning the particular dwelling. In *Eagle Enterprises*, however, defendant was able to dig his own well. Consequently, the water agreement did not add any new dimension to his ownership of the parcel, and the promise to take water was a "personal, contractual promise to purchase water rather than a significant interest attaching to . . . [the homeowner's] property."[41]

If the developer's successor had quit supplying water before the homeowner had been able to dig his well, *Nicholson*[42] would have been on point. Indeed, the Court did address *Nicholson*, but only to provide "an additional reason why [it was] reluctant to enforce this covenant".[43] In *Nicholson*, the fear had been expressed that, by enforcing the promise to supply heat, the Court was imposing an undue restraint on alienation or an onerous burden in perpetuity.[44] The Court dismissed this objection on the ground that the promise

36. Eagle Enterprises, Inc. v. Gross, 39 N.Y.2d 505, 508, 349 N.E.2d 816, 819, 384 N.Y.S.2d 717, 719-20 (1976).

37. *Id.* at 508, 349 N.E.2d at 819, 384 N.Y.S.2d at 720.

38. *Id.* at 509, 349 N.E.2d at 819, 384 N.Y.S.2d at 720.

39. Neponsit Property Owner Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938).

40. *Id.* at 258-60, 15 N.E.2d at 796-97.

41. 39 N.Y.2d at 509-10, 349 N.E.2d at 819, 384 N.Y.S.2d at 720.

42. Nicholson v. 300 Broadway Realty Corp., 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959).

43. 39 N.Y.2d at 510, 349 N.E.2d at 820, 384 N.Y.S.2d at 720.

44. 7 N.Y.2d at 246, 164 N.E.2d at 835, 196 N.Y.S.2d at 950.

ran only so long as both buildings stood in use.[45] There was no such limitation in the principal case, however, so that the promise to take water fell "prey to the criticism that it create[d] a burden in perpetuity".[46] This also was the reason given for not enforcing the covenant as "an exception to the general rule prohibiting the 'running' of affirmative covenants."[47]

A note of caution is in order, therefore, when drafting affirmative covenants, since their enforcement has been described as the exception rather than the rule.[48] The perpetuity problem "militate[d] strongly against . . . enforcement",[49] and was another reason for the Court's reluctance. Thus, whether an affirmative covenant runs with the land depends upon the totality of the circumstances at the time an attempt is made to enforce it.[50] Since the action here was at law, changed conditions theoretically had no bearing on the matter.[51] Such considerations, however, seem to have influenced the result. The difficulty was that "the law" had to be keyed back to the date the covenant was created; it could not die, as in equity, but had to be aborted.

This "realistic and pragmatic approach"[52] creates a technique with respect to affirmative covenants not unlike that applied to proximate cause in torts and to the doctrine of consideration in contracts. Black-letter law does not govern results; judicial perception of what makes social sense does.

D. Landlord and Tenant

Hard times, like hard cases, may create bad law. Witness the intriguing case of *City of New York v. Pennsylvania Railroad.*[53] The

45. *Id.*

46. Eagle Enterprises, Inc. v. Gross, 39 N.Y.2d 505, 510, 349 N.E.2d 816, 820, 384 N.Y.S.2d 717, 721 (1976).

47. *Id.*

48. Until now, it was possible to read *Nicholson* as abolishing the "exception" approach and holding that an affirmative covenant is enforceable if it meets the tripartite test of intent, privity, and touching and concerning the land. Nicholson v. 300 Broadway Realty Corp., 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959).

49. Eagle Enterprises, Inc. v. Gross, 39 N.Y.2d 505, 510, 349 N.E.2d 816, 820, 384 N.Y.S.2d 717, 721 (1976).

50. *Id.* at 510, 349 N.E.2d at 819-20, 384 N.Y.S.2d at 720.

51. An early New York case first articulated the principle that equity could refuse to enforce a covenant if and when conditions in the neighborhood changed. Trustees of Columbia College v. Thacher, 87 N.Y. 311 (1881).

52. Eagle Enterprises, Inc. v. Gross, 39 N.Y.2d 505, 509, 349 N.E.2d 816, 819, 384 N.Y.S.2d 717, 720 (1976).

53. 37 N.Y.2d 298, 333 N.E.2d 361, 372 N.Y.S.2d 56 (1975), *rev'g* 33 App. Div. 2d 670, 305 N.Y.S.2d 344 (1st Dep't 1969).

railroad had built a pier on city-owned land in 1888 under an arrangement whereby title to the improvement reverted to the city. From the moment the pier was completed until July 1, 1891, the railroad occupied the pier under a permit. For the next thirty years, the railroad occupied the pier on the basis of a ten-year lease twice renewed. It then occupied the pier for almost another thirty years, pursuant to a series of annual or semiannual permits executed by both parties. The lease and the permits required the railroad to maintain the pier in good repair. The last of these permits expired at the end of 1949, after which the railroad remained in possession until June 1961. It continued to pay rent but would not agree to the terms of another permit. Three years after the railroad surrendered possession, the city sued to recover the cost of putting the pier into repair, despite plans to demolish the pier as part of an urban renewal scheme.

In 1969, the Appellate Division, First Department, granted a motion to reverse on the law a summary judgment in favor of the city.[54] Crucial to this unanimous decision was the postulate that, given its plan to demolish the pier, the city had waived any claim to damages. This was considered to be particularly appropriate since a covenant to repair was involved, rather than a covenant to surrender the premises in a state of good repair.[55] In any event, the suit was time-barred because no covenant had obtained since the last permit expired in 1949. The railroad's status after 1949 had been that of a licensee; thus, the covenant to repair had not continued to run as it would have in the case of a conventional holdover tenant.[56]

In 1972, however, the Court of Appeals decided *Farrell Lines,*

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54. City of New York v. Pennsylvania R.R., 33 App. Div. 2d 670, 305 N.Y.S.2d 344 (1st Dep't 1969). For a discussion of this case see Rohan, *Property, 1970 Survey of N.Y. Law*, 22 SYRACUSE L. REV. 121, 127 (1971).

55. 33 App. Div. 2d at 670, 305 N.Y.S.2d at 345. The court stated:

> In reaching this conclusion it is appropriate to note the distinction between a covenant to repair and a covenant to surrender in repair, unilaterally sought to be imposed upon appellant (by the city's unexecuted permits after the period 1949) but to which appellant had never given its consent during the occupancy of the premises after 1949.

Id. at 670, 305 N.Y.S.2d at 345-46. Thus, one of the reasons why a new permit was not executed after 1949 was that the new form contained the extra covenant requiring the tenant to surrender up the premises in a state of good repair. Hornbook law did insist that with the covenant to repair the landlord waived his right to damages if he elected to replace the structure. *See* 2 J. RASCH, NEW YORK LANDLORD AND TENANT § 637 (2d ed. 1971).

56. City of New York v. Pennsylvania R.R., 33 App. Div. 2d 670, 305 N.Y.S.2d 344, 345 (1st Dep't 1969).

Inc. v. City of New York,[57] in which a tenant had covenanted not only to maintain a pier in good repair but to surrender it at the end of the term "well and sufficiently repaired" and "in good order and condition."[58] That the city had leased the area to a new tenant who planned to replace the pier was held not to alter the city's right to collect damages.[59] More importantly, the Court did not draw any careful distinction between the covenants. It simply held that, upon the expiration of a lease, a landlord could sue "for breach of a covenant to keep in good repair" and collect "the cost of accomplishing what should have been done".[60]

When the *Pennsylvania Railroad* case came before the Court of Appeals,[61] the sole question was whether the covenant to maintain the pier in repair had continued to run after the expiration of the last permit. Whether the railroad was classified as a holdover tenant or a licensee depended on the characterization of the railroad's status at the end of 1949, and the Court would determine the "true character" of the railroad's status, "permit" or not.[62] The railroad's right to exclusive possession against the whole world, including the city, persuaded four judges that it was more than a mere licensee.[63] The permit had created "an irrevocable estate or interest in land" so that, after 1949, the railroad became a holdover tenant.[64] The Court concluded that

> the covenant to maintain the pier remained in force for so long as the railroad remained in possession and, upon surrender, a cause of action for breach of said covenant could be timely brought.[65]

All five intermediate judges had concurred in the conclusion that the railroad was a licensee, and three members of the Court of Appeals would have sustained their result.[66] Although the permit was the crucial ingredient in the entire dispute resolution process, its terms were not mentioned in either of the opinions. The casual

57. 30 N.Y.2d 76, 281 N.E.2d 162, 330 N.Y.S.2d 358 (1972).

58. *Id.* at 83-84, 281 N.E.2d at 165-66, 330 N.Y.S.2d at 363.

59. *Id.* at 84, 281 N.E.2d at 166, 330 N.Y.S.2d at 364.

60. *Id.* at 84, 281 N.E.2d at 166, 330 N.Y.S.2d at 363.

61. City of New York v. Pennsylvania R.R., 37 N.Y.2d 298, 333 N.E.2d 361, 372 N.Y.S.2d 56 (1975).

62. *Id.* at 300, 333 N.E.2d at 362, 372 N.Y.S.2d at 58.

63. *Id.*

64. *Id.*

65. *Id.* at 301, 333 N.E.2d at 362-63, 372 N.Y.S.2d at 58.

66. Judges Gabrielli, Jones, and Wachtler voted to affirm the lower court decision. *Id.* at 301, 333 N.E.2d at 363, 372 N.Y.S.2d at 59.

reader can glean something, however, from the city's argument, which was that, while the permit was revocable at will, it gave rise to a tenancy at will—an estate sufficient to cause the covenant to continue to run after 1949.[67] Uncertainty is the final result, however, since the absence of both facts and ratiocination leaves the line between license and tenancy at will blurred, if not erased. Moreover, scriveners may persuade themselves that this peculiar opinion establishes nothing in the line of principled law, but simply evidences that result-oriented jurisprudence obtains when it comes to allocating losses between a nearly bankrupt city and bondholders of a bankrupt railroad.[68]

The case of *Mobil Oil Corp. v. Rubenfeld*[69] presented a novel twist to the developing law of landlord and tenant. If a residential tenant were to make a nuisance of himself by complaining to the authorities about housing code violations, no one would be surprised. No one would be surprised if the landlord failed to renew the lease of this obstreperous tenant, and everyone would expect this tenant, now a holdover tenant, to resist any effort by the landlord to regain possession by raising the defense of retaliatory eviction The question in *Mobil* was whether this type of approach should extend to commercial settings. The defendant was a commercial tenant—a lessee of a gas station—and the gravamen of the defense was that the landlord was "out to get him" because he refused to cooperate in various price-fixing and tie-in sales schemes that violated the federal antitrust laws. The obvious, and certainly most efficient, solution was to refrain from blending commercial disputes with the developing law of residential landlord and tenant, but to leave the tenant to an action for money damages under the relevant federal laws.[70]

E. Mortgages

The decision by a puisne judge in *Federal National Mortgage Association v. Ricks*[71] is likely the most important decision articu-

67. The city's argument is encapsulated with the official report. *Id.* at 299.

68. Worthy of consideration is the treatment of the railroad and other property owners when it comes to drawing the line where public regulation tails off into outright confiscation. *Compare* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *with* Penn Cent. Transp. Co. v. City of New York, 50 App. Div. 2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975).

69. 48 App. Div. 2d 428, 370 N.Y.S.2d 943 (2d Dep't 1975).

70. *Id.* at 433-34, 370 N.Y.S.2d at 948-49.

71. 83 Misc. 2d 814, 372 N.Y.S.2d 485 (Sup. Ct., N.Y. Co. 1975).

lated during the *Survey* year in the realm of New York property law. It tapped a case load, the dimensions of which are just becoming apparent.[72] The case can best be appreciated by concentrating on one crucial issue.

Plaintiff was proceeding to foreclose a home mortgage when it was confronted by an affirmative defense. The mortgage had been insured by the Federal Housing Administration as part of a program to make home purchases feasible for low-income families. Only those lenders deemed eligible by the Department of Housing and Urban Development (HUD) could participate in what, for them, was a risk-free venture. The statutory program required that these lenders be capable of properly servicing a mortgage, but the standard of propriety was left to a HUD handbook for determination. The actual guidelines recommended selection of lenders who would resort to foreclosure or assignment only as a last resort. Lenders were to attempt to get to the root cause of any default and attempt to salvage the mortgage, whether by voluntarily forbearing to foreclose or by recasting.

The guidelines, however, were never promulgated in the *Federal Register*, so they did not have the force of law.[73] Hence, when defendant raised a defense to foreclosure based upon these guidelines, a motion was made to dismiss the defense. The issue was clear: "Notwithstanding that the Handbook does not represent a validly enacted rule or regulation, are mortgagees otherwise obligated to comply with the guidelines contained therein?"[74] The court found the answer equally clear:

> A foreclosure action is equitable in nature, and . . . he who seeks equity must do equity. . . . [A]ny conduct on the part of the plaintiff mortgagee which is considered unconscionable or oppressive will operate to deny it the aid of a court of equity.
>
> . . . .
>
> To allow the F.N.M.A. or any mortgagee under the program to ignore these HUD Handbook guidelines would be to permit it to subvert the very goal the program was established to achieve and to make a mockery of the National Housing Act.[75]

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72. *See, e.g.*, Government Nat'l Mtge. Ass'n v. Screen, 85 Misc. 2d 86, 379 N.Y.S.2d 327 (Sup. Ct., Queens Co. 1976). The national scene can be sensed by following the *Clearinghouse Review*. *See, e.g.*, 10 CLEARINGHOUSE REV. 56-57 (1976).

73. Federal Nat'l Mtge. Ass'n v. Ricks, 83 Misc. 2d 814, 820, 372 N.Y.S.2d 485, 490 (Sup. Ct., N.Y. Co. 1975).

74. *Id.* at 821, 372 N.Y.S.2d at 493.

75. *Id.* at 823-25, 372 N.Y.S.2d at 494-96 (citations omitted).

Consequently, the motion to dismiss the defense was denied, and the question of compliance was left for trial.[76]

The case serves as a signal that behavior in the real estate field will increasingly be subject to federal statutes, rules, regulations, and guidelines. Any doubt of this trend is quickly eliminated by perusal of the Real Estate Settlement Procedures Act[77] and the Truth in Lending Act.[78] Clearly, the rules of property law are no longer the unique product of autonomous state legislatures, much less the product of a received common-law tradition.

The recent federal incursions into the field may be rationalized as exceptions made necessary by unique problems, such as the need to protect the gullible or help the hard-working poor. Yet, the volume of real estate transactions may be more than a convenient barometer by which to tell whether the overall economy is moving up or down. The capacity to influence the behavior of lenders, sellers, buyers, and their lawyers in that market may give certain agencies a powerful lever with which to influence the direction of the overall economy. Entropy appears to have beset the law of real property, with the rules of landlord and tenant falling apart and with obscure federal manuals becoming part of the mortgage canon. We may, in fact, be experiencing the birth pangs of a whole new real property system.

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76. *Id.* at 828, 372 N.Y.S.2d at 499.

77. 12 U.S.C. §§ 2601-16 (Supp. V, 1975). It should be noted that the recent controversy over lawyers' fixed fee schedules came to a head over this practice in the real estate closing field. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), *rev'g* 497 F.2d 1 (4th Cir. 1974).

78. 15 U.S.C. §§ 1601-14, 1631-45, 1665a, 1666, 1666a-66j (Supp. V, 1975), *amending* 15 U.S.C. §§ 1601-13, 1631-44, 1661-65 (1970).