Winter 1976

Property

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PROPERTY

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A survey can be a wine list inventorying the entire stock in the house or a selective list of vintages worth spending some time to savour. The reader will be able in a thrice to make his or her own judgment about the policy of this house.

I. LEGISLATION

Several measures affecting property were enacted into law during the 1975 session of the New York legislature. The most significant changes were in the landlord-tenant area. The Real Property Actions and Proceedings Law Section 531 was amended to make it clear that adverse possession by a tenant against his landlord does *not commence until* 10 years have elapsed from the expiration of the lease or the last payment of rent.[1] Similarly, section 541 of the same law was amended to provide that adverse possession by one tenant in common against a cotenant in common does *not commence until* either 10 years have elapsed from the beginning of the sole and exclusive occupancy of the possessing cotenant, or there has been an ouster by one cotenant of the other cotenant.[2] Additional legislation in this area provides that while the issuance of a warrant for the removal of a tenant terminates the landlord-tenant relationship,[3] a court now may vacate such a warrant for good cause prior to its execution.[4] Recent changes in the Estates, Powers and Trusts Law also relate to the landlord-tenant area. As of September 1, 1975, a disposition of real property to persons who are not legally married to one another, but who are described in the disposition as husband and wife, creates in them a joint tenancy unless expressly declared to be a tenancy in common.[5] As a result of last minute legislative changes, residential leases were declared to contain an implied warranty of habitability which cannot be waived or modi-

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1. N.Y. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 531 (McKinney Supp. 1975).
2. *Id.* § 541 (McKinney Supp. 1975).
3. *Id.* § 749 (McKinney 1963).
4. *Id.* (McKinney Supp. 1975).
5. N.Y. EPTL 6-2.2 (McKinney Supp. 1975). Prior to this amendment a joint tenancy under such circumstances was confined to situations where there was express language of survivorship or specific language negating an intent to create a tenancy in common. N.Y. EPTL 6-2.2 (McKinney 1967).

fied by the tenant,[6] and landlords were forbidden to retaliate when tenants exercise their right to form collectives.[7] Article 7-B of the Personal Property Law, dealing with lost and found personal property, was amended to provide that a finder is entitled to any bearer instrument that is unclaimed.[8]

II. Case Law

A. Real Estate Brokers

Real estate brokers and their problems consumed an inordinate number of pages in this year's law reports. It is hornbook law in New York that a broker's commission is earned when he produces a ready, willing and able purchaser, unless payment of his commission is conditioned upon successful completion of the closing, or some other designated event.[9] Even when the right to a commission depends upon a condition, the broker is protected if his employer is responsible for the condition's nonoccurrence.[10] *Cushman & Wakefield, Inc. v. Dollar Land Corp.*[11] provided a novel illustration of this latter situation. The broker's commission was contingent upon closing, but the closing was aborted when dissident stockholders of the vendor corporation's parent secured an injunction against the sale. Ordinarily, such third-party intrusion into the normal run of events would have excused the vendor's failure to close vis-à-vis the broker. According to the Court, however, the excuse evaporated when, while performance was still possible, the dissidents obtained control of the vendor, and the corporation, now under new management, repudiated the sales agreement.[12]

Who is a broker and perforce must have a license[13] is a question which has resurfaced during this period of economic hard times. A broker is usually perceived as someone retained either by a vendor or purchaser and paid by his employer for finding a willing and able buyer or seller. During the Great Depression some entrepreneurs

6. N.Y. Real Property Law § 235-b (McKinney Supp. 1975).

7. *Id.* § 230 (McKinney Supp. 1975).

8. N.Y. Personal Property Law § 251 (McKinney Supp. 1975).

9. New York law is neatly capsulized in Lane—The Real Estate Dep't Store, Inc. v. Lawlet Corp., 28 N.Y.2d 36, 42-43, 268 N.E.2d 635, 638-39, 319 N.Y.S.2d 836, 840-41 (1971).

10. Weniger v. Union Center Plaza Associates, 387 F. Supp. 849 (S.D.N.Y. 1974); Grayside Realty Corp. v. Contino, 47 App. Div. 2d 667, 364 N.Y.S.2d 206 (2d Dep't 1975); Mulvilhill v. DiPrima, 47 App. Div. 2d 560, 363 N.Y.S.2d 629 (2d Dep't 1975).

11. 36 N.Y.2d 490, 330 N.E.2d 409, 369 N.Y.S.2d 394 (1975).

12. *Id.* at 496, 330 N.E.2d at 413, 369 N.Y.S.2d at 399.

13. N.Y. Real Property Law § 440-a (McKinney Supp. 1974).

distributed free lists of apartments available for rent, and derived a profit by charging eager landlords advertisement fees. The Attorney General ruled that a license was necessary to engage in this enterprise, notwithstanding the absence of any "employer".[14] With modern-day tenants waxing hot to find apartments, a new generation of entrepreneurs has begun compiling lists of available apartments and selling them to would-be tenants. The courts have held such activities to be the brokerage of real estate for which a license is required.[15]

Clearly, one who collects a fee for performing the job of a real estate broker needs a license. In one case where the amount of the fee was in dispute, the First Department held that it is an acceptable practice to let the jury consider the Real Estate Board schedule of recommended fees, notwithstanding the objection that fee schedules violate the Sherman Act.[16] The case is noteworthy for its fey dissenter who suggested that his brethren implicitly recognized the harmful effect of the "illegal" rate schedule when they cut back the jury award to one-fourth its original size.[17]

The licensing of any profession presumes that its members are subject to discipline for misbehavior. In the case of brokers the test of misconduct is one of "demonstrated untrustworthiness or incompetency".[18] Peculiarly, the cases illustrate a tendency to set aside or modify the efforts by the Secretary of State to impose sanctions.[19] According to the dissenters in these cases, the low-water mark may have been reached in the First Department when the suspension of a broker was set aside even though the

> hearing demonstrated, beyond question, that petitioner, who was acting as lawyer and broker for his client, did not disclose to her that

14. 18 N.Y. STATE DEP'T REP. 575 (Op. Atty. Gen. 1933) (1934).

15. N.Y. REAL PROPERTY LAW § 440-a (McKinney Supp. 1974). *See* People v. Biss, 81 Misc. 2d 449, 365 N.Y.S.2d 983 (Crim. Ct., Kings Co. 1975); People v. Sickinger, 79 Misc. 2d 572, 360 N.Y.S.2d 796 (Crim. Ct., N.Y. Co. 1975). The legislature has since provided for the licensing of "Apartment Referral Agents." N.Y. REAL PROPERTY LAW §§ 446-a-i (McKinney Supp. 1975).

16. Williams Real Estate Co. v. Solow Dev. Corp., 47 App. Div. 2d 872, 366 N.Y.S.2d 147 (1st Dep't 1975). A purely advisory fee schedule was not the issue in the recent Supreme Court decision which held enforced fee schedules violative of the Sherman Act. Goldfarb v. Virginia State Bar, 95 S. Ct. 2004, 2010 (1975).

17. 47 App. Div. 2d at 873, 366 N.Y.S.2d at 149 (Kupferman, J., dissenting).

18. N.Y. REAL PROPERTY LAW § 441-c(1) (McKinney Supp. 1974).

19. Badamo v. Ghezzi, 47 App. Div. 2d 746, 364 N.Y.S.2d 555 (2d Dep't 1975) (mem.); Jacobson v. Ghezzi, 47 App. Div. 2d 516, 363 N.Y.S.2d 590 (1st Dep't 1975).

> her house, which was about to be sold for $21,000, was to be resold immediately for $28,750.[20]

However, *Butterly & Green, Inc. v. Lomenzo*[21] signals a turning point. There, the Court of Appeals reinstated a 30-day suspension where brokers had been found guilty of promoting racial segregation. It remains to be seen whether the state's inferior tribunals will heed the Court's admonition that

> [w]here an administrator is clothed by the Legislature with the responsibility of licensing and disciplining a calling, he must not be denuded of the commensurate authority to punish those licensees who violate professional standards unless his measures are shockingly unfair.[22]

B. Conveyancing

Suppose that *A* conveyed to *B* a parcel of land, and the deed described the boundaries as a lake on the east and irregular lines along adjoining parcels to the north and south, the lot to comprise the easterly six-eighths of an acre out of a parcel consisting of seven-eighths of an acre. Where is the western boundary? Can one infer the missing line by placing a rule on a north-south axis on a map, and then move the rule west from the lake until six-eighths of an acre are encapsulated between the rule and the lake? The Court of Appeals in *Wood v. LaRose*[23] held that such a description is valid when used in a tax deed executed by a county treasurer exercising his authority to sell fractional parts of tax-delinquent property. Allowing treasurers to sell what they can certainly expedites the collection of tax revenues. The Chief Judge and two of his brethren, however, failed to agree that the legislature, by authorizing less than fee sales,[24] licensed the treasurers to be so expeditious that they could employ deed descriptions which a fair number of the real estate bar would regard as hopelessly insufficient.[25]

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20. Hiltzik v. Lomenzo, 46 App. Div. 2d 855, 856, 361 N.Y.S.2d 363, 366 (1st Dep't 1974) (Capozzoli, J., dissenting). The majority believed that although the broker had failed to reveal the better offer to the vendor, no lack of trustworthiness could be demonstrated where the broker produced prospective buyers, and acted in neither bad faith nor in furtherance of undisclosed interests. *Id.* at 856, 361 N.Y.S.2d at 365-66.

21. 36 N.Y.2d 250, 326 N.E.2d 799, 367 N.Y.S.2d 230 (1975).

22. *Id.* at 258, 326 N.E.2d at 804, 367 N.Y.S.2d at 236.

23. 35 N.Y.2d 266, 319 N.E.2d 186, 360 N.Y.S.2d 864 (1974).

24. N.Y. Real Property Tax Law § 1006 (McKinney 1972).

25. Chief Judge Breitel, in dissent, stated: "The tax deeds in suit did not describe an enclosed parcel." 35 N.Y.2d at 272, 319 N.E.2d at 189, 360 N.Y.S.2d at 868. According to

An interesting episode occurred when a title insurance company issued a mortgage policy, only to discover later that it had overlooked a federal tax lien on the subject parcel. The company paid off the lien as its policy required, but then sought to recoup its loss by suing the former owner of the parcel who had suffered the lien before quitclaiming the parcel to the mortgagor corporation. The Court held that the plaintiff could not "call into being the doctrine of subrogation . . . to relieve itself of its mistake in insuring the property free of the tax lien."[26]

C. Consumer Protection

In *Bobrow v. City of Syracuse*,[27] a purchaser of a building relied on a city inspector's certificate of compliance with the local building code. At the later date, when cited for violations of the very same code, it was discovered that the inspector had relied on the oral assurances of the vendor. When plaintiff-purchaser sued the city for the cost of repairs on both a negligence and warranty theory, the city's motion to dismiss was denied.[28] The court held that the city should be estopped from holding the plaintiff responsible for present violations.[29]

One objection to imposing a statutory warranty on builder-vendors has been that any corporation would be devoid of assets with which to answer an adverse judgment.[30] In *Haberman v.*

Judge Bascom, in his trial opinion in *Wood v. LaRose*, one might as easily draw a line parallel to the turns of the lake shore.

> So, too, would a diversity of variously located straight, irregular, curved or elliptical lines satisfy this vague description, and all of which would leave the part of the lot not sold in as many different shapes and dimensions as the imagination can conceive. Where do the parties put down their corner stakes or erect a line fence?

67 Misc. 2d 597, 604, 324 N.Y.S.2d 788, 798 (Sup. Ct., Warren Co. 1971).

26. Chicago Title Ins. Co. v. Eynard, 81 Misc. 2d 931, 933, 367 N.Y.S.2d 399, 401 (Civ. Ct., N.Y. Co. 1975). Unable to find New York authority, the court, on its own initiative, applied Coy v. Raabe, 69 Wash. 2d 346, 418 P.2d 728 (1966), wherein the court denied a claim of subrogation by a title insurance company which had issued insurance to buyers in a federal tax lien settlement without having determined whether the realty was subject to a lease with an option to buy.

27. 79 Misc. 2d 169, 359 N.Y.S.2d 758 (Syracuse City Ct. 1974).

28. *Id.* at 170, 359 N.Y.S.2d at 760.

29. *Id.* This case should not, however, cause anyone to doubt that there are extant many building commissioners and similar public officials—America's unique local Civil Service—who are dedicated to their roles. *E.g.*, Long v. Kissler Real Estate, 80 Misc. 2d 817, 364 N.Y.S.2d 134 (Rockland Co. Ct. 1975) (building inspector brought an action to enforce the deposit of rents and the repair of slum dwellings pursuant to N.Y. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 776 (McKinney Supp. 1974)).

30. *See* N.Y. LEGIS. DOC. No. 65(A) (1967), at 12, *reprinted in* 1967 LAW REVISION COMMIS-

Greenspan[31] however, an action based on fraud, the sole stockholders of the corporation were held personally liable for concealing a building code violation.[32]

D. Covenants

Huggins v. Castle Estates, Inc.[33] was precipitated by a developer who sold lots restricted by covenants to residential use. In lieu of boundary descriptions in each individual deed, the filed plat of the subdivision was incorporated by reference. The defendant-vendor owned land across the street from this project. The plaintiff-purchasers claimed both that the president of the development corporation had orally promised that this remaining parcel would be developed as a residential project, and that such parcel bore the caption "R-2 Zoning" on the plat map, which would allow residential use only. The town subsequently revised its zoning ordinances and downzoned the parcel to commercial use; the vendor corporation then set about to sell the parcel to an automobile dealer. The plaintiffs, who were residents in the development, sued to enjoin this sale on the theory that the parcel was subject to a negative easement. The residential purchasers should have obtained an express reciprocal restrictive covenant,[34] but such a covenant can be derived from an incorporated plat map under the guise of a negative easement.[35] In order to satisfy the Statute of Frauds, the plat incor-

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SION REPORT 21, 32.

31. 82 Misc. 2d 263, 368 N.Y.S.2d 717 (Sup. Ct., Richmond Co. 1975).

32. The court found that the individual defendants, in obtaining loans from the corporation after commencement of the suit, had purposely rendered the corporation judgment proof. *Id.* at 267, 368 N.Y.S.2d at 722.

33. 36 N.Y.2d 427, 330 N.E.2d 48, 369 N.Y.S.2d 80 (1975).

34. The classic illustration of this truth is Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913). *See* Foro v. Doetsch, 39 App. Div. 2d 150, 332 N.Y.S.2d 817 (3d Dep't 1972), *aff'd*, 33 N.Y.2d 767, 305 N.E.2d 491, 350 N.Y.S.2d 412 (1973).

35. At one time, negative easements tended to be corridors through airspace rather than paths on solid ground. *See* United States v. Causby, 328 U.S. 256 (1946) (glide path). The "negative" was prefixed to the word easement because the owner of the dominant estate could not enter over the servient estate; it was the servient tenant who could not obstruct the easement. *See* C. BERGER, LAND OWNERSHIP AND USE 448 (2d ed. 1975), which states:

> *Negative* easements can be illustrated by an agreement between neighbors A and B, wherein A agrees, in order to protect B's view of the surrounding countryside, not to build any structure on his lot higher than two stories. . . . At early common law, negative easements were fairly uncommon, limited almost exclusively to easements for *light, air, or view*.

Negative easements have since come to mean promises, enforceable in equity, which pertain to the uses to which land may be put. The caption "negative easement" came into use because it was not clear that these promises met the tests of privity and enforceability which

porated by reference into a signed deed must evidence an express intent to establish a restriction, although not necessarily in promissory language.[36] The issue in *Huggins,* then, was whether the simple caption "R-2 Zoning" was a promise to develop the parcel accordingly or merely a neutral statement of fact.

The trial judge admitted oral testimony offered by defendants on the ground that the zoning caption was ambiguous. Despite plaintiffs' claimed reliance upon the developer's oral promises, the court dismissed the suit, concluding that the purchasers, who had never looked at the plat map, could not now escalate a neutral caption into a written promise. The appellate division reversed, holding the vendor bound by the caption on the plat. Since the absence of data in the deeds required reference to the plat, the plat descriptions were as enforceable as they would have been if they were contained in the deeds.[37] Furthermore, the purchase of home sites in this development would make sense only if there had been an agreement about the future of the neighboring parcel.[38] The dissent objected to what it claimed was an abuse of the appellate authority to review trial court findings of fact.[39] Additionally, it criticized the majority for providing a means to convert plat references to prevailing zoning into binding negative easements, thereby freezing present zoning designations and eroding the power of the public authority to alter its own land use decisions.[40]

The Court of Appeals reinstated the trial judge's dismissal of the complaint, but did not address the zoning issue.[41] Instead, the

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were required of a covenant at law running with the land. *See* Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877):

> It would be unreasonable and unconscientious to hold the grantees absolved from the covenant in equity for the technical reason assigned, that it did not run with the land, so as to give an action at law. . . . The action can be maintained for the establishment and enforcement of a negative easement created by the deed of the original proprietor.

Id. at 450. It is interesting to note that in the instant case the promise was described as a "restrictive covenant." Huggins v. Castle Estates, Inc., 44 App. Div. 2d 25, 28, 352 N.Y.S.2d 719, 723 (4th Dep't 1974), *rev'd,* 36 N.Y.2d 427, 330 N.E.2d 48, 369 N.Y.S.2d 80 (1975).

36. *E.g.,* White v. Moore, 139 App. Div. 269, 123 N.Y.S. 1012 (2d Dep't 1910). In this case, a property owner filed a map showing a parcel marked "Park." After the passage of years, the village was found to have an easement in the park.

37. Huggins v. Castle Estates, Inc., 44 App. Div. 2d 25, 28, 352 N.Y.S.2d 719, 722 (4th Dep't 1974).

38. *Id.* at 30, 352 N.Y.S.2d at 724.

39. *Id.* at 34-35, 352 N.Y.S.2d at 728-29 (Moule, J., dissenting).

40. *Id.* at 34, 352 N.Y.S.2d at 728 (Moule, J., dissenting).

41. 36 N.Y.2d 427, 330 N.E.2d 48, 369 N.Y.S.2d 80 (1975).

Court identified two ways in which a negative easement can arise. One is where the incorporated plat contains clear language which by its very nature reflects existing restrictions. The instant caption was merely an equivocal invocation of the existing zoning status.[42] The second is where a common plan of development has become so obvious that, in order to protect purchasers relying on its completion in accordance with the prevailing pattern, the developer is estopped to deny the existence of a negative easement.[43] The existence of numerous commercial enterprises in the immediate vicinity of this development, however, made it impossible to find any common plan.[44] The *Huggins* decision leaves open the question of what law obtains in the case of a developer who begins to pursue a line of development on one of several adjoining tracts in virgin territory. Reflection on the whole tenor of the opinion does, however, reveal a mood on the part of the Court to preserve the options of a developer, absent express promises on any incorporated plats or a huge advertising campaign which promises a "planned community." Such promises, however, raise an estoppel, a matter of no small moment for large-scale residential developers.[45]

The nexus between private covenants and zoning restrictions was the central point in *Ginsberg v. Yeshiva of Far Rockaway,*[46]

42. *Id.* at 431-32, 330 N.E.2d at 52, 369 N.Y.S.2d at 85-86, *citing* Weil v. Atlantic Beach Holding Corp., 1 N.Y.2d 20, 133 N.E.2d 505, 150 N.Y.S.2d 13 (1956) (parcel caption "Boardwalk" on plat gave rise to an implied negative restriction for the parcel which abutted a beach).

43. *Id.* at 432, 330 N.E.2d at 52, 369 N.Y.S.2d at 86. The Court went on to state that "[w]hether or not a general plan of development exists is a question of fact which must be established by clear and definite proof." *Id. See* Phillips v. West Rockaway Land Co., 226 N.Y. 507, 124 N.E. 87 (1919).

44. 36 N.Y.2d at 432-33, 330 N.E.2d at 52-53, 369 N.Y.S.2d at 86-87.

45. Interestingly enough, this raises a problem of possible permanent restrictions on land use similar to the frozen zoning plan problem posed by the dissent in the appellate division. See note 40 *supra* and accompanying text. For further discussion see Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control,* 114 U. PA. L. REV. 47 (1965):

> [T]he consequences of obtaining final approval and recording the plat are troublesome. . . . More importantly, changes in the plan of development become more difficult. Public streets shown on the plat will have to be dedicated at the time of approval. . . . Furthermore, the courts have been expanding the doctrine that purchasers who buy lots by reference to a recorded plat acquire rights in those areas which appear intended for common use and enjoyment. Thus, after the recording of the plat and certainly after the sale of lots, the site plan may become substantially frozen and changes in it will require both public proceedings and private releases.

Id. at 88-89.

46. 45 App. Div. 2d 334, 358 N.Y.S.2d 477 (2d Dep't 1974), *aff'd,* 36 N.Y.2d 706, 325 N.E.2d 876, 366 N.Y.S.2d 418 (1975).

wherein a covenant restricting a parcel to residential use was enforced against a religious school. The covenant was enforced despite the fact that public and private schools, as well as religious institutions generally, are in many ways immune from public land use controls in New York because they exemplify the general welfare that land use controls are designed to protect.[47] The court based its decision on the view that zoning is an *encroachment* on private property rights which cannot be enforced without a public interest justification, while a private restrictive covenant is *itself* a private property right, the lack of enforcement being the equivalent of "*condemnation without authority of law.*"[48] A vigorous dissent suggested that these religious institutions are equally immunized from private covenants because, according to *Shelley v. Kraemer*,[49] the court-ordered enforcement of a restrictive covenant necessitates state action which would deprive people of their right to freely exercise religion.[50] Inherent in *Ginsberg* is the potential for an equally vigorous opinion that in a contemporary secular society any exemptions from the zoning regimen for the benefit of a religious organization might constitute an illicit establishment of religion.[51]

E. Easements

New York law pertaining to easements appears to be as inflexible as the sines, cosines and tangents fed into a Norden bombsight so that, once a fix is had on the terrain below, a "correct result" has to obtain. Illustrative of this logic-chopping approach is *Lafayette Auvergne Corp. v. 10243 Management Corp.*[52] A tenant exacted in

47. 1 R. ANDERSON, NEW YORK ZONING LAW AND PRACTICE §§ 9.07, 9.29-9.35 (2d ed. 1973). Despite a designation of church-owned buildings as landmarks by a local landmarks commission, a church group in New York can assert an absolute private right to demolish its designated buildings. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 125 n.1, 132, 316 N.E.2d 305, 308 n.1, 312, 359 N.Y.S.2d 7, 11 n.1, 16-17 (1974).

48. 45 App. Div. 2d at 338, 358 N.Y.S.2d at 482, *citing* Christ's Methodist Church v. Macklanburg, 198 Okla. 297, 300, 177 P.2d 1008, 1112 (1947).

49. 334 U.S. 1 (1948).

50. 45 App. Div. 2d at 343, 358 N.Y.S.2d at 487 (Benjamin, J., dissenting). The dissent cites Marsh v. Alabama, 326 U.S. 501 (1946), for the proposition that *Shelley v. Kraemer* is not limited solely to racially restrictive covenants. 45 App. Div. 2d at 343, 358 N.Y.S.2d at 487.

51. *Quaere*: If Sunday closing laws are not offensive to the establishment clause of the first amendment since they have become a mere secular convenience, then should religious institutions be treated differently than other institutions to the extent they are *religious* in character, or, to the extent they have fallen to the level of secular conveniences, should they be subject to the notions of equal protection? *See* McCowan v. Maryland, 366 U.S. 420, 444 (1961).

52. 35 N.Y.2d 834, 321 N.E.2d 784, 362 N.Y.S.2d 863 (1974).

its lease the right to install a skylight, only to discover that the landlord had since acquired certain adjoining parcels and was about to erect high-rise buildings thereon. The tenant instituted an action for summary judgment to establish that its "easement of light and air" was about to be unlawfully destroyed. It has long been the established rule in New York that while an easement of light and air cannot be acquired by prescription,[53] such a right can be created by agreement.[54] Permission to construct a skylight is one thing; an agreement to restrain a neighbor's activities which might lessen the skylight's value is another. To infer one from the other, after all, would be to imply a promise by the landlord to impose a servitude on his adjacent parcel and to so create an easement of light and air by less than an explicit agreement.[55]

Some years ago the Court of Appeals decided *Loch Sheldrake Associates v. Evans,*[56] a controversy which originated when a mill owner in Sullivan County conveyed a tract of land containing a natural lake, but expressly reserved the right to maintain a dam and draw off water which was needed for the continued operation of the mill. The defendants ultimately acquired the mill lot, ceased its operations and began to use the water to supply a summer hotel which they owned on another parcel. The owners of the lake sought to enjoin the defendants' use of water from the dominant estate, claiming that the circumstances surrounding the original reservation indicated the grantor's intent to create an easement appurtenant to the mill lot.[57] The Court, however, was unwilling to consider the surrounding circumstances because the original reservation was not ambiguous; it expressly reserved an unrestricted right to draw water, with no reference to any particular use.[58] Further, the Court found that defendants' claim to possession of an easement in gross was misconceived because speaking "with strictest accuracy, there is no such thing".[59] What had been created was "an absolute right

53. Parker v. Foote, 19 Wend. 309 (Sup. Ct. 1838).

54. Cohan v. Fleuroma, Inc., 42 App. Div. 2d 741, 346 N.Y.S.2d 157 (2d Dep't 1973).

55. 35 N.Y.2d at 834, 321 N.E.2d at 784, 362 N.Y.S.2d at 863 (1974).

56. 306 N.Y. 297, 118 N.E.2d 444 (1954).

57. *Id.* at 302, 118 N.E.2d at 446.

58. *Id.* at 304-05, 118 N.E.2d at 447-48.

59. 306 N.Y. at 304, 118 N.E.2d at 447. According to the Court, an "easement" by definition contains two distinct tenements, one dominant and the other servient. The phrase "in gross", however, implies an absolute right capable of being conveyed without reference to any specific parcels. Consequently, the phrase "easement in gross" was internally inconsistent, despite the fact that it enjoyed considerable usage by the New York courts. *E.g.*, Wilson v. Ford, 209 N.Y. 186, 102 N.E. 614 (1913).

to take profit or produce from the land conveyed, a right which was capable of being conveyed in gross".[60]

Passaic Valley Council of Boy Scouts v. Hartwood Syndicate, Inc.,[61] also involved a body of water in Sullivan County. Over a century ago, a canal company had created a reservoir from which it could draw water in order to maintain the level of its canal. It later conveyed the reservoir *tract* to *W*, but reserved the absolute right to maintain the reservoir. *W* subsequently conveyed the southern portion of the tract, along with *exclusive* fishing and boating rights over the *entire* reservoir, to a private club. The canal company eventually went out of business, but not before conveying its rights in the reservoir to the defendant-syndicate, an organization closely related to the club. *W* conveyed the balance of the tract to the Boy Scout Council, including the land upon which the reservoir dam was situated. The dispute arose when the club asserted its exclusive rights to use the entire reservoir, in support of which the syndicate threatened to drain the reservoir.

The crucial issue was the scope of the syndicate's rights in the reservoir. Unlike the agreement in *Loch Sheldrake,* the original reservation here was ambiguous on its face; only by looking at the surrounding circumstances could one infer that the canal company had any right to draw water out of the reservoir the maintenance of which it had reserved! Once in view, however, these circumstances illustrated that the water was intended solely for canal-related purposes, thereby making the canal a dominant estate which no longer existed, and leading to the inexorable conclusion that the easement appurtenant had long since been extinguished.[62] In what was characterized as a "well-reasoned and scholarly opinion,"[63] the trial judge had attempted to put to rest the concept of a "right to profit," suggesting, *contra Loch Sheldrake,* that the only worthwhile distinction is between easements appurtenant and easements in gross.[64] Since the notion of easement in gross would have worked in

60. *Id.*

61. 46 App. Div. 2d 247, 361 N.Y.S.2d 945 (3d Dep't 1974), *modifying* 75 Misc. 2d 1018, 348 N.Y.S.2d 883 (Sup. Ct., Sullivan Co. 1973).

62. 75 Misc. 2d 1018, 1031, 348 N.Y.S.2d 883, 895 (Sup. Ct., Sullivan Co. 1973), *modified on other grounds,* 46 App. Div. 2d 249, 361 N.Y.S.2d 945 (3d Dep't 1974).

63. 46 App. Div. 2d at 249, 361 N.Y.S.2d at 948.

64. 75 Misc. 2d at 1021-22, 348 N.Y.S.2d at 886; *see* A. CASNER & B. LEACH, CASES AND TEXT ON PROPERTY 1111 (2d ed. 1969):

> You will notice that there is no separate treatment of profits in this book. Profits are not separately developed because we agree with the conclusion of the Restatement

Loch Sheldrake just as well as the notion of a right to profits, the former hopefully will become the accepted approach, unless the judicial compunction against altering any "rule" pertaining to property law causes judges to have second thoughts.[65]

F. Cooperatives and Condominiums

The United States Supreme Court in *United Housing Foundation, Inc. v. Forman*[66] reversed a decision by the Second Circuit,[67] reviewed in last year's *Survey*,[68] that sales of shares of stock in a cooperative apartment corporation were subject to federal securities law.[69] The Court, looking to the substance of the transactions instead of the form and name of the instruments, ruled that this stock was not a "security" within the meaning of the applicable statutes.[70] Neither tax savings from mortgage interest payments, cost savings relative to comparable housing elsewhere, nor leasing of commercial space within the cooperative itself resulted in the "expectation of profits" necessary for the finding of a "security."[71]

G. Landlord and Tenant

A long-term commercial lease contained a provision whereby the landlord could terminate the agreement if the tenant filed for, or there was filed against the tenant, a petition in bankruptcy, or if the tenant was adjudicated a bankrupt. A petition in bankruptcy was filed against the tenant but was quickly dismissed. The Court of Appeals held however that the landlord *could* elect to terminate the lease.[72] Absent fraud, collusion or overreaching by the landlord, early dismissal of the petition did not justify equitable intervention

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of Property that in the United States the rules generally applicable to easements are also applicable to profits.

See also RESTATEMENT OF PROPERTY, Special Note § 450, at 2901-02 (1944).

65. *See* Heyert v. Orange & Rockland Util., Inc., 17 N.Y.2d 352, 359-65, 218 N.E.2d 263, 267-70, 271 N.Y.S.2d 201, 206-11 (1966).

66. 421 U.S. 837 (1975).

67. Forman v. Community Servs. Inc., 500 F.2d 1246 (2d Cir. 1974), *rev'd sub nom.* United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975).

68. Rohan & Sanchirico, *Property, 1974 Survey of N.Y. Law*, 26 SYRACUSE L. REV. 351, 357 (1975).

69. Securities Act of 1933, 15 U.S.C. § 77 *et seq.* (1970); Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.* (1970).

70. 421 U.S. at 847-58.

71. *Id.* at 855-58.

72. W.F.M. Restaurant, Inc. v. Austern, 35 N.Y.2d 610, 324 N.E.2d 149, 364 N.Y.S.2d 500 (1974).

to avoid forfeiture.[73]

At one time the rules pertaining to residential tenants could be succinctly stated. Today any number of applicable "rules" exist, either unsupported by the Court of Appeals or actually subversive to that authority, and such rules continue to multiply. When a tenant vacates the premises during the lease term without cause, landlords must mitigate damages.[74] An implied warranty of habitability exists in all residential leases unless expressly excepted.[75] Even where an implied warranty does not exist, a tenant can invoke the doctrine of constructive *eviction* to excuse his refusal to *enter* the premises.[76] Clearly, the "law" in this area has fallen into such a state of chaos that the legislature must consider restoring order through enactment of something akin to the Uniform Residential Landlord and Tenant Act,[77] or else risk public recognition that Mr. Bumble's estimate of the law was correct.[78]

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73. *Id.* at 616-17, 324 N.E.2d at 153, 364 N.Y.S.2d at 505.

74. Parkwood Realty Co. v. Marcano, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (Civ. Ct., Queens Co. 1974).

75. Tonetti v. Penati, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975). This is in apparent conflict with Potter v. New York, O. & W. Ry., 233 App. Div. 578, 253 N.Y.S. 394 (4th Dep't 1931), *aff'd,* 261 N.Y. 489, 185 N.E. 708, 264 N.Y.S. 489 (1933) (no implied warranty of habitability in lease).

The conflict has since been resolved by codification of the implied warranty of habitability cited in note 6 *supra*. This raises the question whether a similar warranty obtains in New York in the sale of a new house by a builder-vendor. The Law Revision Commission proposal to codify such a warranty was never adopted. N.Y. LEGISLATIVE DOC. No. 65A, 190th Sess. (1967). One objection was that there was no way to guarantee the builder-vendor's solvency to meet claims, and the Commission notion that builder-vendors should have to post bonds was not greeted with enthusiasm. COMMITTEE ON STATE LEGISLATION OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, Bull. No. 5, 285 (1968). Now, however, the legislature has authorized municipalities to require builder-vendors undertaking to build a home to post a bond equal to any deposits made in advance by their vendees. N.Y. GENERAL BUSINESS LAW § 781 (McKinney Supp. 1974).

76. Mayers v. Kugelman, 81 Misc. 2d 998, 367 N.Y.S.2d 144 (Dist. Ct. Suffolk Co. 1975) (failure of landlord to keep premises free of vermin before tenant moved in justified a finding of constructive eviction).

77. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1972).

78. The new implied warranty legislation (N.Y. REAL PROPERTY LAW § 235-b (McKinney Supp. 1975)) is devoid of any articulation of the precise procedures by which it is to be implemented. This is left to the judiciary. *See* 1975 MCKINNEY'S SESS. LAWS OF NEW YORK, 1760 (Governor's Memorandum). Presumably, if and when the Uniform Act is adopted in New York, the New York State Law Revision Commission will draft a new code of procedure pertinent to the landlord-tenant area.

Caveat Emptor. The author has been consultant to the New York State Commissioners on Uniform State Laws with particular reference to this subject matter. *See* Douglas, *Law Reviews and Full Disclosure,* 40 WASH. L. REV. 227, 228-30 (1965).