PART THREE
Property Law

REAL AND PERSONAL PROPERTY

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TWO of the most important property decisions of the year involved adverse possession against the state, and the inapplicability of zoning restrictions to the governmental activities of a municipal corporation, discussed herein under Adverse Possession and Zoning respectively.

Apart from the continued extension of emergency rent controls, the most important legislative developments involved wildlife,[1] recordation of master form mortgages[2] and lease memoranda,[3] and *lis pendens*.[4]

The effect of filing a *lis pendens* is now limited to three years, with discretion in the court to permit an extension for an additional three. Cancellation by a person aggrieved is permitted if service of summons in the action is not made or service by publication begun within sixty days of the filing of the notice, although if the defendant dies before service, the time is extended until sixty days after issuance of letters testamentary or of administration. Cancellation is now also permitted in cases where the plaintiff does not "commence or prosecute the action

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1 N.Y. Laws 1957, cc. 66, 523 (largely devoted to clearing up ambiguities and typographical errors in the 1955 conservation law).

2 Consult the topic Mortgages, infra at 1425.

3 Certain recording offices having previously refused to accept for record a memorandum of an unrecorded lease, the new statute specifies that a memorandum of lease shall be eligible for recording if duly acknowledged and containing the names and addresses of the parties, a reference to the (unrecorded) lease and its date, a description of the premises, the dates of commencement and termination, and any renewal provisions. The recording officer may demand that the original lease be exhibited for his inspection when the memo is submitted. N.Y. Real Prop. Law § 291-c, added by N.Y. Laws 1957, c. 602.

4 N.Y. Civ. Prac. Act §§ 120, 121-a, 123-25 (Supp. 1957), added by N.Y. Laws 1957, cc. 876-77.

in good faith."[5] The court may also, in cancelling the notice, direct the plaintiff (or counterclaimant so filing) to pay all or any of the expenses occasioned by filing and cancellation, in addition to the costs of the motion.

Under the prior statute, on a motion by a party aggrieved to cancel the notice, the court in its discretion could instead require the plaintiff to post security for any damages which the notice might cause. Now, in addition, the court may grant cancellation of the notice upon the moving party furnishing security for the plaintiff's damages. The two provisions can be interlocked, so that if the plaintiff is required to post security but fails to do so, the notice will be cancelled only if the moving party first gives security. Where so interlocked the provisions give the plaintiff the option of posting security to keep the notice in force, or permitting the other party to substitute security for it.[6]

I

Real Property and Personal Chattels

Adverse Possession.—In *People v. System Properties, Inc.*[7] the Court of Appeals discussed numerous legal rules, including adverse possession against the state. The defendant and its predecessors had maintained for 154 years on the Ticonderoga River (which flows from Lake George to Lake Champlain) a dam capable of controlling the water level of Lake George. The state sought a declaration that it owned the Ticonderoga River bed and had paramount right to regulate the Lake George water level. The defendant asserted that it owned, either by grant or by adverse possession, the portion of the river bed comprising its dam site, and that it had acquired against both the state and the riparian owners a prescriptive right of flowage as to Lake George. As to the Ticonderoga River, the defendant urged and the trial court found that it was nonnavigable, the appellate division held it to be navigable, and the Court of Appeals ruled that its navigability was immaterial for purposes of the decision. The Court held, *inter alia:* (1) In New York, there can be private ownership of a stream bed irrespective of navigability. (2) At the time of the deed from King George III to defendant's predecessor the English common law view was that a grant of land on both sides of a nontidal[8] stream carried with it the ownership of the bed, unless language was used which excluded such a construction. (3) The present New York law is sub-

[5] N.Y. Civ. Prac. Act § 123 (Supp. 1957).

[6] Id. § 124 (Supp. 1957).

[7] 2 N.Y.2d 330, 141 N.E.2d 429 (1957).

[8] As to tidal waters, the presumption was that a crown grant did not include the submerged land without an express grant thereof. Matter of City of New York, 2 N.Y.2d 859, 141 N.E.2d 615 (1957) (mem.).

stantially like the English law, but a deed running a boundary "to the side of" and "along the banks of" a stream, excludes from the deed the land under water.[9] (Therefore, the grant in question did not convey the river bed to the defendant's predecessor.) (4) Land held by the state in trust for the people, and appropriated to public uses by it, cannot be acquired from it by adverse possession, being inalienable.[10] (5) The instant dam site, however, was acquired from the state by adverse possession, because it had not been appropriated to a public use, because its location interferes with no public use, and because a post-Revolution conveyance by the state to a private individual of another part of the Ticonderoga River bed shows that the state did not consider that it was holding this stream bed in trust. (6) Defendant's ownership of the dam site, however, does not give a prescriptive right against the state[11] to raise and lower the level of Lake George through the operation of its dam. (7) Apart from emergency injunctive orders, the exercise of the state's paramount rights to control the level of Lake George is exclusively for the legislature and its authorized agencies, and not for the courts.[12]

Bailments.—Since 1934 the New York statutes have provided that no automatic renewal clause in a realty lease shall be operative unless the lessor notifies the tenant of such clause at least fifteen and not more than thirty days prior to the last date on which, by such clause, the tenant must give notice in order to prevent automatic renewal.[13] In 1953 the legislature enacted a virtually identical provision concerning automatic renewal clauses in leases of personalty.[14] Al-

[9] It should be noted that in the instant case the deed successively described two areas, the first having a course along one bank of the river, and the second having a course along the opposite bank.

[10] Unfortunately, the Court stated, "Adverse possession always rests on the presumption of a lost grant. A grant of these underwater lands . . . would not have been illegal. Adverse possession commenced . . . . Accordingly, we hold that title by adverse possession was established here." 2 N.Y.2d at 343, 141 N.E.2d at 434. Because "lost grant" is purely a fiction, not a factual inference or rebuttable presumption, the quoted words are mischievous. If land is held by the state in trust, the reason it cannot be lost by adverse possession is that the statute does not run against the sovereign except insofar as the sovereign consents. It is unnecessary that the purely fictional lost grant be flourished in open court.

[11] But a prescriptive right against the private riparian owners had been acquired. 2 N.Y.2d at 343, 141 N.E.2d at 434.

[12] Two judges, specially concurring, dissented from the majority opinion on this point.

[13] N.Y. Real Prop. Law § 230. As originally enacted, the statute applied only in cities of at least one million inhabitants. An amendment deleted that restriction, thus making it applicable throughout the state. N.Y. Laws 1936, c. 702.

[14] N.Y. Gen. Bus. Law § 399. Apart from differences necessitated by the subject matter being personalty instead of realty, only three changes appear in the new statute: (1) It says "lessee" instead of "tenant"; (2) it omits "of time" following the words "additional period"; and (3) it omits "registered" before the word "mail." Only the

though the latter statute uses the word "lease," it, of course, applies to bailments.

In the first decision under the latter statute, the appellate division has held that the statute means just what it says and that a bailor who failed to give the required notice could not enforce the automatic renewal clause.[15] Involved was a towel supply contract wherein the plaintiff supplied a towel cabinet, soap, and a specified number of towels per week for a term of one year, the defendant customer agreeing to pay a "stated monthly rental" for such service. After having continued to receive and pay for such service for two years and three months after the end of the initial year, the defendant customer elected to discontinue receiving the service. The plaintiff sued, relying on an automatic renewal clause contained in the written agreement, and seeking to avoid the application of the statute by contending that the transaction constituted not a lease but a "contract" involving no specific property capable of identification. The municipal court accepted this view as did the appellate term, but the appellate division held that the statute clearly covered the intended transaction. The latter court observed that the transaction involved specific property; that being of remedial nature, the statute should be given a broad construction; and that it was actually designed to cover equipment rental contracts.[16]

Since the realty lease statute was designed for the protection solely of the lessee, it has been held that where neither party gives the requisite notice of the existence of the renewal clause the lessor may not enforce such clause, but that this does not prevent the lessee from asserting an automatic renewal.[17] Similarly, a realty lease provision expressly waiving the benefit of the statute in advance is void as against public policy.[18] It has also been held that the lessor's failure to give the requisite notice deprives him of no rights and remedies other than his ability to enforce the automatic renewal clause, *i.e.*, he may treat a holdover as a tenant for an additional term, relying on

last variation has any significance. Both statutes refer to a clause renewing automatically "unless the lessee gives notice," but each statute would apply also where the clause read "unless either party gives notice." The latter phrase was present in Boyd H. Wood Co. v. Horgan, 291 N.Y. 422, 52 N.E.2d 932 (1943); Johnson v. Bjerregaard, 158 Misc. 436, 285 N.Y. Supp. 581 (Sup. Ct., App. T., 2d Dep't 1936).

[15] Peerless Towel Supply Co. v. Triton Press, 3 A.D.2d 249, 160 N.Y.S.2d 163 (1st Dep't 1957) (per curiam).

[16] Quoting New York Legislative Annual 1953, p. 61: "This bill seeks to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals." Peerless Towel Supply Co. v. Triton Press, 3 A.D.2d at 251, 160 N.Y.S.2d at 165.

[17] J. H. Holding Co. v. Wooten, 291 N.Y. 427, 52 N.E.2d 934 (1943).

[18] Boyd H. Wood Co. v. Horgan, 291 N.Y. 422, 52 N.E.2d 932 (1943).

the applicable common law rules as if no automatic renewal clause existed.[19]

By parity of reasoning, a bailment automatic renewal clause could be relied upon by the bailee where neither party gave the requisite notice, notwithstanding that the bailor could not have enforced it.[20] Certainly a purported waiver of the statute in the bailment contract itself would be void as against public policy. On the other hand, an agreement by the bailee, made after the deadline for the bailor's notice had passed, waiving the benefit of the clause, should be enforceable as not within the evils sought to be prevented.[21] *Quaere:* whether an agreement by the bailee made subsequent to the original contract but prior to the period specified by the statute could validly waive his statutory protection. Possibly not; if the evil legislated against is also present in such a situation the fact that a valuable consideration existed for such waiver should not be controlling.

The hotel keeper's statutory liability for loss of or damage to personal property which guests deliver to the hotel for safekeeping contains a limit of liability without a receipted declaration of higher value when the property is bailed.[22] A person renting hotel facilities solely for a wedding was held not to be a guest within the meaning of the statute; hence there was no statutory limitation of the bailee hotel's liability, the "wedding guest" recovering the full value of property lost or damaged through the negligence of the hotel keeper.[23]

Where an unlocked hotel safe was looted at 4 a.m. by gunmen who ripped open some of its safety deposit boxes and fled with a unit of fifteen such deposit boxes which unexpectedly proved not to be bolted or otherwise fastened to the containing safe, the trial court, in a suit brought by a guest whose valuables had been in one of the

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19 Johnson v. Bjerregaard, 158 Misc. 436, 285 N.Y. Supp. 581 (Sup. Ct., App. T., 2d Dep't 1936).

20 Obviously, once the bailee has chosen to enforce the renewal his election fixes his own obligations as well as those of his bailor. But enforcement by a bailee does not necessarily mean specific performance.

21 See Simon Ginsberg Realty Co. v. Greenstein, 158 Misc. 473, 475, 286 N.Y. Supp. 33, 35 (Sup. Ct., App. T., 1st Dep't 1936). The declaration in this opinion that the tenant could not avail himself of the automatic renewal clause where neither party had given either kind of notice is overruled by J. H. Holding Co. v. Wooten, 291 N.Y. 427, 52 N.E.2d 934 (1943).

22 N.Y. Gen. Bus. Law § 201. This is true even though the hotel is negligent, and even though the evidence indicates that the hotel clerk failed to place in the hotel safe the valuables entrusted to him for that purpose. Carlton v. Beacon Hotel Corp., 3 A.D.2d 28, 157 N.Y.S.2d 744 (1st Dep't 1956).

23 Ross v. Kirkeby Hotels, 160 N.Y.S.2d 978 (Sup. Ct., App. T., 1st Dep't 1957). Upon arrival the prospective groom left his automobile with the hotel doorman with instructions to park it in the hotel garage. This was held to constitute the hotel a bailee. The doorman instead parked the car across the street. It was broken into and valuable luggage and apparel stolen therefrom.

fifteen boxes, found the hotel to be negligent. In reversing, the appellate division noted that the safe was behind the clerk's desk and that the clerk was present when the gunmen appeared and locked him in a closet. Had the safe been locked, the gunmen would simply have forced him to unlock it. The hotel had not known the boxes were removable, but since a number of immovable boxes were ripped open and looted, and there was no indication that the gunmen had known in advance that some boxes were removable, the court apparently felt that such boxes would have been ripped open if not removable. The proximate cause of the loss was armed robbery, which the hotel was not required to foresee and prevent.[24] It would seem, however, that since not all of the nonremovable boxes were looted, the gunmen allowed themselves only a limited time for their work, and hence would not have taken time to pry open all of the fifteen boxes in the removable unit with which, in the words of the dissent, "they proceeded gratefully to walk away."[25]

Brokers.—Section 442 of the Real Property Law, permitting recovery of an amount equal to four times the commission lost, has been held not to permit recovery by one broker against another where the former lost out on the transaction to the latter because the latter had agreed to split commissions with the owner in violation of the statute. The decision reasoned that the defendant did not receive "any sum of money . . . in consequence of his violation"[26] but instead paid money for the kickback which constituted the violation. Furthermore, the plaintiff was held not to be a "person aggrieved" so as to be entitled to recover, because his injury was not proximately caused by the act prohibited.[27] If, however, the kickback was the only reason the second broker rather than the first received the commissions, it would seem that the kickback was the proximate cause of plaintiff's loss, and, in addition, that the second broker actually received money (the balance of his commission) solely because he agreed to participate in the violation.

Church Property.—Rector of the Church of the Holy Trinity v. Melish[28] involved the legality of an election of a new rector to replace

[24] Jacobs v. Alrae Hotel Corp., 4 A.D.2d 201, 164 N.Y.S.2d 330 (1st Dep't 1957).

[25] Id. at 205, 164 N.Y.S.2d at 334. If the plaintiff's box was on or near that end of the unit immediately nearest the looted immovable boxes, and the gunmen had been moving in that direction, looting each box as they came to it, the plaintiff's box would have been rifled in situ if it had not been removable.

[26] N.Y. Real Prop. Law § 442-e(3).

[27] Williams & Co. v. Collins, Tuttle and Co., 4 Misc. 2d 851, 163 N.Y.S.2d 142 (Sup. Ct., N.Y. Co. 1956).

[28] 4 A.D.2d 256, 164 N.Y.S.2d 843 (2d Dep't 1957). The Court of Appeals has affirmed. N.Y. Times, Dec. 6, 1957, p. 31, col. 8. See 1 Misc. 2d 933, 151 N.Y.S.2d 286 (Sup. Ct., Kings Co.), aff'd mem., 1 A.D.2d 978, 151 N.Y.S.2d 291 (2d Dep't 1956) (denial of temporary injunction).

the defendant, who refused to turn over the church property in his possession. The appellate division reiterated that the courts have no power to decide ecclesiastical questions except where, as in this instance, the dispute affects the property of the church. It was necessary to decide whether a proper quorum had been present at the meeting which elected the new rector. The court held that where the quorum requirements of the Religious Corporations Law (one more than a majority) differed from those of the church canons (a simple majority), the issue must be resolved under canon, and not secular law.[29] The Religious Corporations Law could not govern, as this would violate the fourteenth amendment of the United States Constitution. That statute was decided to be applicable solely where purely temporal questions arose affecting only church property and having no bearing on ecclesiastical matters. Since the requirements of the canon law had been complied with, the election was held to have been valid.

There was dictum that the pronouncement of the bishop acting as an appellate ecclesiastical tribunal, of the validity of the election, would have been binding upon the courts if properly pleaded and proved.

Cotenancy.—The appellate division held that a surviving wife who had deeded to her husband "all her undivided one-half right, title and interest" in premises held as tenant by the entirety, owned an undivided one-half of the premises upon his death, even though it was found that the actual intent of the parties was that she was conveying "all her undivided interest" in the premises.[30]

In a partition action involving the applicability of the statute of limitations where one cotenant was sued by his cotenants for rents he had collected during twelve years but had not distributed to the latter, the appellate division held that no statute of limitations affected the power of equity to adjust the equities in distributing the proceeds in a valid partition action. The court added that the question of personal liability for an excess of rents received beyond the adjusted share of the proceeds, being a case where the action in equity for an accounting was concurrent with the action at law on an account, the legal statute of limitations and not that of equity must apply. The action was timely brought because, in the absence of agreement as to division of rents, the statute was deemed not to begin to run until the property was sold and the cotenancy ended, either upon the theory of an action against a "quasi-trustee," or on the theory of an open and mutual account where the tenant who collected the rents on the one hand also paid

[29] Cf. Bierce, The Devil's Dictionary. "Quorum: A sufficient number of members of a deliberative body to have their own way and their own way of having it."

[30] Karp v. Karp, 2 A.D.2d 796, 153 N.Y.S.2d 312 (3d Dep't 1956) (per curiam).

charges on the property which were the duty of the other tenants to pay.[31]

Dead bodies.—Removal of a body from a New York mausoleum to a California burial plot was permitted where the sole surviving descendants would soon become unable to pay the annual $500 maintenance charges for the upkeep of the mausoleum, the deceased having expressed a desire to be buried with the rest of his family, all of whom had later decided to be buried in the California plot.[32]

Deeds.—Lipton v. Bruce[33] presented the Court of Appeals with the unusual situation of a deed granting the right to select an acre of land out of a larger tract. Sarah Coon deeded to Clarence Coon a specified strip of land out of a farm tract described in the deed, plus "one acre of land out of the above described premises, or so much thereof as the said party of the second part may require . . . adjoining the premises now used and occupied by him . . . ." At the same time Sarah separately conveyed the balance of the farm to DeLamater, particularly excepting the strip and the one acre, and reciting the deed to Clarence Coon. Subsequently, Clarence Coon executed a deed to Gluck (plaintiff's grantor), purporting to convey the strip of land and also purporting to select the one acre, describing it by boundaries, and reciting the deed to Clarence from Sarah Coon. The deed to the plaintiff repeated this description. The one acre had neither been marked out on the ground nor used in any way.

Defendant took title through and under the DeLamater deed, the descriptions in his chain of title being identical with the DeLamater deed.

In holding for the plaintiff, the majority decided that the deed to Gluck particularly describing the one acre selected formed part of defendant's chain of title, and that a valid selection of the acre having been made, plaintiff's documentary title was clearly established, of which defendant had constructive notice under the recording act. The majority also declared that the right of selection was not merely a personal right but a grant to the grantee and "his heirs and assigns forever."[34] Considerable reliance was placed on the fact that although on public record for over thirty years, the deed purporting to select the one acre had never been questioned. The repetition of its description down through the chain of title of both plaintiff and defendant was deemed a recognition by all parties of the sufficiency of those deeds

[31] Goergen v. Maar, 2 A.D.2d 276, 153 N.Y.S.2d 826 (3d Dep't 1956).

[32] Matter of Bausher, 5 Misc. 2d 44, 159 N.Y.S.2d 857 (Sup. Ct., Bronx Co.), aff'd mem., 3 A.D.2d 1001, 165 N.Y.S.2d 432 (1st Dep't 1957).

[33] 1 N.Y.2d 631, 136 N.E.2d 900 (1956).

[34] The Court means that a fee was granted. Since Coon himself made the selection, the question of whether the selection could have been made by his grantee does not arise.

to convey valid title to the acre of land. This perhaps leaves open the question of the validity of the deed in question if a prompt objection had been made.

Two judges dissented on the ground that the mere making and recording of a deed describing the acre selected was an insufficient exercise of the right of selection, and that the irregular shape of the selected area was unreasonable.

Easements.—The basic distinction between a franchise and an easement was reiterated. Involved was the validity of a special franchise assessment on the "right and easement"[35] to build and maintain a natural gas pipeline on the bed of the Hudson River. In holding this to be an easement and not a franchise, it was pointed out that whereas a franchise is predicated on the rights inhering in the state as a result of its sovereignty, the right here granted was an easement because based upon the state's ownership of the river bed.[36]

An injunction pendente lite was granted in an interesting case involving interference with an easement.[37] The easement consisted of a right of way from the street to a parking lot provided for the customers of plaintiff's restaurant. On a fence on defendant's land adjoining the right of way the defendant erected a sign which read: "Trespassing Strictly Forbidden Under Penalty." It contained the name of defendant's restaurant and indicated that there was free parking for defendant's guests only. Indicating that the sign might well deter plaintiff's customers from using plaintiff's parking lot, the court granted a temporary injunction against maintenance of the sign. The order granted seems correct, notwithstanding that the cases cited in support all presented actual or threatened physical interference with an easement, as distinguished from defendant's use of its own land without any physical invasion of the land subject to the easement.

Eminent Domain.[38]—Two Court of Appeals decisions pointed up the basic distinctions between the two procedures used in New York to determine the amount of the award in condemnation proceedings.[39]

Gifts.—The 1956 statute facilitating gifts of securities to minors[40] continued to be noted in legal periodicals,[41] but was not passed upon

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35 The language used in the instrument creating the interest.

36 Matter of Algonquin Gas Transmission Co., 2 Misc. 2d 997, 157 N.Y.S.2d 748 (Sup. Ct., Albany Co. 1956).

37 Brearton v. Fina, 3 Misc. 2d 1, 155 N.Y.S.2d 399 (Franklin Co. Ct. 1956).

38 For a five-part article discussing the law applicable to condemnation awards, particularly in New York City, see Searles and Raphael, Developments in the Law of Condemnation, 136 N.Y.L.J. Nos. 101-05, p. 4, col. 1 (1956).

39 Matter of Huie, 2 N.Y.2d 168, 139 N.E.2d 140 (1956); Matter of City of New York, 1 N.Y.2d 428, 136 N.E.2d 478 (1956).

40 N.Y. Pers. Prop. Law §§ 265-70 (Supp. 1957).

41 Bronston, Gifts To or For Minors, 95 Trusts & Estates 934 (1956); Tenney,

by any New York court. The United States Treasury ruled, contrary to the hopes of the sponsors of the statute, that if a donor who named himself custodian under such a statute dies before the minor-donee becomes twenty-one, the securities so given are includible in the donor's estate for federal estate tax purposes.[42] The Treasury has also held that a gift under a similar custodian statute was a completed gift for gift tax purposes and qualified for the $3,000 annual gift tax exclusion. For income tax purposes, regardless of the relationship of the donor or custodian to the minor-donee, the Treasury treats the income from such securities as taxable to the father, to the extent that it is used to discharge his pre-existing support obligation.[43]

As would be expected, an asserted gift causa mortis was disallowed for lack of the requisite apprehension of death where the evidence showed that although the donor made the alleged gift only five weeks before his death and shortly before he entered the hospital for an operation, and that some of his family then knew he was suffering from an incurable illness, the donor himself did not know the nature of his illness and expected to recover and return to work.[44]

Another trial court held that the presumption of joint tenancy arising when Lena's husband opened a savings account payable to himself "or Lena, or the survivor," was sufficiently overcome by his own positive testimony that he intended no gift, notwithstanding testimony by the estranged Lena that he had said, "The money is to become yours 100% when I retire from the bookie business."[45] The appellate division affirmed, two justices dissenting.[46]

Liens.—By statute in New York funds received by a contractor for the improvement of real property are trust funds in his hands for the benefit of materialmen.[47] It has now been decided that even though the contracts under which materials were supplied were executed in New York and the contractor was a resident of New York, these statutory provisions apply only when the property improved is located in this state.[48] The court reasoned that the Lien Law must be read as a whole to effectuate its purpose to give the courts of New York a unitary jurisdiction over the improvement itself.[49]

Tax Considerations in Gifts to Minors Made Under New State Custodian Laws, 5 J. Taxation 348 (1956).

[42] Rev. Rul. 57-366, 1957 Int. Rev. Bull. No. 32, at 20.

[43] Rev. Rul. 56-484, 1956-2 Cum. Bull. 23.

[44] In re Lupatkin's Estate, 156 N.Y.S.2d 249 (Surr. Ct., Westch. Co. 1956).

[45] Loeb v. Dry Dock Sav. Bank, 156 N.Y.S.2d 559 (Sup. Ct., N.Y. Co. 1956).

[46] Loeb v. Dry Dock Sav. Bank, 4 A.D.2d 190, 164 N.Y.S.2d 408 (1st Dep't 1957).

[47] N.Y. Lien Law § 36-b.

[48] Allied Thermal Corp. v. James Talcott, Inc., 3 A.D.2d 198, 159 N.Y.S.2d 115 (1st Dep't 1957).

[49] For a general discussion of the weaknesses of the present New York law with

The status of federal tax liens was discussed in two decisions[50] which seem inconsistent with the leading federal decisions,[51] the latter being nowhere cited in the former.

The statute by which money owed to public improvements contractors is subject to lien claims filed by persons furnishing material "to a contractor or his subcontractor," was held not to permit lien claims by the materialman of a subcontractor's subcontractor.[52]

Mortgages.—Simplification in the recording of mortgages has been achieved by a statute permitting the filing of a master form of mortgage covenants and clauses, which can then be incorporated in the mortgages filed by reference to the book and page number, date and place of filing of the master form, together with a statement that a copy of the master form was furnished to the person executing the mortgage.[53]

The rights of third parties to defend against mortgage foreclosures received attention in two interesting and novel lower court decisions. A former record holder of title to the property subject to the mortgage was permitted to intervene in the foreclosure action for the purpose of showing that her deed to the mortgagor was a forgery and thus void.[54] It was urged that since the intervenor was neither a proper nor a necessary party to the foreclosure action, her title could not be affected by the judgment in the action. However, the court relied on the fact that if the deed was shown to be a forgery, the mortgage upon which it was based was also void. Furthermore, it was pointed out that the statute permitting intervention[55] should not be so narrowly construed as to frustrate its purpose to dispose of controversies in a single action if possible.[56]

A judgment creditor having a lien subordinate to the mortgage being foreclosed was permitted to assert the defense of lack of consideration for the mortgage, although the original mortgagors were not

respect to mechanic's liens, see Friedman, Protecting the Equitable Lien of the Subcontractor and Materialman, 136 N.Y.L.J. Nos. 84-85, p. 4, col. 1 (1956).

50 Aquilino v. United States, 2 A.D.2d 747, 153 N.Y.S.2d 268 (2d Dep't 1956) (mem.); Koehler v. Aljon Homes, Inc., 2 Misc. 2d 474, 155 N.Y.S.2d 175 (Sup. Ct., Nassau Co. 1956).

51 United States v. Acri, 348 U.S. 211 (1955); United States v. New Britain, 347 U.S. 81 (1954); United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953); United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950). To the same effect, see Comment, 25 Fordham L. Rev. 100 (1956).

52 Wynkoop v. People, 1 A.D.2d 620, 153 N.Y.S.2d 836 (2d Dep't 1956).

53 N.Y. Real Prop. Law § 291-d (Supp. 1957).

54 Harrison v. Mary Bain Estates, Inc., 2 Misc. 2d 52, 152 N.Y.S.2d 239 (Sup. Ct., Bronx Co.), aff'd without opinion, 2 A.D.2d 670, 153 N.Y.S.2d 552 (1st Dep't 1956).

55 N.Y. Civ. Prac. Act § 193-b.

56 Additional arguments for permitting such intervention are that it protects later bona fide purchasers from being defrauded, and prevents unfortunate misapplications of estoppel for failure to speak. Cf. Clifford v. Kampfe, 147 N.Y. 383, 42 N.E. 1 (1895) (forged release of inchoate dower).

parties to the action, and their assuming assignee defaulted.[57] This is apparently an open question in New York. To support its decision the court merely cited Corpus Juris, which in turn cites no New York authority on the point. New York has allowed a purchaser from the mortgagor to assert lack of consideration as a cause of action to restrain foreclosure of the mortgage.[58] There is one holding, however, that because of lack of privity and because it was only a collateral attack and not a direct attack on the mortgage, a judgment creditor could not plead lack of consideration as a defense to a foreclosure action.[59]

It was properly held that conveying realty "subject to existing mortgages," where the grantee did not assume the mortgage debt and was not in privity with one who was liable for the debt, was not such an acknowledgement of the debt as would toll the statute of limitations.[60]

Two recent trial court cases reveal an interesting contrast. In one, foreclosure was permitted by the mortgagee under an acceleration clause where the mortgagor was in default in the payment of principal and interest for ten days after the expiration of a five-day grace period, even though tender of the payment was subsequently made and refused.[61] In the other case, foreclosure was denied to one who purchased the mortgage subsequent to and with knowledge of default in the payment of taxes, although the mortgage allowed acceleration for such default and the election to accelerate had apparently been made by the prior owner before sale to the plaintiff.[62]

Vendor and Purchaser.—Contracts for the sale of realty presented several new and interesting problems. Where fire substantially destroys property subject to an executory contract of sale, the buyer who has not gone into possession may by statute rescind the contract and recover his deposit.[63] However, he is not thereby deprived of his common law right to specific performance of the contract with an abatement of the purchase price.[64] In what appears to be a case of first impression in New York, the amount of this abatement was held to be in ordinary cases the difference between the contract price and

[57] Rezak v. Kings Trading and Holding Co., 154 N.Y.S.2d 298 (Sup. Ct., Kings Co. 1955).

[58] Briggs v. Langford, 107 N.Y. 680, 14 N.E. 502 (1887).

[59] Rochester Lumber Co. v. Dygert, 136 Misc. 292, 240 N.Y. Supp. 580 (Sup. Ct., Monroe Co. 1930).

[60] Winter v. Kram, 3 A.D.2d 175, 159 N.Y.S.2d 417 (2d Dep't 1957).

[61] Mayer v. Myers, 155 N.Y.S.2d 129 (Sup. Ct., Kings Co. 1956).

[62] Clark-Robinson Corp. v. Jet Enterprises, Inc., 159 N.Y.S.2d 214 (Sup. Ct., Bronx Co. 1957). Accord, Purdy v. Coar, 109 N.Y. 448, 453, 17 N.E. 352, 353 (1888).

[63] N.Y. Real Prop. Law § 240-a.

[64] World Exhibit Corp. v. City Bank Farmers Trust Co., 296 N.Y. 586, 68 N.E.2d 876 (1946).

the fair and reasonable market value of the property after the fire.[65] Furthermore, the court pointed out that if the plaintiff contract vendee could have shown that the premises at the time of the signing of the contract had a fair market value in excess of the contract price, such excess, constituting a profit on his bargain, should go to reduce the fair market value after the fire in computing the amount he would be required to pay in return for specific performance.[66]

Where the contract vendor breaches the contract, the right of the vendee to recover the costs of a survey as part of his damages has apparently received little attention in New York. It was held, however, that the "net cost of examining the title," specified in the contract as constituting the contract vendee's damages in the event of breach, did not ordinarily include survey charges,[67] although no authority was cited bearing directly on the point.[68]

The right of the vendee to waive the failure of a condition in a contract also gave rise to controversy. A contract for the sale of realty was conditioned upon the premises being zoned for business use. The seller contracted to apply for the zoning change and bear all expenses thereof. If the change was not obtainable, the seller was to refund the down payment, the contract was to be deemed cancelled, and "neither party shall thereafter have any claim upon the other."

Although the application for the zoning change was denied, and the seller elected to cancel the contract, the plaintiff vendee was granted specific performance of the contract, to take title as is.[69] It was held that the plaintiff could waive any condition in the contract inserted for his benefit, and accept performance of the contract as is. The defendant's insistence upon the application of the doctrine of lack of mutuality of remedy was correctly overruled in view of the settled law in New York.[70] However, it is debatable whether the language of the contract itself would not lead to the opposite conclusion.[71]

[65] Burack v. Tollig, 6 Misc. 2d 450, 160 N.Y.S.2d 1008 (Sup. Ct., Westch. Co. 1957).

[66] The court relied on the general rule as carefully laid down in Phinizy v. Guernsey, 111 Ga. 346, 36 S.E. 796 (1900).

[67] Bronxwood Homes, Inc. v. Bivona, 5 Misc. 2d 891, 161 N.Y.S.2d 500 (Sup. Ct., Bronx Co. 1957).

[68] But the court seems to have overlooked Bulkley v. Rouken Glen, Inc., 222 App. Div. 570, 226 N.Y. Supp. 544 (2d Dep't), aff'd mem., 248 N.Y. 647, 162 N.E. 560 (1928), which laid down a general rule that the costs of a survey were recoverable as special damages in the event of a breach if "within the contemplation of the contracting parties."

[69] Di Leonardo v. Paoline, 161 N.Y.S.2d 660 (Sup. Ct., Suffolk Co. 1956).

[70] Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861 (1922).

[71] The only case cited by the court in support of its conclusion involved the inability of the vendor to pass marketable title. Cf. Brandes v. Oram Constr. Corp., 158 N.Y.S.2d 897 (Sup. Ct., App. T., 1st Dep't 1956) (vendee in realty contract conditioned on his ability to obtain G.I. loan was allowed to recover his deposit where, because of illness and worsened financial condition, he withdrew loan application without it having been denied).

The problem of the "first option to buy" has come before the courts again, this time with respect to its assignability and inheritability. Such options have usually arisen with respect to landlord-tenant relationships.[72] The general principle that such options cannot be assigned apart from the lessee's estate has now been extended. In *MacEllven v. Lincoln Rochester Trust Co.*[73] the option was made binding upon the owners of two contiguous parcels of land with respect to each parcel, and was expressly made binding upon their heirs and assigns. After one of the parties sold her parcel without the option being exercised by her neighbor, the statutory distributee of the deceased seller sought to enforce the option as to the other parcel against the estate of the deceased neighboring owner. It was held that the benefits of the option contract ran with the land, and therefore the plaintiff, having no interest in the land it was meant to benefit, could not enforce it.

Zoning.—A village was permitted to disregard its own residential zoning ordinance for the purpose of using a building for governmental functions and purposes, such as offices and garages for village cars, highway maintenance equipment and garbage disposal trucks, in the absence of any showing of a use amounting to a "nuisance in fact."[74]

A variance from a zoning restriction granted for the erection of a garage on condition that in the event of condemnation the cost of the building must be amortized over only ten years was held invalid as a taking of property without just compensation, where the proposed garage building would have had a useful life of fifty years.[75]

The use of model homes for display and sales promotion purposes on a site some distance from the development in which the houses sold were to be erected was held to violate a residential zoning ordinance prohibiting either erection or use for nonresidential purposes, notwithstanding that such model homes would eventually be sold for use as dwellings.[76] The court refused to treat such use as analogous to the display of model homes built on the actual development site.

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[72] See, e.g., Gilbert v. Van Kleeck, 284 App. Div. 611, 132 N.Y.S.2d 580 (3d Dep't 1954). See also "First Option to Purchase" Leased Premises, 136 N.Y.L.J. No. 84, p. 4, col. 1 (1956), for a discussion of the interpretation of the meaning of these options.

[73] 3 A.D.2d 977, 162 N.Y.S.2d 828 (4th Dep't 1957) (mem.).

[74] Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 140 N.E.2d 241 (1957). In holding that garbage disposal was a governmental rather than a proprietary function, the Court overruled O'Brien v. Town of Greenburgh, 239 App. Div. 555, 268 N.Y. Supp. 173 (2d Dep't 1933), and noted that its memorandum affirmance of that case on another ground had expressly left that question untouched.

[75] Rand v. City of New York, 3 Misc. 2d 769, 155 N.Y.S.2d 753 (Sup. Ct., Queens Co. 1956).

[76] City of New York v. Jack Parker Associates, 5 Misc. 2d 633, 161 N.Y.S.2d 731 (Sup. Ct., Queens Co. 1957).

II

LANDLORD AND TENANT

During the current survey period, rent control again dominated the new developments in the law of landlord and tenant. Residential rent controls were extended for two years; business and commercial rent controls were extended for one year. Following the pattern of the past few years, further amendments moving toward full decontrol were made to the commercial rent control laws. Litigation developed little of interest in the area of rent control as, with the passage of time, most of the essential interpretations and applications of the statutes have been hammered out. Apart from rent control there were interpretations of several standard lease clauses and an interesting lease security deposit case.

Business and commercial rent control.—Finding that an emergency still exists in New York City, the legislature extended both business[77] and commercial[78] rent controls for another year. However, there is again a promise of early full decontrol,[79] and again amendments have narrowed the scope of control and brought nearer fulfillment of that promise.

The principal amendments[80] are: (1) A redefinition of "emergency" (ceiling) rent which is now defined as the freeze-date rent plus 50 per cent. Aside from permitting a further increase in the rents of those tenants who are not paying 150 per cent of 1943 or 1944 rents, the change eliminates the ambiguities of the 1956 and prior definitions of emergency rent.[81] (2) The addition of a new subdivision which will permit eviction for the purpose of demolition in order to make a parking lot where the assessed value of the improvements is less than 60 per cent of the total assessed value.[82] (3) The addition of a new paragraph which when read literally permits any lessee or sublessee under a five-year lease to evict a statutory tenant in order to obtain possession for his own use.[83] It is not clear what the legislature intended to ac-

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77 N.Y. Unconsol. Laws § 8567 (Supp. 1957).

78 Id. § 8538 (Supp. 1957).

79 Report, Temporary State Comm'n to Study Rents and Rental Conditions, McKinney's 1957 N.Y. Sess. Laws 1546.

80 Similar amendments were made to both the commercial rent control law, N.Y. Unconsol. Laws §§ 8521-38, and the business rent control law. N.Y. Unconsol. Laws §§ 8551-67. Both laws will be discussed together throughout this article.

81 N.Y. Unconsol. Laws §§ 8522(e) (commercial), 8552(c) (business) (Supp. 1957). See 1956 Survey of N.Y. Law, 31 N.Y.U.L. Rev. 1456 n.69.

82 N.Y. Unconsol. Laws §§ 8528(ccc) (commercial), 8558(ccc) (business) (Supp. 1957).

83 N.Y. Unconsol. Laws §§ 8528(d)(2-a) (commercial), 8558(d)(2-a) (business) (Supp. 1957).

complish by this amendment. To read it literally would result in decontrol to a much greater extent than is indicated by the absence of legislative history. Using essentially this reasoning, one court has already held that the section applies only to leases in effect on April 12, 1957, when the amendment became law and not to those executed subsequently.[84] (4) Elimination from the 1953 amendments,[85] which permitted eviction of a statutory tenant of less than 25 per cent of a floor in favor of a five-year full-floor lessee, of the provision that the evicted tenant be relocated in comparable space in the same building. A further change makes the 25 per cent test inapplicable if the space is sought for a lessee who already occupies more than twice the space occupied by the statutory tenant.[86]

Residential rent control.—The legislature extended residential rent control until June 30, 1959,[87] and made some minor amendments to the law. Most significant of the amendments are: (1) A provision for making rent increase or decrease orders retroactive for not more than six months if issued more than two months after application.[88] This provision will apply principally to delays by the local administrator and does not change the rule[89] that on appeal the orders of the state administrator are effective as of the date of such orders. (2) A change in the statute of limitations with respect to tenants' suits to recover for rent overcharges.[90]

In rejecting an attack on continued rent control of hotel accommodations in New York City, the Court of Appeals[91] affirmed an administrative finding that accommodations in hotels were not a separate class of housing within the purview of section 12(1) of the Residential Rent Control Law[92] which provides for decontrol upon a finding that there is a vacancy rate of five per cent in "any particular class of housing." The Court held that the statutory "class" refers to rental

84 Allied Graphic Arts, Inc. v. Berkwit, 165 N.Y.S.2d 815 (N.Y. Munic. Ct. 1957).

85 N.Y. Unconsol. Laws §§ 8528(kk) (commercial), 8558(kk) (business).

86 N.Y. Unconsol. Laws §§ 8528(kk) (commercial), 8558(kk) (business) (Supp. 1957). For discussion of other amendments together with analysis and criticism, see Shaw, Commercial Rent Laws—1957 Model, 137 N.Y.L.J. Nos. 116-18, p. 4, col. 1 (1957).

87 N.Y. Unconsol. Laws § 8581(2) (Supp. 1957).

88 Id. § 8584(6) (Supp. 1957).

89 Neulist v. Weaver, 2 A.D.2d 530, 157 N.Y.S.2d 192 (1st Dep't 1956).

90 N.Y. Unconsol. Laws § 8591(5) (Supp. 1957). Cf. Dachinger v. Heller, 3 A.D.2d 399, 160 N.Y.S.2d 648 (1st Dep't 1957) (cause of action for wrongful eviction based on the landlord's failure to carry out his intention to build a new building accrued and the limitation period commenced on the date the site of the demolished building was first openly and notoriously used as a parking lot). For a discussion of other amendments together with an analysis and criticism, see Morris and Domber, The 1957 Amendments to the Residential Rent Control Law, 138 N.Y.L.J. Nos. 10-14, p. 4, col. 1 (1957).

91 Hotel Ass'n v. Weaver, 3 N.Y.2d 206, 144 N.E.2d 14 (1957).

92 N.Y. Unconsol. Laws § 8592(1).

level and that delineation of rental levels is a matter for administrative determination in the first instance.

In *Drinkhouse v. Parka Corp.*[93] the Court of Appeals dismissed the complaint of a statutory tenant whose landlord locked him out. The Court held that such a tenant has no contractual or property rights, and the statute which permits him to remain in possession does not give him a right to damages in the case of a lockout. It is doubtful that the loophole opened by *Drinkhouse* will be so attractive to landlords as to require legislation.[94]

Real estate brokers successfully challenged a Rent Commission regulation which set up a conclusive presumption that it was a rent overcharge for a broker to charge a tenant a commission for finding an apartment that had already been listed with the broker by the owner.[95] Two other regulations were similarly invalidated: one rejecting the use of sales price in determining the value of the property on a section 4(a)(1)[96] application by a landlord to increase rents so as to secure a 6 per cent return, where a similar application had been granted to a previous owner based on assessed value;[97] the other rejecting the use of sales price on a section 4(a)(1) application where acquisition is by sale of stock in the corporation owning the property rather than sale of the fee.[98] In two cases landlords were refused permission to withdraw residential property from the rental market in order to make parking lots.[99] Of two cases which considered the troublesome question of "essential services," one held that a landlord is not required to make a major capital improvement in order to maintain elevator service;[100] and the other that room service in a luxury apartment hotel is an "essential service."[101]

Covenants.—Dolman v. United States Trust Co., noted here last

[93] 3 N.Y.2d 82, 143 N.E.2d 767 (1957).

[94] In another unusual situation it was held that where a "husband" (Nevada divorce held invalid) after the death of his "wife" remained in possession of the apartment they had shared in a building owned by his "wife" there was no theory upon which the "wife's" executors could recover for his occupancy. Deickler v. Abrams, 159 N.Y.S.2d 449 (Westch. Co. Ct. 1956), aff'd, 4 A.D.2d 779, 164 N.Y.S.2d 756 (2d Dep't 1957) (mem.).

[95] Flatbush Real Estate Bd., Inc. v. Weaver, 5 Misc. 2d 75, 160 N.Y.S.2d 276 (Sup. Ct., Kings Co. 1957).

[96] N.Y. Unconsol. Laws § 8584(4)(a)(1).

[97] 340 East 57 St. Corp. v. Weaver, 3 Misc. 2d 356, 153 N.Y.S.2d 851 (Sup. Ct., N.Y. Co.), aff'd mem., 2 A.D.2d 678, 154 N.Y.S.2d 422 (1st Dep't 1956), aff'd mem., 2 N.Y.2d 799, 140 N.E.2d 550 (1957).

[98] Goldstein v. Weaver, 155 N.Y.S.2d 185 (Sup. Ct., N.Y. Co. 1956).

[99] R. H. Macy & Co. v. Abrams, 3 A.D.2d 923, 162 N.Y.S.2d 660 (2d Dep't 1957) (mem.); Various Tenants v. Weaver, 5 Misc. 2d 269, 159 N.Y.S.2d 765 (Sup. Ct., N.Y. Co. 1957).

[100] Abrams v. S. A. Schwartz Co., 7 Misc. 2d 635, 161 N.Y.S.2d 1008 (Sup. Ct., N.Y. Co. 1957).

[101] Matter of Everly, 163 N.Y.S.2d 103 (Sup. Ct., N.Y. Co. 1957).

year when it was in the appellate division,[102] has been reversed by a 5-to-2 decision of the Court of Appeals.[103] It had been held below that the standard covenant of quiet enjoyment was breached if a lessor co-operated in condemnation to the extent of giving the city an option to purchase the award (a device to enable the city to know in advance how much it will cost to condemn a parcel). The reversal appears to have been predicated primarily on the policy consideration that a contrary holding would render nugatory the use by the city of the option-to-purchase method of ascertaining costs of condemnation. However, in light of the express finding of the trial court that the lessor induced condemnation by having granted the option,[104] the better rule would seem to be that eviction resulting from condemnation, through whatever procedure accomplished, does not breach the covenant of quiet enjoyment in a lease unless the lessor induces the sovereign to condemn the property. Such a holding would in no way impair the use of options by the city, and would come closer to the intent manifested by the covenant of quiet enjoyment.

A covenant providing that "tenant shall not sublet or assign without written consent of landlord *and such consent will not be unreasonably withheld*"[105] has been interpreted as imposing an affirmative duty on the landlord not to be unreasonable, thus giving the tenant a cause of action for damages resulting from breach of the covenant by the landlord. The provision for notice to the tenant of the landlord's election under the standard fire clause[106] and the provision for the tenant's payment of rent in the standard covenant of quiet enjoyment[107] were both held to be conditions precedent.

Security Deposits.—Section 1302-a of the Penal Law, which governs the disposition of lease security deposits in case of sale of the leased realty, makes no provision for disposition where the lessor with whom the deposit was made dies. A federal case,[108] applying New York law, held that since the security deposit is a personal obligation of the lessor[109] the lessor's personal representative is responsible for it after

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102 1 A.D.2d 809, 148 N.Y.S.2d 809 (1st Dep't 1956) (mem.), 1956 Survey of N.Y. Law, 31 N.Y.U.L. Rev. 1460.

103 2 N.Y.2d 110, 138 N.E.2d 784 (1956).

104 143 N.Y.S.2d 58, 61 (Sup. Ct., N.Y. Co. 1955).

105 Singer Sewing Machine Co. v. Eastway Plaza, Inc., 5 Misc. 2d 509, 510, 158 N.Y.S.2d 647, 648 (Sup. Ct., Monroe Co. 1957). (Emphasis by the court.)

106 Franzo & Resciniti, Inc. v. Duva, 4 Misc. 2d 984, 159 N.Y.S.2d 425 (N.Y. Munic. Ct. 1956).

107 Dave Herstein Co. v. Columbia Pictures Co., 157 N.Y.S.2d 130 (Sup. Ct., N.Y. Co. 1956), aff'd mem., 3 A.D.2d 907, 162 N.Y.S.2d 391 (1st Dep't 1957).

108 Lynch v. Guaranty Trust Co., Civil No. 114-89, S.D.N.Y., July 17, 1957.

109 Mallory Associates, Inc. v. Barving Realty Co., 300 N.Y. 297, 90 N.E.2d 468 (1949).

the lessor's death. The court rejected a contention that liability for the deposit ran with the land so that those who succeeded to the land would be liable for the deposit. The holding is supported by the one New York case to consider the problem[110] and on principle is sound. A contrary result, where numerous heirs succeed to the leased premises, would create a serious administrative problem for the tenant seeking return of his deposit.

110 In re Walter's Will, 79 N.Y.S.2d 17 (Surr. Ct., Westch. Co. 1948).