PART THREE
Property Law

REAL AND PERSONAL PROPERTY

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POSSIBLY the two most important New York property decisions of the past year involved cotenancy and zoning. On the legislative side, in addition to the statutes discussed in later portions of this article, there were numerous lesser measures dealing with abandoned property, eminent domain takings, housing, and amendments to the Multiple Residence Law and Multiple Dwelling Law. A new amendment provides that Real Property Law section 333-a shall not invalidate any realty conveyance or instrument merely because of the nonfiling of a map referred to in the instrument.[1] Another section declares than an Indian may convey realty (other than tribal common property) the same as a citizen.[2]

I

Real Property and Personal Chattels

Bailments.—Attempts of bailees to limit their liability for loss again received attention.[3] In a case involving sections 20(11)[4] and 319[5] of the Interstate Commerce Act, the plaintiff had delivered to the defendant interstate carrier several shipments of cartons of goods,

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1 N.Y. Laws 1956, c. 403.

2 N.Y. Laws 1956, c. 243, amending N.Y. Indian Law § 2.

3 Dajkovich v. Hotel Waldorf-Astoria Corp., 309 N.Y. 1005, 133 N.E.2d 456 (1956), affirming without opinion 285 App. Div. 421, 137 N.Y.S.2d 764 (1st Dep't 1955), 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1566-67.

4 24 Stat. 386 (1887), 49 U.S.C. § 20(11) (1952).

5 56 Stat. 746 (1942), 49 U.S.C. § 319 (1952).

the shipping tickets therefor declaring a value of $50 for each shipment. Five shipments were lost and defendant contended that its liability was limited to $250. Under the sections referred to, the carrier might limit its liability if it had filed with the Interstate Commerce Commission a tariff based upon declarations of value and had received from the Commission permission to effectuate such special rates. Because the defendant failed to produce evidence that such tariff had been filed, the court held that plaintiff, upon introduction of proper evidence, should recover the full value of the cartons.[6]

Brokers.—A broker who also was the lawyer for the purchaser secured the parties' signatures to a realty contract which specified that the broker agreed that no commission was earned until the closing of title. After several delays occasioned by the purchaser's inability to perform, the purchaser and seller cancelled the contract, the seller retaining a part only of the down payment he had received. The broker unsuccessfully sued for his commission and a divided appellate division affirmed.[7]

In a memorandum decision the Court of Appeals held that a broker's license was not revocable for his good-faith refusal to return, without a release from both parties, a deposit he had received with a purchase offer which fell through after acceptance.[8]

Cotenancy.—Clearly the single most important cotenancy decision was that of *Matter of Polizzo*,[9] a four-to-three decision of the Court of Appeals. Before her marriage Minnie was sole owner of a $20,000 bond and realty mortgage. After marrying Joseph Polizzo she assigned the bond and mortgage to an obvious conduit, who simultaneously assigned the bond and mortgage to Polizzo and Minnie. The latter assignment recited a $100 consideration "paid by Joseph Polizzo and Minnie Polizzo his wife," and its habendum ran to "the party of the second part, and the successors, legal representatives, the survivor, such survivor's heirs, assigns of the party of the second part, forever." Ten years later Minnie became incompetent and remained so until her death in 1953. Joseph died in 1948, a year after having purportedly assigned to a third person a half interest in the bond and mortgage. There was no evidence that Joseph had paid Minnie anything. In an accounting by Joseph's executor (who was also Joseph's assignee) the trial court held that Joseph never acquired more than a survivorship interest and did not have a regular joint

[6] Kaplan v. Jacobowitz, 152 N.Y.S.2d 751 (N.Y. City Ct., N.Y. Co. 1956).

[7] Gluckman v. Froehlich, 283 App. Div. 795, 128 N.Y.S.2d 579 (2d Dep't 1954) (mem.), aff'd without opinion, 309 N.Y. 651, 128 N.E.2d 313 (1955).

[8] Okun v. Department of State, 309 N.Y. 939, 132 N.E.2d 313 (1955) (mem.).

[9] 308 N.Y. 517, 127 N.E.2d 316, cert. denied, 350 U.S. 911 (1955), 31 N.Y.U.L. Rev. 855 (1956), 41 Cornell L.Q. 749 (1956).

tenant's interest. The second department unanimously held that a regular joint tenancy was created and that Joseph's later inter vivos assignment created a tenancy in common between his assignee and Minnie.[10] In affirming the latter holding, the majority opinion reasoned that if Minnie and Joseph had not been married, the original transfer to them would have created a joint tenancy with a right of survivorship and a power in either to transmute the tenancy into a tenancy in common by transferring his interest to a third person. Conceding that earlier New York precedents had held that a bond and mortgage originally held by the husband and thereafter assigned by him to himself and his wife would create only a right of survivorship in the wife rather than an equal present ownership, the majority declared such a rule to be an anachronism, a vestige of the feudal rule that the husband owned the wife's tangibles and such of her intangibles as he "reduced to possession," and refused to extend it to such assignments by a wife to herself and husband.[11]

The dissenting opinion relied on the rejected precedents and urged that it was unfair to apply a different rule to wife-to-both assignments than was applied in husband-to-both assignments.[12]

The majority reached the preferable result, which was also legally supportable, but both opinions may have cast doubt on whether the cited precedents will be followed in a husband-to-both assignment. The rule that where one spouse provides the whole consideration for a chose taken in the name of both spouses, the donee-spouse will receive only a right of survivorship (if the chose remains in that form until the donor's death) and not a full undivided interest, is based on the presumed intent and arises only where there is no evidence of a contrary intent. Apart from the possible difference between evidence that the husband paid nothing and "no evidence that he paid anything," the instant case presented the resort to a conduit, plus a consideration recited as paid to the conduit by both spouses. Could not this have been deemed sufficient to overcome the presumption?

In a questionable decision the appellate division held that where each tenant in common in an oil lease paid his share of the operating expense and received payment for his share (less royalty), a bank which took a mortgage of one cotenant's share (in the lease, the equipment, and future oil production) was not subordinated to an asserted equitable lien for the mortgagor's unpaid share of drilling expenses arising subsequent to the execution of such mortgage.[13]

[10] 284 App. Div. 812, 132 N.Y.S.2d 295 (2d Dep't 1954) (mem.).

[11] 308 N.Y. at 521, 127 N.E.2d at 317.

[12] Id. at 524, 127 N.E.2d at 320.

[13] Conkling v. First Nat'l Bank, 286 App. Div. 537, 145 N.Y.S.2d 682 (4th Dep't 1955).

Deeds.—The restricted capacity of a school district to convey was emphasized in *Ross v. Wilson,*[14] a four-to-three decision by the Court of Appeals, which voided the action of a special meeting of a common school district in voting that the premises occupied by its discontinued school be sold to a church for $2,000 when a grange had offered $3,000. The court declared that not even a majority of the members attending the school district meeting had power to disregard the higher bid and that the statute authorizing sale by a majority vote should be construed to require that any such sale be only for the highest nondefective bid by a responsible bidder.[15]

Easements.[16]—Three appellate division decisions deserve passing mention. The first, relying on similar decisions involving public road easements, held that a corporation holding a private easement in certain land "for highway and street purposes" was not entitled to lay a gas pipe line thereunder without the consent of the owner of the fee.[17] The second declared that, where reciprocal use of a driveway lying partially on each of two contiguous lots had continued openly for the statutory period, a reciprocal prescriptive easement presumably arose, absent a showing that such user was permissive.[18] In the third case, an electric company had erected a power line across the rear of certain premises and held an unrecorded easement from the fee owner entitling it to maintain the line and trim trees along its route. The fee owner later conveyed to one who paid value without knowing of the existence of the line. The grantee sued the electric company for having trimmed the trees, and the trial court directed a verdict for the company on the ground that the purchaser took subject to the unrecorded easement merely because the power line existed. The purchaser testified that he had not seen the rear of the premises, that the line was not visible from the front, and that he had

[14] 308 N.Y. 605, 127 N.E.2d 697 (1955).

[15] Id. at 616, 127 N.E.2d at 700.

[16] Two decisions discussed last year, 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1569, have been affirmed without opinion: Panzica v. Galasso, 309 N.Y. 978, 132 N.E.2d 894 (1956); Miller v. Edmore Homes, 309 N.Y. 839, 130 N.E.2d 623 (1955). In Weil v. Atlantic Beach Holding Corp., 1 N.Y.2d 20, 133 N.E.2d 505 (1956), the Court of Appeals upheld a finding of a boardwalk easement by implication but modified the appellate division opinion, 285 App. Div. 1080, 139 N.Y.S.2d 799 (2d Dep't 1955) (mem.), on a procedural point.

[17] Ferguson v. Producers Gas Co., 286 App. Div. 521, 145 N.Y.S.2d 649 (4th Dep't 1955). The parties stipulated that the deed provision "excepting and reserving, for highway and street purposes, a strip of land 48 feet wide" (and particularly described) created an easement.

[18] Hildreth v. Goodell, 286 App. Div. 278, 143 N.Y.S.2d 108 (3d Dep't 1955), followed in Hall v. De Lia, 147 N.Y.S.2d 559 (Sup. Ct., Richmond Co. 1955). And see Jenkins v. New York Cent. R.R., 1 A.D.2d 57, 147 N.Y.S.2d 68 (3d Dep't 1955) (prescriptive easement for crossing over railroad tracks).

not been informed that either the line or the easement existed. The vendor, who had earlier granted the easement, testified that he had not shown the purchaser the rear line nor informed him of the electric line. In remanding the cause for a jury trial on whether or not the purchaser actually knew of the existence of the electric line, the majority of the appellate division[19] distinguished the earlier case of *Barber v. Hudson River Tel. Co.*[20]

Gifts.—The most important development in this area during the past year was amendment of the Personal Property Law to provide for gifts of securities to minors.[21] This statute, similar to those passed in recent years in several other states,[22] has significance also in the fields of succession and trusts. It provides that securities in *registered* form may be registered in the *donor's* name "as custodian, for (name of minor), a minor under article eight-a of the personal property law of New York,"[23] and that such registration constitutes the *delivery* required to effectuate the gift. The pain which traditionalists feel at this definition may be partly alleviated by the requirement that bearer-form securities "shall be delivered by the donor to any adult member of the minor's family, other than the donor, or to any guardian of the minor," accompanied by a deed of gift in substantially the form prescribed by the statute. The statute also provides that a gift made as prescribed is irrevocable, conveying to the minor "indefeasibly vested legal title."[24]

Under the new article 8-a, the custodian holds a power in trust over the securities, in addition to the same rights, powers, and duties as if he were a guardian of the infant's property. He has power to manage and invest, to sell or otherwise dispose of the subject matter of the gift, and to execute and deliver any instruments necessary to effectuate his powers. Provision is made for reimbursement for reasonable expenses, liability for losses, resignation, appointment of a successor custodian, and accounting.[25]

Liens.—The first department construed the words "or otherwise"

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[19] Covey v. Niagara Lockport and Ontario Power Co., 286 App. Div. 341, 143 N.Y.S.2d 421 (4th Dep't 1955) (Vaughan and Piper, JJ., dissenting).

[20] 105 App. Div. 154, 93 N.Y. Supp. 993 (3d Dep't 1905).

[21] N.Y. Pers. Prop. Law §§ 265-70.

[22] For a listing of statutes in other states, see Niles, Trusts and Administration, 1955 Ann. Survey Am. L. 530 n.2, 31 N.Y.U.L. Rev. 700 n.2 (1956).

[23] N.Y. Pers. Prop. Law § 265(1)(a). Provision is made, too, for registration "in the name of any adult member of the minor's family or in the name of any guardian of the minor."

[24] Id. § 265(2).

[25] Id. §§ 266-68. Section 269 concerns definitions of terms used in the act, and § 270 makes it clear that the statute does not prescribe the exclusive method of making gifts to minors.

in the automobile repairman's lien statute[26] in determining the relative priority between such lien and an earlier chattel mortgage. Cohen, having purchased an automobile with money borrowed from the plaintiff and having given plaintiff a chattel mortgage which specified that upon any default the mortgagee had the right to possession without notice or demand, defaulted in the very first mortgage payment and thereafter, unknown to plaintiff, delivered and purported to sell the automobile to a used car dealer in a different county. The dealer sold the automobile to Vito, who later had it repaired by the defendant garageman. A municipal court holding that the chattel mortgage was superior to the repairman's lien was affirmed by the appellate term and a unanimous appellate division.[27] In construing the statutory language, which gives a repairman's lien for work done "at the request of or with the consent of the owner, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise," the court held that the words "or otherwise" referred only to an ownership of the same class as a conditional vendee or chattel mortgagor, and did not include the vendee of a vendee of a chattel mortgagor whose former title had previously been lost by his defaulting on the mortgage. The purported transfer by such original mortgagor was treated as terminating his authority over the vehicle, so that the acts of later possessors could not be said to be by his authority. That Vito possessed a vehicle registration certificate did not make him an "owner" within the statute. The court distinguished *Commercial Credit Corp. v. Moskowitz*[28] as involving a lien which not only arose before the mortgagor had defaulted but may have arisen before the mortgagor transferred the registration to a third person.

Mortgages.[29]—The unfamiliar line, "A loan is (not) a loan when alone," characterizes an enigmatic mortgages case decided by the Court of Appeals. One Kline allegedly advanced money from time to time to the Panes (a husband, S.A.P., and his wife, herein known as Lou).[30] To secure the repayment of these sums, Lou and her husband executed a mortgage on land they held by the entireties. There-

[26] N.Y. Lien Law § 184.

[27] Manufacturers Trust Co. v. Stehle, 1 A.D.2d 471, 151 N.Y.S.2d 384 (1st Dep't 1956). Cf. Lloyd v. Kilpatrick, 71 Misc. 19, 127 N.Y. Supp. 1096 (N.Y. City Ct., N.Y. Co. 1911).

[28] 142 Misc. 773, 255 N.Y. Supp. 525 (N.Y. City Ct., N.Y. Co. 1932), aff'd without opinion, 238 App. Div. 831, 262 N.Y. Supp. 933 (1st Dep't 1933).

[29] See Mark, Assignments of Leases to Mortgagees, 134 N.Y.L.J. Nos. 67, 68, p. 4, col. 1 (1955) (doubting that the mere assignment, to the mortgagee of leased premises, of the lease itself as additional security is effective to prevent later modification of the lease by the lessee and the lessor-mortgagor).

[30] The trial court completely voided both mortgages, believing that all the money was advanced to Lou.

after, Lou conveyed her interest in the mortgaged land to her husband and he executed a second mortgage to Kline to secure additional advanced sums. Lou and her husband later separated. When Kline sought to foreclose the two mortgages, Lou made complete default, and her ex-husband interposed a counterclaim asking that both mortgages be rescinded because the sums, admittedly advanced by Kline to Lou and represented to her husband to have been loans, were in reality gifts, which fact had been fraudulently withheld from him until after the second mortgage was executed. The ex-husband testified that he had "learned" that the moneys were really gifts, and some neighbors testified that they had overheard Kline tell Lou that the moneys she got from him were gifts. The trial court denied a motion to dismiss the counterclaim, and a jury verdict thereon was returned in favor of the ex-husband, whereupon the trial court voided both of the mortgages. The third department reversed the judgment on the law and the facts, holding that the evidence was insufficient to show fraud and that the counterclaim should have been dismissed.[31] The Court of Appeals modified the judgment and ordered a new trial.[32] Because Lou had defaulted, the first mortgage was admittedly valid as to her undivided interest. Her ex-husband having established a prima facie case on his counterclaim, its dismissal should not have been ordered by the appellate division, and he would hold free of the second mortgage and have a defense against the first mortgage except to the extent of the value of Lou's interest at the time such first mortgage was executed.

A five-to-two decision by the Court of Appeals held that a written guarantee of "payment of principal and interest of said mortgage, together with any and all expenses of foreclosure" did not obligate the guarantor to reimburse the mortgagee for taxes the latter had paid on the mortgaged premises for many years preceding the foreclosure.[33] Invoking the rule that a guarantor should not be bound beyond the express terms of his guaranty, the majority opinion rejected a contention that the guarantor's meaning should be read in the light of Civil Practice Act section 1087, which provides that when a judgment in a realty mortgage foreclosure action directs a sale, "taxes and assessments which are liens upon the property sold . . . are deemed expenses of the sale." The majority noted that the section spoke of sale expense, not foreclosure expense, and also that it referred to taxes which were still liens, not taxes previously paid by

[31] Kline v. Pane, 285 App. Div. 981, 138 N.Y.S.2d 152 (3d Dep't 1955) (mem.).

[32] Kline v. Pane, 1 N.Y.2d 15, 133 N.E.2d 447 (1956).

[33] Wesselman v. Engel Co., 309 N.Y. 27, 127 N.E.2d 736 (1955) (Dye and Desmond, JJ., dissenting on this point).

the mortgagee and therefore no longer liens. Finally, the section was designed to protect the foreclosure purchaser by giving him a title free of tax liens. The minority opinion insisted the delinquent taxes necessarily paid by the mortgagee thereupon became part of the principal, hence within the guaranty, and in addition were within the term "all expenses of foreclosure."[34]

Although recognizing the general rule that a payment on a note by one joint obligor does not prevent the defense of a statute of limitations by the others unless the latter previously authorized or subsequently ratified such payment, the appellate division held that a mortgage payment by one tenant in common did interrupt the running of the statute against enforcement of the mortgage against the land, not only as to the payor's interest but also as to the interest of his cotenant.[35]

An interesting, if somewhat depressing, mortgage problem was presented in a deed reformation case. A soldier, accompanied by his father, executed a contract to buy a farm and made the down payment, thereafter sending to his father each month sums of money to be used in making the soldier's tax and contract payments. Later a deed was executed to the soldier and a purchase money bond and mortgage executed by him. Still later, and unknown to the soldier, his father had his own name added as a grantee and as an obligor on the bond and mortgage. Upon his return from service the soldier successfully obtained reformation of the deed, the judgment being affirmed notwithstanding that the soldier had not sought nor the trial court awarded a similar reformation of the mortgage. The third department held that the soldier had no duty to ask reformation of the mortgage; nor, in view of the conduct of the father, was the judgment reversible for the failure to do so.[36]

Pledges.—Matter of the Estate of *Kiamie*[37] began as a discovery proceeding in surrogate's court, but the question decided was whether a pledgee had made a valid sale of securities pledged as collateral for a promissory note on which the pledgor defaulted. Among the note's provisions was one permitting sale to the pledgee, as well as others, of the pledged securities "without demand, advertisement or notice, which are hereby waived." The pledgee in fact gave written notice to the pledgor's representatives and advertised the sale by public auc-

[34] Id. at 31, 127 N.E.2d at 738.

[35] Ricci v. Perrino, 285 App. Div. 502, 138 N.Y.S.2d 313 (3d Dep't 1955).

[36] Jozwiak v. Jozwiak, 1 A.D.2d 915, 149 N.Y.S.2d 600 (3d Dep't 1956). The appellate division had earlier affirmed another order issued in the same action. Jozwiak v. Jozwiak, 286 App. Div. 1128, 146 N.Y.S.2d 140 (3d Dep't 1955) (reopening trial for introduction of new evidence).

[37] 309 N.Y. 325, 130 N.E.2d 745 (1955).

tion in newspapers, describing the shares only by the number offered, the name of the corporation, and the state of incorporation. The corporations were all "family" corporations, unknown to the public at large. At the sale the pledgee's bid took the stock. The court held the published notice so defective as to invalidate the sale, stating that there was an equitable requirement that the pledgee adequately advertise the sale. Irrespective of the explicit waiver by the pledgor of notice and advertising, the good-faith requirement necessitates appropriate advertising.[38] What the court seems to mean (although the principle is nowhere explicitly stated) is that the pledgee may purchase the pledged goods at a public sale if the pledgor consents, *but* that in this case the deficient advertising precluded labeling the sale "public."

Vendor and Purchaser.—The appellate division affirmed a holding that a purchaser in possession under a real estate contract and accordingly bearing the risk of fire loss under the Uniform Vendor and Purchaser Risk Act,[39] who pursuant to agreement paid the premiums on a fire policy issued to the vendor, was entitled to credit toward his contract price for the amount of such policy proceeds paid to the vendor.[40]

In addition to various decisions in specific performance cases,[41] two appellate division decisions allowed purchasers to recover deposits on the basis of unmarketability. In one the contract involved two parcels, and title was marketable except as to the smaller parcel, comprising only one half of one per cent of the area of the principal parcel and not necesssary for access thereto.[42] In the other the title to premises sold by metes and bounds was entirely clear except

[38] The court said that "we find it impossible to announce detailed rules applicable to every such notice of sale. But the notice at the least must contain enough information to alert investors and to invite competition." Id. at 331, 130 N.E.2d at 748. A rule composed of this requirement and the good-faith element seems to provide sufficient protection.

[39] § 1, 9A U.L.A. 358, N.Y. Real Prop. Law § 240-a.

[40] Raplee v. Piper, 2 A.D.2d 732, 152 N.Y.S.2d 799 (3d Dep't 1956).

[41] E.g., Musco v. Pares, 2 A.D.2d 689, 152 N.Y.S.2d 612 (2d Dep't 1956) (mem.) (vendor denied specific performance of contract for sale of 48 new subdivision lots, which specified price for 47 but left price of 48th lot "to be agreed on after the other 47 should be sold"); Klir Realty Corp. v. Bobinski, 1 A.D.2d 926, 150 N.Y.S.2d 813 (2d Dep't 1956) (mem.) (contract that purchaser of 187-acre farm would, at closing, deed back 3 acres thereof, including the house and barns and not less than 325 feet of frontage on a named road, contained sufficient description for specific performance); Balan v. Russik, 286 App. Div. 1134, 146 N.Y.S.2d 88 (3d Dep't 1955) (mem.) (vendee who, under oral contract to buy land for a lake, entered and erected $3,000 dam 500 feet long and 35 feet high, entailing 2,788 man hours of labor, showed sufficient "part performance" to avoid Statute of Frauds and obtain specific performance).

[42] Wates v. Crandall, 2 A.D.2d 715, 152 N.Y.S.2d 874 (2d Dep't 1956), affirming 144 N.Y.S.2d 211 (Sup. Ct., Queens Co. 1955).

that its stone retaining walls, ramp, and stairway encroached onto an adjoining city-owned street. That the contract clause called for such a title "as _____ will prove and insure," was deemed unimportant, the parties obviously having intended that some title company be named and having agreed on a title company which thereafter noted the encroachments as exceptions.[43]

Wild Animals.—The former article IV of the Conservation Law was repealed and a new article called the "Fish and Game Law" substituted therefor by the 1955 session of the legislature.[44] The stated purpose of the change was to clarify language, correct inconsistencies, and eliminate duplicated or superseded provisions. This past year those changes and corrections were themselves, in numerous instances, changed and corrected, generally upon the recommendation of the Joint Legislative Committee on Revision of Conservation Law.

Zoning.[45]—The Court of Appeals decided two cases involving the application of zoning laws to religious organizations. In *Community Synagogue v. Bates*[46] an elaborate mansion and grounds in a "Residence A" zone in the Village of Sands Point was purchased by a religious corporation for use as a synagogue. An application for a use permit was denied by the village board of appeals, whose determination was confirmed by the second department.[47] With a single judge dissenting, the Court of Appeals ordered that the use permit be issued. Provisions in the zoning ordinance, adopted almost on the eve of the acquisition of the land by the petitioning corporation, permitted use of land in "Residence A" districts for "churches for public worship and other strictly religious uses . . . providing any such use and accessory use has been approved by the Board of Appeals . . . after taking into consideration the public health, safety and general welfare." A finding by the board of appeals that the proposed use

[43] Dukas v. Tolmach, 2 A.D.2d 57, 153 N.Y.S.2d 392 (1st Dep't 1956).

[44] N.Y. Laws 1955, c. 630.

[45] Zoning law changes in N.Y. Laws, 1956, include c. 759, amending Village Law § 179 to require only a specified majority of the board of trustees, rather than all of them, to change zoning regulations or boundaries over the signed protest of owners of 20 per cent of the land; c. 611, adding new provisions to Gen. Munic. Law § 239-d to give county planning board authority to conduct researches and to recommend to municipal governing bodies a comprehensive zoning plan; c. 167, amending Village Law § 177 by adding "floods" to the perils against which zoning regulations may be aimed; and c. 83, amending Gen. City Law § 37 to require that any [other] city, village, town or county whose boundaries are within 500 feet of property affected by a proposed zoning change, be given written notice thereof and a chance to a public hearing thereon but no right to judicial review. The express negation of a right to judicial review was prompted by the veto of a 1955 bill granting such right. See 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1582 n.87.

[46] 1 N.Y.2d 445, 136 N.E.2d 488 (1956).

[47] 1 A.D.2d 686, 147 N.Y.S.2d 204 (2d Dep't 1955) (mem.) (Schmidt, J., dissenting).

of the premises as a synagogue, religious school, and meeting place for men's, women's, and children's church groups was "for purposes other than a church for public worship and other strictly religious uses" was reversed as erroneous, the court noting that the social activities of church groups constitute an integral part of the religious program of the church.[48] The court further held that the evidence did not support the board's finding that the proposed use "would not promote public health, safety, convenience and welfare." The court overturned several other rulings of the board and held that the provision in the ordinance allowing the board to require, "as a condition to any permit issued," that the applicant's buildings comply with the General Building Construction Code, referred to the certificate of occupancy not to a use permit, as it would be unreasonable to require alteration of buildings as a prerequisite to the granting of a use permit which might, after such alterations were completed, be denied on other grounds.[49]

The other decision was *Diocese of Rochester v. Planning Bd.*,[50] in which the court set aside as arbitrary and unreasonable the action of the local planning board, zoning appeals board, and town board in denying a permit for the erection of a Roman Catholic church and parochial school in a residential zone. The ordinance permitted "educational and religious buildings" in such residential zone, "if approved by the Planning Board"; but the court held insufficient all the various grounds relied on by the planning board. The majority opinion, disregarding any conflicting decisions, declared

> It is well established in this country that a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district. Such a provision is stricken on the ground that it bears no substantial relation to the public health, safety, morals, peace or general welfare of the community.[51]

Miscellaneous.—There were less significant developments involving church property,[52] cooperative apartments,[53] dead bodies,[54]

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[48] 1 N.Y.2d at 453, 136 N.E.2d at 493.

[49] Id. at 456, 136 N.E.2d at 495.

[50] 1 N.Y.2d 508, 136 N.E.2d 827 (1956). (Van Voorhis, J., dissenting).

[51] Id. at 522, 136 N.E.2d at 834.

[52] Eastern Orthodox Catholic Church v. Adair, 141 N.Y.S.2d 772 (Sup. Ct., N.Y. Co. 1955).

[53] Forest Park Cooperative v. Hellman, 152 N.Y.S.2d 685 (Sup. Ct., Queens Co. 1956) (proprietary tenants enjoined from using laundry machines in own apartments, where cooperative's directors provided laundry machines in basement and adopted rule excluding such machines from apartments; evidence showed water and vibration damage to other apartments).

[54] Where the deceased husband had purchased a family plot in cemetery and had his body placed therein with those of two beloved cousins, his widow who thereafter remarried was denied permission to remove his body to a new plot which was to con-

escheat,[55] joint bank accounts,[56] restrictive covenants,[57] tax lien foreclosures,[58] and title examination standards.[59]

II

LANDLORD AND TENANT

During the period covered by this survey the continuing housing and business space shortage in New York with its concomitant plethora of landlord-tenant problems continued to receive sympathetic attention from the legislature, the governor, and the courts. There also occurred several significant judicial interpretations of fairly common lease covenants.

The Housing Shortage and Rent Control.—Residential rent controls having been continued until June 30, 1957, by the 1955 legisla-

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tain also the bodies of herself, her second husband, and the deceased first wife of the latter. Matter of the Application of Shine, 208 Misc. 832, 143 N.Y.S.2d 374 (Sup. Ct., Westch. Co. 1955). Cf. Teitman v. Elmwier Cemetery Ass'n, 148 N.Y.S.2d 159 (Sup. Ct., Queens Co. 1956) (widow whose deceased husband had desired that their bodies be buried side by side was allowed to remove his body where its burial in his sister's plot was accomplished while the widow was in the shock of bereavement, subsequent controversy with the sister having made the widow fearful that she would not be accorded burial in such plot).

[55] In Mayer v. Chase Nat'l Bank, 233 F.2d 468 (2d Cir. 1956), recoveries under judgments against a guarantor of defaulted railroad mortgage bonds had been distributed by the trustee among all the discoverable holders of the guaranteed bonds. The excess funds remaining in the trustee's hands years later because some of the bondholders could not be located, were held, under the controlling New York law, not to belong to the bondholders who had already received their ratable share of the complete fund. The cause was remanded to the district court to determine whether the State of New York could take the funds under its Abandoned Property Law. See Matter of Accounting of Dally, 2 A.D.2d 160, 154 N.Y.S.2d 820 (2d Dep't 1956), reversing Matter of Hammond, 205 Misc. 309, 127 N.Y.S.2d 702 (Surr. Ct., Orange Co. 1954), 30 N.Y.U.L. Rev. 730 (1955).

[56] Matter of Accounting of Rowland, 1 N.Y.2d 284, 135 N.E.2d 193 (1956).

[57] Baxendale v. Property Owners Ass'n, 309 N.Y. 871, 131 N.E.2d 287 (mem.), affirming 285 App. Div. 1148, 140 N.Y.S.2d 176 (2d Dep't 1955) (mem.), affirming 138 N.Y.S.2d 76 (Sup. Ct., Nassau Co. 1954), discussed in 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1576.

[58] Covey v. Town of Somers, 351 U.S. 141 (1956), reversing 308 N.Y. 798, 125 N.E.2d 862 (1955), held that it would violate due process to enforce against a known incompetent, without any appointment of a committee for him, a state tax lien statute permitting foreclosure in rem by means of publication notice and rendering the tax sale deed conclusively valid after two years. The case is discussed in McKay, Constitutional Law, 1956 Survey of N.Y. Law, 31 N.Y.U.L. Rev. 1364 nn.36-39 (supra). See editorial explaining a statute providing a measure of relief from the New York City Administrative Code provisions on in rem tax foreclosures, in 135 N.Y.L.J. No. 124, p. 4, col. 1 (1956). Cf. L. K. Land Corp. v. Gordon, 1 N.Y.2d 465, 136 N.E.2d 500 (1956) (city charter provisions respecting realty tax liens were not overridden by general state-wide limitation statutes).

[59] A proposed set of twenty-five standards for title examination, formulated by the committee on real property law of the New York State Bar Association, appears in 136 N.Y.L.J. No. 1, p. 4, col. 1 (1956).

ture,[60] this aspect of the problems of the housing shortage received scant attention from the 1956 legislature.[61] The only significant legislative action in this area was triggered by a report of the State Housing Rent Administrator to the State Rent Commission that more than 26 per cent of the people living in the Borough of Manhattan reside in rooming houses and are subject to lockouts rather than the statutory summary eviction procedure. Acting on this report and the recommendation of the Commission,[62] the legislature amended section 1410 of the Civil Practice Act to require rooming-house operators in New York City to follow the statutory procedure when attempting to evict a lodger who has occupied his accommodations consecutively for thirty days or more.[63] In his message to the legislature approving the amendment Governor Harriman said:

> It will not prevent the eviction of a transient tenant for non-payment of rent. But it will bring to a halt the vicious reprisal practice of locking out families for alleged non-payment of rent when the real reason is that they have complained to the Rent Commission about being overcharged . . . .[64]

The Business and Commercial Space Shortage and Rent Control.—With amendments that presage the eventual demise of controls in this area, the legislature extended the Emergency Business Space Rent Control Law[65] and the Emergency Commercial Space Rent Control Law[66] until July 1, 1957. A similar amendment to each law authorizes an additional 15 per cent increase in the emergency rent of statutory tenants who have not paid such an increase since January 1, 1952.[67] The second, and far more significant, amendment enables landlords of store premises, regardless of the annual rental, and commercial or business space, which is presently rented for $20,000 or more per annum, to offer to the present tenant a lease for a term to expire on June 30, 1958, and provides for the present emergency rent

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[60] N.Y. Unconsol. Laws § 8581(2).

[61] The Temporary State Commission to Study Rents and Rental Conditions was extended until July 1, 1957. N.Y. Laws 1956, c. 107. The governor announced that it will be the function of the Commission this year to study the problems involved in residential rent control. McKinney's 1956 N.Y. Sess. Laws 1677 (message April 16, 1956, approving N.Y. Laws 1956, c. 684).

[62] McKinney's 1956 N.Y. Sess. Laws 1401 (report of the Temporary State Commission to Study Rents and Rental Conditions, March 15, 1956).

[63] N.Y. Laws 1956, c. 565, § 2, adding N.Y. Civ. Prac. Act § 1410(10).

[64] McKinney's 1956 N.Y. Sess. Laws 1669 (message April 13, 1956, approving N.Y. Laws 1956, c. 565). See also 136 N.Y.L.J. No. 7, p. 4, col. 2 (1956), setting forth the procedure the Rent Commission will follow in an effort to enforce diligently the new amendment.

[65] N.Y. Unconsol. Laws § 8567.

[66] Id. § 8538.

[67] Id. §§ 8552(c), 8522(e).

for such premises.[68] If the tenant elects to accept the lease the premises will continue to be subject to rent control until June 30, 1958, after which date they will be completely decontrolled. If the tenant elects to reject the lease, after a six-month waiting period he can be evicted.[69]

The only other important legislative development was passage on the penultimate day of the 1956 session of a bill that would have permitted landlords to submeter electricity in commercial and business buildings. The ensuing political storm resulted in a scathing gubernatorial veto.[70]

Rent Control.—In *Lincoln Bldg. Associates v. Barr*[71] the Court of Appeals recognized that the constitutionality of the Emergency Business Space Rent Control Law was dependent upon a legislative finding that at the time the law was enacted there was such a shortage of office space as to constitute an emergency situation. Although holding that the plaintiff-landlord had failed to rebut the presumption that facts sufficient to justify the re-enactment of the law in 1955 existed at that time, the court, nevertheless, apparently felt that office rent control may soon cease to be needed for the majority opinion concluded with the warning that "Whether and for how long the Legislature may lawfully continue office rent control must, and shall, be a question open for future review."[72] This statement, when considered with the dissenting opinion denying the existence of an emergency in 1955 and the amendments to the Emergency Business Space Rent Con-

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[68] Id. §§ 8558(gg)(1)-(2), 8562, 8528(gg)(1)-(2), 8533.

[69] For further analysis and criticism of these amendments, see Shaw, Commercial Rent Laws—1956 Model, 135 N.Y.L.J. Nos. 93, 94, 95, p. 4, col. 1 (1956). Space limitations preclude discussion of Jabe Estates, Inc. v. Real Curtains, Inc., 149 N.Y.S.2d 452 (N.Y. Munic. Ct. 1955); Amboc Corp. v. Bell Cap Co., 208 Misc. 642, 144 N.Y.S.2d 685 (N.Y. Munic. Ct. 1955), 31 N.Y.U.L. Rev. 659 (1956); and Charipo Realty Corp. v. Safeway Stores, Inc., 208 Misc. 569, 144 N.Y.S.2d 340 (N.Y. Munic. Ct. 1955), construing prior amendments authorizing a 15 per cent increase. One must agree with Mr. Shaw that the amendments with respect to the 15 per cent increase are poorly drafted and will continue to create confusion and plague the courts.

[70] McKinney's 1956 N.Y. Sess. Laws 1720 (veto message April 5, 1956, concerning S. Int. 1219, Pr. 1280): "This measure would turn the clock back in a long battle against various abuses, the most vicious of which the bill would perpetuate as a matter of law,—i.e., sub-metering profiteering at the ultimate expense of all consumers of electricity served by a public utility."

[71] 1 N.Y.2d 413, 135 N.E.2d 801, affirming 1 Misc. 2d 560, 149 N.Y.S.2d 460 (N.Y. Munic. Ct. 1956). See also Four Maple Drive Realty Corp. v. Abrams, 2 A.D.2d 753, 153 N.Y.S.2d 747 (2d Dep't 1956) (mem.), holding that § 4(4)(a)(1) of the Residential Rent Control Law, N.Y. Unconsol. Laws § 8584(4)(a)(1), which provides for the use, in certain instances in computing maximum rents, of a ratio established by the State Board of Equalization and Assessment which ratio is not uniform in all areas of the state, is not an unconstitutional denial of equal protection of the laws.

[72] 1 N.Y.2d at 420, 135 N.E.2d at 806.

trol Law and the Emergency Commercial Space Rent Control Law discussed above, lends credence to the prediction that this type of control will soon be eliminated.

Section 4(1) of the Emergency Business Space Rent Control Law provides for judicial determination of a "reasonable rent" in excess of the emergency rent upon proof by a landlord that he is receiving less than the "fair rental value" of the space in question.[73] The section sets forth a series of rather vague standards to be applied in determining what is a "reasonable rent." To facilitate the application of these standards the section requires the landlord to serve a bill of particulars setting forth a number of items including gross income and expenses for the "preceding year."

In Matter of *Masonic Fund*[74] the Court of Appeals clarified many of the ambiguities in the section by holding: (1) That the statutory presumption that a "net annual return of eight per cent on the fair value of the entire property . . . [is] a reasonable return" is not mandatory but its use is warranted in any case where the property in question is a substantial building.[75] (2) That where the parties' experts differ as to the "fair value" of the property, one above and the other below the assessed value, the trial court is justified in applying the statutory presumption that the assessed value is the "fair value."[76] (3) That where the landlord's bill of particulars sets forth changes in expenses having prospective effect but fixed in amount and liability the trial court may take these changes into consideration even though the section requires the fixing of the fair rental value as of the date the landlord commences the action.[77] (4) That where the landlord enjoys an exemption from real estate taxes, the taxes he would have to pay absent such exemption should be treated in the same manner as any other expense.

In one of the all-too-frequent legal travesties that result from suits against a state, an applicant for relief under the above-mentioned section 4, who had for his tenant the State of New York, was advised by the supreme court that his action was cognizable only in

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[73] N.Y. Unconsol. Laws § 8554(1).

[74] 1 N.Y.2d 616, 136 N.E.2d 889 (1956).

[75] Cf. Steinberg v. Forest Hills Golf Range, 303 N.Y. 577, 585, 105 N.E.2d 93, 96 (1952).

[76] As a practical matter this holding means that the statutory presumption will be applied in virtually all cases.

[77] See also Matter of Alibel Corp., 285 App. Div. 140, 136 N.Y.S.2d 344 (1st Dep't 1954). In Matter of Chatlos, 1 A.D.2d 584, 151 N.Y.S.2d 944 (1st Dep't 1956), it was held that this section requires a bill of particulars for the preceding *fiscal* year measured from the date the action is commenced rather than for the preceding calendar year.

the Court of Claims.[78] Thereupon he resorted to that court only to be told that his remedy was by legislation or settlement.[79]

Section 8(g) of both the Emergency Business Space Rent Control Law[80] and the Emergency Commercial Space Rent Law[81] provide that an agreement to terminate occupancy operates as a waiver of the protection of the anti-eviction provisions of these laws. The period under review produced several decisions to the effect that the standard quit-and-surrender clauses contained in most business and commercial leases are not within the purview of section 8(g).[82] Although a superficial dialectic argument based on the language of the section supports the position taken by the landlords in these cases, the courts were not led astray. The interpretation contended for by the landlords would have emasculated the statutes contrary to the obvious intent of the legislature.

In Matter of *Castleton Estates*[83] the landlord of a housing development containing a number of separate two-family developments contended that the 1953 amendment to the rent control laws, excluding from control "accommodations in one or two family houses which are or become vacant after April 1, 1953,"[84] operated to decontrol several of its units. The court rejected this argument on the ground that the 1953 amendment was intended by the legislature to apply only to nonprofessional landlords, not to landlords of two-family-type developments. The court cited with apparent approval cases which have termed these developments "horizontal apartment houses."[85]

The rather nebulous constitutional right to withdraw property

[78] Pennbild Realty Co. v. People, 208 Misc. 825, 145 N.Y.S.2d 129 (Sup. Ct., N.Y. Co. 1955).

[79] Pennbild Realty Co. v. State, 1 Misc. 2d 4, 147 N.Y.S.2d 704 (Ct. Cl. 1955). The court did not cite J. Clarence Davies, Inc. v. State, 205 Misc. 713, 128 N.Y.S.2d 629 (Ct. Cl. 1954), which appears to be contrary in general theory.

[80] N.Y. Unconsol. Laws § 8558(g).

[81] Id. § 8528(g).

[82] Fischel v. S. W. Steel Management Co., 286 App. Div. 780, 147 N.Y.S.2d 140 (1st Dep't 1955); 31-39 Realty Corp. v. Rothstein, 151 N.Y.S.2d 190 (Sup. Ct., App. T., 1st Dep't 1956); Olympic Assets, Inc. v. Frederic H. Hatch & Co., 1 Misc. 2d 653, 148 N.Y.S.2d 891 (Sup. Ct., App. T., 1st Dep't 1956); Schneider v. Greenberg, 146 N.Y.S.2d 636 (N.Y. Munic. Ct. 1955). Cf. Edward Tarr, Inc. v. Phoenix Publications, Inc., 1 A.D.2d 189, 148 N.Y.S.2d 689 (1st Dep't 1956), where stipulation to quit entered into in open court was construed to fall within § 8(g).

[83] 1 A.D.2d 390, 152 N.Y.S.2d 181 (1st Dep't 1956).

[84] N.Y. Unconsol. Laws § 8582(2)(i). See also Woolcock v. Temporary State Housing Rent Comm'n, 148 N.Y.S.2d 846 (Sup. Ct., Kings Co. 1956), interpreting N.Y. Unconsol. Law § 8582(2)(h) ("owner" means anyone having the right to possession, not owner of legal title).

[85] Jackson & Feldstein v. McGoldrick, 152 N.Y.S.2d 180 (Sup. Ct., Richmond Co. 1954); Karol v. McGoldrick, 150 N.Y.S.2d 875 (Sup. Ct., Queens Co. 1952).

from the rental market and evict the tenants despite the rent control laws[86] plagued the first department in two cases. First the court held that a landlord could not effect a partial withdrawal by evicting the tenants of the upper floors of a building in order to close permanently the entire building except the street floor because the continued operation of the upper floors was uneconomical.[87] Then the court held that where a landlord was forced to demolish a building and it would be uneconomic not to demolish an extension the landlord was entitled to evict the tenant of the extension.[88]

The Court of Appeals affirmed *First Terrace Gardens, Inc. v. McGoldrick*,[89] discussed in last year's *Survey;* an appellate term held that one who pays a bonus to secure a lease is not in pari delicto with the person who demands the bonus in violation of Penal Law section 965, and therefore he can recover in a civil action;[90] and the recent cases concerning the waiver-of-jury-trial provision now standard in most leases were treated in a series of three articles in the *New York Law Journal*.[91]

Breach of Express or Implied Covenants.—That four of the new decisions on restrictive covenants running in favor of the lessee involved restaurants, luncheonettes, and food stores is probably more readily explained by the fiercely competitive nature of these businesses than by mere coincidence.[92] In *Weiss v. Mayflower Doughnut Corp.*[93] the Court of Appeals delineated the scope of "luncheonette" as opposed to "restaurant" in what will probably become the leading case in this much-litigated area. The court also held that,

> One who rents premises with knowledge of a prior restrictive covenant agreed to by his lessor in favor of another tenant is bound by the restrictive covenant and the construction placed upon it, even though he did not believe it would be so construed and relied on the advice of counsel that it would not be so construed.[94]

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[86] Emray Realty Corp. v. McGoldrick, 307 N.Y. 772, 121 N.E.2d 614 (1954).

[87] Anmark Enterprises, Inc. v. Zimring, 1 A.D.2d 1, 146 N.Y.S.2d 892 (1st Dep't 1955).

[88] Harmor Operating Co. v. Vent-O-Matic Incinerator Corp., 1 A.D.2d 551, 151 N.Y.S.2d 445 (1st Dep't 1956).

[89] 1 N.Y.2d 1, 132 N.E.2d 887 (1956), affirming 285 App. Div. 1126, 140 N.Y.S.2d 447 (1st Dep't 1955) (mem.), 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1586.

[90] Gardner v. Miller, 136 N.Y.L.J. No. 26, p. 1, col. 8 (Sup. Ct., App. T., 1st Dep't July 15, 1956).

[91] 135 N.Y.L.J. Nos. 99, 100, 101, p. 4, col. 1 (1956).

[92] Weiss v. Mayflower Doughnut Corp., 1 N.Y.2d 310, 135 N.E.2d 208 (1956); Arista Luncheonette, Inc. v. Harann Operating Corp., 1 A.D.2d 681, 147 N.Y.S.2d 144 (2d Dep't 1955), aff'd, 1 N.Y.2d 724, 134 N.E.2d 682 (1956); Fulway Corp. v. Liggett Drug Co., 1 Misc. 2d 527, 148 N.Y.S.2d 222 (Sup. Ct. N.Y. Co. 1956); L. & S. Delicatessen, Inc. v. Carawana, 143 N.Y.S.2d 350 (Sup. Ct., Nassau Co. 1955).

[93] 1 N.Y.2d 310, 135 N.E.2d 208 (1956).

[94] Id. at 316, 135 N.E.2d at 209.

This latter holding indicates that the alert lessee who gives notice to a possible competitor will have complete protection in the courts.

A supreme court decision,[95] mentioned in last year's *Survey*, that the instigation and facilitation of condemnation proceedings by an owner-lessor against the demised premises, which resulted in the tenant's eviction, constituted a breach of the express covenant of quiet enjoyment, has been affirmed in a three-to-two decision by the first department.[96] The affirmance is without opinion. The dissenting justices, however, took the position that another express covenant permitting the lessor to terminate in the event of condemnation vitiated the effect of the covenant of quiet enjoyment.[97]

A covenant giving the tenant an option of first refusal to purchase the demised premises was construed by the Court of Appeals as requiring the landlord to have received and notified the tenant of a bona fide offer at a definite price before the refusal of the tenant could constitute a waiver of his option rights. In the absence of a bona fide offer at a definite price communicated to the tenant, a refusal by the tenant to meet the price at which the property was listed for sale was not operative as a waiver or estoppel, and the tenant was held to be entitled to specific performance against the lessor at the price eventually agreed upon between the lessor and a third party.[98]

Security Deposits.—Section 233 of the Real Property Law provides that money deposited by a tenant "as security for the performance of a contract for the use or rental of real property" shall constitute a trust fund in the hands of the landlord. In *People v. Horowitz*[99] the Court of Appeals affirmed the dismissal of an indictment for grand larceny charging the defendants with having misappropriated funds deposited as security by a concessionaire with the operators of a motion picture theatre. The court held that the statute applied only where the usual landlord-tenant relationship existed and that where, as in the instant case, no defined space was demised, the concessionaire was a mere licensee. While the decision is undoubtedly justified by the maxim of strict construction of penal laws, there can be no doubt that the underlying purpose of protecting the tenant

[95] Dolman v. United States Trust Co., 206 Misc. 929, 134 N.Y.S.2d 508 (Sup. Ct., N.Y. Co. 1954), 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1587.

[96] Dolman v. United States Trust Co., 1 A.D.2d 809, 148 N.Y.S.2d 809 (1st Dep't 1956).

[97] Id. at 809, 148 N.Y.S.2d at 810.

[98] Cortese v. Connors, 1 N.Y.2d 265, 135 N.E.2d 28 (1956). See also Sautkulis v. Conklin, 1 A.D.2d 962, 150 N.Y.S.2d 356 (2d Dep't 1956), holding a first refusal option unenforceable for uncertain description.

[99] 309 N.Y. 426, 131 N.E.2d 715 (1956).

against the insolvency or defalcation of the landlord is equally applicable to licenses and leases. An amendment to section 233 is clearly needed.

Windfalls.—In *Fieger v. Glen Oaks Village, Inc.*[100] the Court of Appeals affirmed the dismissal of a complaint in a representative action by tenants against the builder of an FHA-insured development for the recovery of alleged excessive rents resulting from a purported windfall profit. The court based its decision on three grounds. First, since the plaintiffs' rent was fixed by federal officials under federal laws the state court had no power to revise it. Second, in the absence of a statute this type of wrong has no remedy. And finally, the complaining tenants were not third-party beneficiaries of the contract between the builder and the FHA. This comprehensive disposition portends the failure of any future attempts by tenants to recover for the rent overcharges they have suffered as a result of windfall profits and the eventual cessation of this type of suit.

[100] 309 N.Y. 527, 132 N.E.2d 492 (1956), affirming 285 App. Div. 814, 136 N.Y.S.2d 539 (2d Dep't 1955) (mem.), affirming 206 Misc. 137, 132 N.Y.S.2d 88 (Sup. Ct., Queens Co. 1954), 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1589 (1955). See also Commissioner v. Gross, Docket Nos. 23869-79, 2d Cir., Aug. 29, 1956 (holding the windfall profits resulting from the financing of Glen Oaks Village taxable as capital gains rather than ordinary income); Choy v. Farragut Gardens, 131 F. Supp. 609 (S.D.N.Y. 1955).