

## Adjacent Airspace in the Law of Landlord and Tenant

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### Recommended Citation

DePaul College of Law, *Adjacent Airspace in the Law of Landlord and Tenant*, 6 DePaul L. Rev. 63 (1956)  
Available at: <https://via.library.depaul.edu/law-review/vol6/iss1/4>

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## COMMENTS

### ADJACENT AIRSPACE IN THE LAW OF LANDLORD AND TENANT

*Cuicunque Aliquid Conceditur, Conceditur Etiam et Id Sine  
Quo Res Ipsa Non Esse Potuit\**

Whether a tenant's right to space extends beyond the exterior of the walls bounding the premises demised must appear at first glance, even to the serious student of the law of landlord and tenant, a purely academic query. Even to raise the question may strike some as foolhardy since the field is already heavily laden with technical, indeed, hypertechnical concepts. But the question no longer may be regarded as one wholly within the realm of scholarly speculation. Like many recent vexations of the law it is a child of the material inventiveness and creativity of the twentieth century. In eras blessed with fewer gadgets, the tenant's right might safely be assumed to stop at the exterior of the walls, though there were some who doubted this at a time comparatively recent in the development of this phase of the law.<sup>1</sup>

With the cornucopia of science issuing forth a steady stream of new contrivances and devices, it has become commonplace to find a new legal problem created by nearly every invention. The television antenna, a fixture of the American landscape, has been a fruitful source of litigation. How far an air-conditioner may protrude into the airspace outside the tenant's window has been before the courts. The right to hang signs, or restrict them, has always been a problem, but one resolved on the basis of possession of the wall, and without a consideration of conflicting claims to adjacent or contiguous airspace.

Rather than wait for science to spring new surprises, and hence problems, it may be well to consider the question of the tenant's rights to adjacent airspace in advance. This in itself may seem revolutionary in a system of law slavishly addicted to solution by precedent. But the lack of cases in point must not deter the search for the answer to a problem destined to provide litigation in ensuing years. In assessing the problem, perhaps it would do well to bear in mind Holmes' observation:

Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious

\* Shep. Touch. 89.

<sup>1</sup> See arguments of plaintiff's counsel in *Riddle v. Littlefield*, 53 N.H. 503, 16 Am. Rep. 688 (1873).

result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.<sup>2</sup>

#### THE SIGN OR WALL EXTERIOR CASES

Notwithstanding the dearth of cases in point as to the right to adjacent airspace, the landlord and tenant relationship has given rise to one problem that literally ends where the immediate problem begins. The problem, distilled to its essentials, is whether the tenant, without agreement one way or the other, has the possession and right to use the exterior of the walls bounding the premises leased. An unbroken current of authority, both in the United States and England, holds that he does. A brief examination of the cases so holding is in order in that it is here that important clues exist indicating which way the courts will hold when ultimately they decide who has the right of enjoyment and possession of adjacent airspace outside the walls of the tenant's premises.

In the leading case of *Riddle v. Littlefield*, it was squarely held that the tenant, "by the terms of the lease of 'a certain store,' acquired the right to the use and occupation of the outside of the walls belonging to that portion of the tenement which included the store."<sup>3</sup> The court went on to point out that the tenant took the outside walls as a "parcel of the demised premises proper, and not as a thing technically appurtenant thereto. The outside wall of a building leased or conveyed passes by the lease or deed as much as the inside of the same wall."<sup>4</sup> Quoting with approval from a recognized authority,<sup>5</sup> the court held that "whatever easements and privileges legally appertain to property pass by a conveyance of the property itself, without any additional words. The grant of a thing passes the incident as well as the principal, though the latter only is mentioned; and this effect cannot be voided without an express reservation."<sup>6</sup> The court added:

A grant of a thing will include whatever the grantor had power to convey, which is reasonably necessary to the enjoyment of the thing granted. . . . If a house or a store be conveyed, everything which belongs to it or is in use with it, and whatever is essential to the enjoyment passes as an incident, unless specially reserved. Whenever anything is granted, all the means to attain it, and all the fruits and effects of it are also granted, and will pass inclusive. . . .<sup>7</sup>

Fourteen years later, an English court indicated its agreement with the *Riddle* case, citing it by name and approving its rationale.<sup>8</sup> The contro-

<sup>2</sup> Holmes, *The Common Law*, Lec. I, 35 (1881).

<sup>3</sup> 53 N.H. 503, 509, 16 Am. Rep. 688 (1873).

<sup>4</sup> *Ibid.*

<sup>5</sup> Smith and Soden, *Landlord and Tenant*, 86-88.

<sup>6</sup> *Riddle v. Littlefield*, 53 N.H. 503, 509, 16 Am. Rep. 688 (1873).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Carlisle Cafe Co. v. Muse*, 77 L.T. (Eng.) 515, 46 W.R. 107, 67 L. J. Ch. 53 (1897).

versy in the English case arose, as has so often been the case, over the right to hang signs. Defendant tenants leased the premises relying upon representations that they would have the right to use the outer walls for the purpose of advertising their business. Plaintiff, also a tenant, erected a sign that covered by some two and a half feet, the lower portion of the outer wall of the defendants' story. Defendant tenants of the upper floor, evidently inclined to seek summary relief, tore down the sign below, whereupon a suit was brought for an injunction to restrain the defendants from removing the sign or erecting one of their own. In defense, the *Riddle* case was urged upon the court as authority for the proposition that a tenant has the right to use both the outside and inside of the walls bounding the space he rents. The High Court of Justice, Chancery division, concurred with defendants' position, holding through Byrne, J.:

The premises let . . . constitute a little dwelling by itself. . . . It is said on behalf of the plaintiff, that the letting did not include the outer walls of the house. I think that it did include them, so far as they were solely appropriate to the rooms let. . . . If, then, the defendants had a right to use the outer walls at all, they had a right to use them in the way they have done. I think they had that right, and that the signboard put up by the plaintiff was in derogation of that right.<sup>9</sup>

Similarly, the Massachusetts courts have repeatedly held that the tenant is not restricted to the inside of the walls bounding the space rented. In *Lowell v. Strahan*, the court said there is no reason the landlord should be regarded as having one set of rights on the outside of the wall and quite a different set on the inside.<sup>10</sup> The court defined the rights of the landlord, stating that where he retains control of an upper tenement, he has the right in the whole wall for support, but that otherwise the tenant retains control and has the right to give a license to affix a sign to the wall to another without breaching a covenant against "underletting."<sup>11</sup>

In a Massachusetts case of more recent vintage, where a landlord sought to enjoin the maintenance of a sign by the lessee, the court refused to grant relief even though the lease provided for the necessity of the lessor's permission before any sign could be erected.<sup>12</sup> It was held that the landlord was estopped to deny the lessee's right to hang the sign since it had hung on the wall for some two and one half years, pursuant to the landlord's oral permission. The court restated what has been a recurrent theme in the cases:

<sup>9</sup> *Ibid.*, at 516.

<sup>10</sup> 145 Mass. 1, 12 N.E. 401 (1887).

<sup>11</sup> *Ibid.*, at 405.

<sup>12</sup> *Levin v. Rose*, 302 Mass. 378, 19 N.E. 2d 297 (1939).

A lease, unless otherwise providing, includes the control of the outside walls adjacent to the demised premises with the incidental right to such walls for such purposes as they are usually and ordinarily employed. . . .<sup>13</sup>

A similar statement was made where it was held, in denying relief in a tort action against the landlord, that an awning overhanging the store of a lessee was not shown to be in control of the landlord who occupied the floor above the demised premises, merely because the awning was attached to the outside of the wall.<sup>14</sup> *Blanchard v. Stones, Inc.*, another Massachusetts tort decision, held that where plaintiff was injured on a sidewalk as the result of ice formed thereon from water dripping from a sign hung by lessees, the burden of proof was on the plaintiff to show that the sign was under the lessor's control.<sup>15</sup> The court noted:

The fact that it was entirely, or almost entirely, located above the store premises is not enough to fasten liability upon the defendant [lessor]. There is nothing in the record to indicate that the portion of the exterior wall to which the sign was attached was in the control of the owner rather than in that of the tenants upon the second floor. Ordinarily, the control of such portion of this wall would be in the tenants of the second floor, who were occupying the premises adjacent to the wall, in the absence of anything to the contrary.<sup>16</sup>

And, in a relatively recent decision, the Supreme Judicial Court of Massachusetts affirmed an injunction preventing a first floor tenant from erecting a sign that extended on the wall of the building a mere fifteen inches above the floor level of the second floor.<sup>17</sup>

The *Riddle* case has received recognition in other jurisdictions.<sup>18</sup> *Forbes v. Gorman*, a frequently cited Michigan decision, held that the lease of a building, or of one floor or story thereof, conveys to the lessee "absolute dominion over the premises leased, including the outer as well as the inner walls."<sup>19</sup> It was said that the tenant acquired the right to use the walls for all purposes not inconsistent with the lease. *Hilburn v. Huntsman*, a Kentucky decision, affirmed denial of relief to a ground floor tenant stating that although a lintel upon which a sign was attached hung slightly below the tenant's ceiling line, there was no showing that the sign itself extended below the ceiling.<sup>20</sup> The court noted however:

The principles of law governing a case of this kind are well settled. In the absence of a contrary provision in the lease, the lessee has the exclusive right to the

<sup>13</sup> *Ibid.*, at 298. Note also *265 Tremont Street, Inc. v. Hamilburg*, 321 Mass. 353, 73 N.E. 2d 828 (1947).

<sup>14</sup> *Hannon v. Schwartz*, 304 Mass. 468, 23 N.E. 2d 1022 (1939).

<sup>15</sup> 304 Mass. 634, 24 N.E. 2d 688 (1939).

<sup>16</sup> *Ibid.*, at 691.

<sup>17</sup> *265 Tremont Street, Inc. v. Hamilburg*, 321 Mass. 353, 73 N.E. 2d 828 (1947).

<sup>18</sup> *Riddle v. Littlefield*, 53 N.H. 503, 16 Am. Rep. 688 (1873).

<sup>19</sup> 159 Mich. 291, 123 N.W. 1089, 1090 (1909).

<sup>20</sup> 187 Ky. 701, 220 S.W. 528 (1920).

use of the outside walls of the portion of the building covered by his lease, for advertising purposes, to the exclusion of a lessee of another part of the same building.<sup>21</sup>

In *Smith v. Jensen*, the Supreme Court of Georgia ruled that in the absence of an express provision to the contrary, the lease of a building, "or a portion thereof," for business purposes, gives the lessee "the exclusive right to the use of the outside walls of that portion of the building embraced in his lease for advertising purposes."<sup>22</sup> The court held that where there are different tenants of several floors of a building, a tenant on one floor has no right to prevent a tenant on another floor from placing signs upon the walls outside the other tenant's story. In a 1951 decision, the Rhode Island Supreme court restated the rule,<sup>23</sup> and the court of last resort in North Dakota has taken a similar position.<sup>24</sup>

Illinois apparently has adopted the doctrine of the *Riddle* case. In *400 North Rush, Inc. v. D. J. Bielzoff Products Co.*, plaintiff lessor brought an action against lessee under the state forcible entry and detainer act to oust the defendant from possession of a wall upon which the defendant had painted a sign.<sup>25</sup> Holding that the action could not be maintained, the court said that authorities in other states hold that "the exterior walls of leased premises are part and parcel of the demise to the lessee; and if that be the rule (as we think it is), there could have been no trespass. . . ."<sup>26</sup> In a subsequent case, the same Illinois Appellate court was called on to decide whether plaintiff lessee of two floors of a building could maintain an action of forcible entry and detainer to recover possession of the exterior surface of the walls of the floors which it had rented.<sup>27</sup> Defendants contended that the sign which they had painted on the walls was there by virtue of a license from the landlord, and that as mere licensees, the action of forcible entry and detainer, being in nature possessory, could not be maintained against them. Holding that the action could be maintained, the court said:

Defendants' claimed rights as licensee were with plaintiff's lessor, who it was determined . . . had no right to enter into the agreement. Defendants by painting a sign advertising a product of one of plaintiff's competitors on the outside wall of the building disseized plaintiff from its paramount right of possession to its portion of such wall. As long as defendants' sign remained, plaintiff was disseized and deprived of the possession to which it was lawfully entitled.<sup>28</sup>

<sup>21</sup> *Ibid.*

<sup>22</sup> 156 Ga. 814, 120 S.E. 417, 419 (1923).

<sup>23</sup> *Moretti v. C. S. Realty Co.*, 78 R.I. 341, 82 A. 2d 608 (1951).

<sup>24</sup> *Platou v. Swanton*, 59 N.D. 466, 230 N.W. 725 (1930). See also *Kratovil*, *Real Estate Law* § 654 (2d ed., 1952).

<sup>25</sup> 347 Ill. App. 123, 106 N.E. 2d 208 (1952).

<sup>26</sup> *Ibid.*, at 210.

<sup>27</sup> *D. J. Bielzoff Products Co. v. James B. Bean Distilling Co.*, 3 Ill. App. 2d 530, 123 N.E. 2d 135 (1954).

<sup>28</sup> *Ibid.*, at 137.

A Massachusetts decision defines in some detail the limits of the tenant's spatial rights.<sup>29</sup> The case involved an action in contract to recover the expenses of replacing a plate glass window broken by a third person, the window forming a part of the outer wall of the plaintiff's office. The lessee plaintiff was specifically forbidden to affix or paint any sign on the outside of the building. In holding that the lessor was under no obligation to replace the window, the court opined:

It is manifest that the tenant of a room possesses the incidental right to use and decorate the interior walls, floor and ceiling in accordance with his own taste and needs so long as he does no harm to them. *His lease covers not merely the cubical space bounded by the inner planes of walls, floor and ceiling.* Such a tenancy implies the right to attach carpets or rugs to the floor. . . . Painting and papering are within the natural uses by the tenant of a room. These factors lead to the conclusion that, prima facie and in the absence of agreement, the lease in the case at bar included the whole of the plate glass window. . . .<sup>30</sup>

Most of the foregoing cases were concerned with relatively small buildings in which the competitive interests of several tenants were not in conflict. But there have been at least two cases considering the effect of a number of tenants in a single building on the general doctrine. In *Emmons v. D. A. Schulte, Inc.*,<sup>31</sup> the court held that putting advertising signs on an office building did not constitute waste, the Chancellor saying:

If it be legally sound to accord to the tenant of a floor or story of a building the exclusive use of the outside walls for advertising purposes, and the authorities clearly hold that it is, then there is no logical escape from the conclusion that a room or rooms should be accorded a similar right.<sup>32</sup>

But in *Fuller v. Rose*, where tenants were denied the right by the court to use the walls for advertising purposes although they could use the windows, it was held that tenants could not, in the absence of a showing of injury to their business, restrain the landlord from painting advertisements on the walls.<sup>33</sup> Conceding on the one hand that the lessee of an entire building acquires the right to use both sides of the wall, the court maintained that the presence of a number of tenants in a single building restricts the extent of the devise to each, and the rights and privileges incident thereto. The court observed:

The right of all must be so curtailed that they will not interfere with each other. In this building all of the tenants possessed the right to support and in-

<sup>29</sup> *Leominster Fuel Co. v. Scanlon*, 243 Mass. 126, 137 N.E. 271 (1922).

<sup>30</sup> *Ibid.*, at 272. (italics added) The court cited as authority for its holding two English decisions: *Hope Brothers, Ltd. v. Cowan*, 2 Ch. 312 (1913); *Goldfoot v. Welch*, 1 Ch. 213 (1914).

<sup>31</sup> 13 Del. Ch. 336, 120 Atl. 221 (1923).

<sup>32</sup> *Ibid.*, at 226.

<sup>33</sup> 110 Mo. App. 344, 85 S.W. 931 (1905).

closure of the south wall including the part thereof claimed by the plaintiffs. It would lead to absurd conclusions to say that any tenant was vested with title to any portion of the outer walls. The title to them remained in the owner of the building, whose duty it was to maintain them for the benefit of all the occupants. It has been said by some authorities that tenants in buildings of this character,<sup>34</sup> whose rooms are inclosed by an outer wall, have the right to use such portion of the exterior thereof for the placing thereon of their signs; but such right is a privilege acquired from . . . custom—a mere incident to, not a parcel of, the demised premises, and consequently not derived from title. The landlord may deprive his tenants of such privilege by stipulations in the lease, in which case, the ownership of the walls remaining in him, he may use their outside surfaces for purposes of revenue.<sup>35</sup>

The court cautioned that the landlord is required not to inflict damages upon the tenant upon his covenant to give the tenant uninterrupted and peaceable possession of the respective premises and therefore the landlord could not erect signs which would injure the business of any of the tenants. It was said that the court would not take cognizance of "aesthetics" and that "[o]ffended taste will not support a cause of action."<sup>36</sup>

The foregoing decision, qualifying the right of the tenant to the exterior of the wall almost to destroying it, is curious for a number of reasons. Most of the courts that have considered the problem seem to be influenced by what was no doubt an ingenious argument of counsel in the *Riddle* case, to the effect that if the landlord retained control of the wall space outside the premises demised to the tenant, the landlord could rent the space to a competitor which could put the tenant out of business.<sup>37</sup> The Missouri court collided head on with the same proposition but chose to approach the problem from a different direction, holding that the landlord retained ownership of the wall, but could run no advertisements harmful to the business of the tenants. This solution enabled the court to back out of what would otherwise have been equitably a dead-end street, but the rationale of the case lacks the semblance of symmetry intrinsic in the doctrine of *Riddle v. Littlefield*.<sup>38</sup>

An undercurrent of controversy in the wall or sign cases has revolved around acts of the tenant in using the exterior of the wall, involving possibility of waste or damage to the landlord's reversionary interest. Because of the varying factual situations, it is difficult in the extreme to fashion any sort of general definition as to what constitutes waste in this

<sup>34</sup> The building in the instant case was seven stories, had 100 rooms and 50 tenants.

<sup>35</sup> 110 Mo. App. 344, 85 S.W. 931, 932 (1905).

<sup>36</sup> *Ibid.*

<sup>37</sup> See argument of defense counsel in *Riddle v. Littlefield*, 53 N.H. 503, 507, 16 Am. Rep. 688 (1873).

<sup>38</sup> The possibility that a tenant might be eliminated from the market was of course not the only string in the bow of the New Hampshire court.



regard. An examination of a few decisions will suffice for purposes of the question at hand.

In *Bee Building Co. v. Peters Trust Co.*, the issue was whether the lessee of a building had the right to abandon or change the name of the building, and in doing so, to partially dismantle a parapet wall for that purpose.<sup>39</sup> Quoting with approval from a leading text writer, the court said that a lease of part of a building prima facie passes the outer walls adjacent to the rooms or apartment named as a part of the premises leased, and consequently the lessee has the exclusive right to use such wall for advertising purposes.<sup>40</sup>

In holding that the lessee had the right to partially dismantle and rebuild the parapet wall which held the old name of the building, the court reasoned that no damage was done to the freehold since it was shown that the rental value of the building remained unaffected by the changes in the wall, and that the lessee had the right to change the name so as to indicate its possession of the building.

As noted, the question of waste ultimately hinges on the facts of each particular case. Thus where the tenant in possession of a boardinghouse allowed the defendant to paint on a blank wall of the premises a large sign advertising chewing gum, a decision for plaintiff-owner for damage to his reversionary interest was affirmed.<sup>41</sup> The defendants cited *Riddle v. Littlefield*<sup>42</sup> as authority for the right of the tenant in possession to allow the sign to be painted. The court answered the defendants' contention in the following manner:

[I]t is therefore plain that the tenant in possession is entitled to the use of the outside of the walls, just as he is entitled to the use of the inside of the walls, and can delegate that use to a third person.

But the . . . authorities . . . clearly establish the rule that the tenant in possession of the property cannot so use the outer wall as to injure the freehold, nor can he use them for a purpose inconsistent with the lawful and reasonable enjoyment of the property.<sup>43</sup>

It was held that since the tenant could give the defendant no authority to damage the freehold, the jury having found that the painting of the sign did constitute such damage, the defendant third party was liable to the plaintiff-owner.

In the light of the cases, it may be taken as established that the tenant has the right to possession as a part of the demised premises the exterior

<sup>39</sup> 106 Neb. 294, 183 N.W. 302 (1921).

<sup>40</sup> *Ibid.*, at 303. 1 Tiffany, Landlord and Tenant 271.

<sup>41</sup> *Kretzer Realty Co. v. Thomas Cusack Co.*, 196 Mo. App. 596, 190 S.W. 1011 (1916).

<sup>42</sup> 53 N.H. 503, 16 Am. Rep. 688 (1873).

<sup>43</sup> 196 Mo. App. 596, 190 S.W. 1011, 1013 (1916).

of the wall, and that in the absence of agreements against subletting, he may allow another to use the wall. The only qualification on this right is that which exists in relation to every part of the leasehold premises, namely, that the tenant must not injure the landlord's reversionary interest nor commit waste.

#### TELEVISION ANTENNA CASES

Having discovered that the cases hold that the tenant has the right to at least the exterior of the walls, it becomes important to consider a group of cases that have at least indirectly touched upon the question of tenant's rights to adjacent airspace.

Because New York reports more fully than any other jurisdiction, the opinions of its inferior courts, and because of the countless apartments in New York City, most of the cases available for consideration are from that state. However, there appear to be no cases from the court of last resort in that state bearing on the issue. Since many of the antenna cases have gone off on questions of pleading or other collateral issues, only those which come reasonably close to a discussion of the problem of the right to adjacent airspace will be considered.

One of the first television antenna cases held that the installation of an antenna on the roof or exterior walls of a building, without first getting the landlord's consent in writing, was a violation of a lease provision calling for written consent, but did not constitute a violation so substantial as to warrant eviction.<sup>44</sup> The case appeared to augur well for the rights of tenants, but the decision must be viewed in the light of the housing emergency existing in New York at the time. Yet, the language of the court was certainly favorable to the tenant's position. Witness the following bit of *obiter dictum*:

The advent of television is an incident in the progress of the times. It is unnecessary to dwell at length upon the comforts, the convenience and the educational vistas which are opened up by this comparatively new device. Suffice it to say that its presence in many homes is becoming increasingly common with a rapidity that resembles the acceptance of the radio when sets for home use were first made and marketed. . . . Undoubtedly, when telegraph poles were first erected with the wires stretching across their heights, many people felt that the sight was an ungainly one and their presence objectionable.<sup>45</sup>

*Goldstein v. Alweiss*, cited several times later in cases favorable to landlords, held in a cryptic and terse opinion that where, without the landlord's permission, the tenant attached a television antenna to the outside frame of a window in his apartment, "the erection and maintenance of

<sup>44</sup> *Barfur Realty Corp. v. Kaufman*, 83 N.Y.S. 2d 847 (Mun. Ct., N.Y., 1948).

<sup>45</sup> *Ibid.*, at 848.

this structure constitute[d] an unauthorized intrusion or squatting on the landlord's property within the purview of §1411 of the Civil Practice Act."<sup>46</sup>

In *Ruthann Corp. v. Adler*, petitioner sought to recover possession of the outside portion of one of respondent's living room windows, upon which an antenna had been installed.<sup>47</sup> It was contended that to the extent to which the arrangement of the bars touched the outside portion of the tenant's window, there was a squatting or intrusion within the meaning of the statute. Bringing the case under the squatter sections of the act was a fatal misstep for the petitioner. The court seized upon it to hold for the tenant, in what was to prove to be the last of the decisions favorable to lessees. Landlords' lawyers in subsequent cases took the hint and brought their cases under different theories. The court in the *Ruthann* opinion noted:

The window in question is the usual rectangular opening in the wall of a building . . . the window extends from the outer surface or facade of the building, to the inner surface of the walls of the tenant's apartment. . . . Its ordinary, most obvious purpose is to give the tenant immediate access to the easement in light and air enjoyed by lands in private ownership abutting the public way. To give full effect to this palpable purpose the tenant must be deemed to have a possessory right in every part of the window, throughout its length, breadth and depth; *from its inner perimeter to its outer perimeter and all that lies between.*<sup>48</sup>

It was concluded that having come into possession of the entire window frame, for any purpose the tenant could not be regarded as a squatter or intruder in the sense in which the words were used in the statute. "A squatter is one who settles on the lands of another without any legal authority," the court noted.<sup>49</sup>

Another window frame case, *West Holding Corp. v. Cordero*, held for the landlord when he sought an injunction under the theory that the tenant was guilty of trespass.<sup>50</sup> Defendant in that case occupied a sixth floor apartment in plaintiff's building. Without the plaintiff's permission, the tenant installed a television antenna consisting of two pipes that extended out of one of the apartment windows. The antenna was attached to the window frame. The landlord testified on trial that he offered to grant the tenant permission to install a television aerial on the roof if the tenant would execute a lease increasing the present rental by fifteen per cent. The court observed:

<sup>46</sup> 196 Misc. 513, 93 N.Y.S. 2d 854 (S.Ct., 1949). The antenna in the case was affixed to the window frame by bolts and extended outwardly away from the building for a distance of about a foot and a half. The window was located one flight up and directly above the entrance to the building.

<sup>47</sup> 197 Misc. 30, 95 N.Y.S. 2d 20 (Mun. Ct., N.Y., 1950).

<sup>48</sup> *Ibid.*, at 21 (*italics added*).

<sup>49</sup> *Ibid.*

<sup>50</sup> 114 N.Y.S. 2d 668 (S.Ct., 1952).

The tenant has no legal right, without the landlord's permission, to erect or attach a television aerial to the frame of a window in his apartment. . . . Equity is properly invoked to enjoin a continued trespass. The defendant has refused to remove the television aerial and threatens to continue its installation and use. Under such circumstances the plaintiff is entitled to equitable relief enjoining the defendant from the continued maintenance and use of such aerial television.<sup>51</sup>

Of course, where a lease provided that "no plants, rugs, bedding or anything of any nature whatsoever shall be placed in the window or out of the same," the court properly enjoined the tenant from maintaining, by means of a metal bar braced against the window frame, a television antenna projecting out of the window.<sup>52</sup>

As to the right to erect an antenna on a roof, the uniform holding of the cases is against the tenant. *Kanon v. Hefgold Realty Corp.* held that where a television aerial erected by the tenant had been removed by the landlord because of the absence of written consent as required by the lease, the tenant could not have a temporary injunction restraining alleged interference with his peaceful enjoyment of the apartment because to grant the motion would destroy the status quo and grant plaintiff all the relief he could obtain by a final judgment.<sup>53</sup> In another roof antenna case, the court required removal of a roof antenna erected by the tenant of an apartment in a thirty-nine unit building.<sup>54</sup> The lease provided that the tenant should not "drill into, drive nails, . . . or place in any manner any sign, advertisement, illumination, or projection in or out of the windows or exterior, or from the said building or upon it in anyplace," except as approved by the landlord.<sup>55</sup> The court felt that there was damage to the reversion by the affixing of eye screws holding the leading line from the aerial.<sup>56</sup>

<sup>51</sup> *Ibid.*, at 669.

<sup>52</sup> 5701 15th Ave. Realty Corp. v. Rosenberg, 94 N.Y.S. 2d 560 (S.Ct., 1949).

<sup>53</sup> 194 Misc. 54, 85 N.Y.S. 2d 581 (S.Ct., 1949).

<sup>54</sup> Scroll Realty Corp. v. Mandell, 195 Misc. 972, 92 N.Y.S. 2d 813 (S.Ct., 1949).

<sup>55</sup> *Ibid.*, at 814.

<sup>56</sup> The problem became so aggravated in New York, that, like so many other sources of conflict in a large metropolitan area, it became a political football. Several bills relating to antennas were introduced in the 1949 session of the state legislature. Some of the bills were designed to guarantee every tenant the right to install and maintain an antenna or equipment necessary for the operation of television sets and forbade additional charges for tenants who had television sets. A. Int. 755; S. Int. 100; S. Int. 1089. Another group would have declared the installation, operation, and maintenance of antennas or other apparatus an ordinary incident of the tenancy and sought to make it a misdemeanor to make an additional rent charge. A. Int. 57; A. Int. 1260; S. Int. 1172. None of the bills were reported out of committee and one observer called them "demagogic."

In 1950, a bill was introduced in the State Assembly providing that: "Every agreement in or in connection with or collateral to any lease of real property denying the lessee the right to erect or maintain a radio or television aerial or antenna shall be deemed void as against public policy and wholly unenforceable, provided that the lessee

In so far as the courts hold that the tenant has no right to erect aials on the roof, they appear to be on solid ground. Although the lease of an entire building includes the roof,<sup>57</sup> and a lease of a portion of a building entirely independent of other sections includes the roof,<sup>58</sup> where there is a common roof over premises occupied by several different tenants, the portion of the roof covering the premises leased to one tenant is not included in the lease.<sup>59</sup> It has been said that tenants sharing a common roof have no easements or rights in the roof except for purposes of shelter.<sup>60</sup>

As for considerations of policy, hear New Jersey Vice Chancellor Jayne in holding that a tenant had the right to install a television set, but not the right to erect a twenty-five foot antenna in the rear-yard to which the lessee had the right to use in common with other tenants:<sup>61</sup>

There are casual and incidental rights and interests which sometimes pass to lessees by implication arising from reasonable needs, conventional uses, or from other circumstances manifesting the probable intentions of the parties.

No one, I conjecture, has as yet prepared a written lease or contract so copious and diffuse as to speak its entire piece.

And so, where the nature of the intended basic and principal use of the premises is made perceptible, the rights and privileges which habitually and customarily appertain to and accompany such a use are implied, unless clearly negated.

To the trite expression that death and taxes are certain may also be added as of equal certainty the changes of the customs of life. Must a lessee now find in his lease the express permission to install a telephone?

Science has bequeathed to humanity the radio, the juke box, air-conditioning, and the neon sign, all of which may more commonly and generally than elsewhere be found at modern cafes, restaurants and places for recreation and entertainment. Was it not evident in February last that television sets would be similarly popular and prevalent in such resorts?

That the law should always be harmonious with the contemporaneous standards of knowledge and intelligence is a conviction I do not care to defy. Sound law is the dictate of reason. *Lex est dictamen rationis.*<sup>62</sup>

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pays or offers to pay to the lessor any increase in insurance premiums resulting from the installation of such aerial or antenna." A. Int. 16.

All of the proposed bills were assailed as ignoring property rights, increased insurance costs, damage liability to passersby, fire hazards and matters of size regulation. But they also indicated that the law, as well as nature, abhors a vacuum.

<sup>57</sup> Robinson v. Armstrong, 154 Kan. 336, 118 P. 2d 503 (1941).

<sup>58</sup> Rayhertz Amusement Corp. v. Fulton Improvement Co., 124 N.J. Eq. 121, 200 Atl. 557 (1938).

<sup>59</sup> Adler v. Sklaroff, 154 Pa. Super. 444, 36 A. 2d 231 (1944); Liberal Clothing Co. v. Delson Realty Co., 121 W. Va. 721, 6 S.E. 2d 236 (1939).

<sup>60</sup> Smelser v. Deutsche Evangelische Lutherische Gemeinde der St. Markus Kirche, 88 Cal. App. 469, 263 Pac. 838 (1928).

<sup>61</sup> Bellomo v. Bisanzio, 142 N.J. Eq. 363, 60 A. 2d 64 (1948).

<sup>62</sup> Ibid., at 65.

In addition to the problems of television antennas, the courts have recently been called upon to decide just how far air-conditioners may project into contiguous airspace. Two lower New York courts have openly split on the question, not yet settled by the highest court in the state. In the first case, the court dismissed an action to compel removal of an air-conditioning unit projecting six inches beyond the window sill, no part of which touched the outside of the building.<sup>63</sup> The court said that the principle underlying a squatter proceeding is that the alleged squatter is unlawfully trespassing upon and remaining in possession of realty. "The air-conditioning unit in the instant proceeding," the court noted, "has its physical origin and attachment on the demised premises and is incidental to the tenant's enjoyment of those premises, and is, therefore, distinguishable from the television antenna cases."<sup>64</sup> Three years later, another court in the same state, in reversing a final order for the tenant, said simply:

The installation and maintenance by the tenant of an air-conditioning unit projecting beyond the building wall is an intrusion or squatting upon the landlord's property within the purview of . . . the Civil Practice Act. In so far as Taft Constr. Corp. v. Bachnoff<sup>65</sup> is to the contrary, we must decline to follow it.<sup>66</sup>

The television antenna and air-conditioning unit cases presented the courts with an excellent opportunity to define the rights of the tenant to the area outside the tangible, physical boundaries of the premises. But, as should be evident from the foregoing discussion, the problem has received scant attention. This is in part due to the fact that counsel in most of the cases have been content to argue the cases on other grounds, or upon broader theories of landlord and tenant which appeared to meet the exigencies of the varying situations. The courts likewise have been unwilling to examine this problem, the solution of which might have rendered more satisfactory results in some of the cases decided. *Dudic Holding Co. v. Reinstein*, a masterpiece of terseness and brevity, is typical of the treatment accorded the problem.<sup>67</sup>

Even within the limits of the issues attempted to be settled, the television cases are inconclusive. They hardly define the rights of tenants as to erection of aerials. With the wall cases as a ready springboard, the courts might have gone on to settle the problem. As they have not, it is apparent that only by recurring to the bedrock of landlord and tenant law can feasible solutions to the question be posited.

<sup>63</sup> Taft Constr. Corp. v. Bachnoff, 107 N.Y.S. 2d 898 (Mun. Ct., N.Y., 1950); aff'd 116 N.Y.S. 2d 67 (S.Ct., 1951).

<sup>64</sup> Ibid., at 899.

<sup>65</sup> Ibid.

<sup>66</sup> Dudic Holding Corp. v. Reinstein, 205 Misc. 42, 129 N.Y.S. 2d 401 (S.Ct., 1953).

<sup>67</sup> Ibid.

## POLICY CONSIDERATIONS AND GENERAL THEORIES

Textwriters, theorists and courts have been generous in their statement of the tenant's rights. Most of the pronouncements have been so broad that the rights, unless "limited by the neighborhood of principles of policy," which are other than those upon which the particular rights are founded, "tend to declare themselves absolute to their logical extreme."<sup>68</sup> Yet these general statements have value in that they indicate certain policies in the law which have become maximatic in statement, if not in application from case to case.

Taylor declares that a tenant is entitled to the use of "all those privileges, easements, and appurtenances in any way belonging to the premises under lease, as incident to his grant," unless the landlord restricts the rights by stipulation.<sup>69</sup> In another passage in his treatise, he states:

In general, the grant of a thing passes the incident as well as the principal, though the latter only is mentioned, unless there appears an express reservation. Thus, the lease of a building passes everything belonging to it which is essential to its enjoyment.<sup>70</sup>

It could hardly be contended, it would seem, that a tenant could lease an entire building and not have the right to extend into the column of airspace surrounding the building, various mechanical or structural projections necessary for the reasonable enjoyment and use of the building. The conclusion, however, is not so readily drawn where the tenant leases a relatively small space in a building, along with several other tenants. Questions of practicality press the rule at every point, competing interests forcing and compelling compromise at every turn.<sup>71</sup>

However, Taylor's statement of the principle seems to be in accordance with the common-law rule, stated by the Supreme Court of Alabama in *Senteney v. United Embroidery Co.*<sup>72</sup> There, authority was cited in the jurisdiction to the effect that lessees have by implication, the right to "possess and enjoy" the premises and "to put it to such use and enjoyment as they please," not materially different from that in which it is usually employed, "to which it is adapted, and for which it was constructed."<sup>73</sup>

<sup>68</sup> *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). Opinion by Mr. Justice Holmes.

<sup>69</sup> Taylor, *Landlord and Tenant* (9th ed.), 275.

<sup>70</sup> *Ibid.*, at 192.

<sup>71</sup> In *Adler v. Sklaroff*, 154 Pa. Super. 444, 36 A. 2d 231, 233 (1944), the court states: "[W]here a landlord leases different parts of a building to different tenants he remains in control of those portions not specifically leased, and as to such portions he retains the responsibilities of a general owner."

<sup>72</sup> 230 Ala. 53, 159 So. 252 (1935).

<sup>73</sup> *Ibid.*, at 255.

In *Weiland v. American Stores Co.*,<sup>74</sup> the Supreme Court of Pennsylvania, holding that a tenant was not liable for injuries due to a defective sidewalk, quoted with approval from a learned textwriter to the following effect:

The lease of a part of a building carries with it for the benefit of the tenant everything which is necessarily used with or which is reasonably necessary to the enjoyment of the particular portion which he occupies. . . . Under the general rule that those rights essential to the enjoyment of the demised premises, and necessary for the enjoyment thereof, pass as appurtenant thereto, the rights of ingress and egress pass to the tenant even though they are not specifically mentioned.<sup>75</sup>

The California courts likewise have been liberal in their definitions of tenant rights. In *Bellon v. Silver Gate Theaters*, a state appellate court, holding that whether a basement was part of the demised premises where a store above was leased to the tenant was a question of fact for the jury, said that a lease of a part of a building passes with it everything "necessarily used with or reasonably necessary to the enjoyment of the part demised."<sup>76</sup>

In *Jackson v. Birgfeld*, a Maryland court said that in determining what constitutes the premises, the court, after considering the language of the instrument itself, considers the nature of the building and surrounding property and the general purposes of the parties.<sup>77</sup> The court regarded as settled that a deed, absent qualifications, passes to the grantee everything reasonably necessary to the full beneficial use and enjoyment of the property. "This principle," the court declared, "is equally applicable to a lease."<sup>78</sup>

Similar considerations as to reasonable use and enjoyment have been involved in construing the word "appurtenance." In an Illinois decision, the court held that a lease of rooms on the third floor of a building could by no reasonable interpretation include as an appurtenance a storage

<sup>74</sup> 346 Pa. 253, 29 A. 2d 484 (1943).

<sup>75</sup> Ibid., at 485. Trickett, Landlord and Tenant (2d ed.), 47, 48. In *Martel v. Malone*, 138 Conn. 385, 85 A. 2d 246, 249 (1951), citing language in *Arpile v. Colonial Trust Co.*, 118 Conn. 573, 579, 173 Atl. 237, 239 (1934), the court states: "In the absence of an agreement, expressed or implied, the tenant of an apartment acquires an exclusive right of occupancy and control of that apartment, and as incidental thereto of those parts of the structure which form an integral part of the tenement. 1 Underhill, Landlord and Tenant § 3." The court held that the landlord was responsible only for structural defects as the tenant has no exclusive control of them. Thus it was held that the landlord would be liable for structural defects in beams supporting a floor but not for defects in the floorboards.

<sup>76</sup> 4 Cal. 2d 1, 47 P. 2d 462, 467 (1935). See *Owsley v. Hamner*, 83 Cal. App. 2d 454, 189 P. 2d 50 (1948).

<sup>77</sup> 189 Md. 552, 56 A. 2d 793 (1948).

<sup>78</sup> Ibid., at 795.



space in the basement of the building, entirely apart from space designated in the lease itself.<sup>79</sup> The court stated that nothing passes by the word appurtenance except "incorporeal easements, or rights, or privileges, strictly necessary and essential to the proper enjoyment of the estate granted."<sup>80</sup> Mere convenience, said the court, will not create an easement.<sup>81</sup>

How courts balance some of the conflicting claims of right is amply illustrated by *Owsley v. Hammer*.<sup>82</sup> The central point of controversy there was whether a lease signed prior to the completion of a building constructed around a central patio, restricted the lessor from closing up one of the street openings into the patio, converting it from a thoroughfare between two streets into a narrow *cul de sac*. The net effect of the conversion was to interfere with the light, air, visibility and access of passersby to the tenant's display windows.

After paying the customary homage to the rule that a "lease of part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised,"<sup>83</sup> the court reversed and ordered a new trial upon appeal by both parties, holding that in view of the importance of the patio, the fact that there was nothing in the lease as to the right of the landlord to close it off made it mandatory that oral evidence offered to show the intention of the parties be admitted. It was said that whether considered as an easement, or consideration of a contract, or an incorporeal right, the lessee is entitled to "all of that for which he contracted" at the time the lease was entered into. Thus the intent of the parties with regard to the patio became all important.<sup>84</sup>

It may be regarded as settled that a tenant may acquire a right to light

<sup>79</sup> *Harmony Cafeteria Co. v. International Supply Co.*, 249 Ill. App. 532 (1928).

<sup>80</sup> *Ibid.*

<sup>81</sup> The word "appurtenance" has undergone a process of deterioration as a concept of importance. In *Riddle v. Littlefield*, 53 N.H. 503, 508, 16 Am. Rep. 688 (1873), it is said: "These distinctions are refined, and in the common practice of modern conveyancing are not much regarded,—the term appurtenances, in a vast majority of cases in deeds and leases, having, in fact, I presume, no meaning whatever in the minds of the contracting parties, who append the unnecessary formula by force of the custom and example which has for so long a time applied it to grants and leases of a principal thing, to which no inferior easement or servitude whatever, in fact, belongs."

<sup>82</sup> 83 Cal. App. 2d 454, 189 P. 2d 50 (1948).

<sup>83</sup> *Ibid.*, at 52.

<sup>84</sup> The trial court in the instant case found that it was the manifest intention and agreement of the lessor and lessee that the lessee should have occupancy of the interior areas described in the lease (the patio) and the right to have it kept open for free access by the lessee's customers. Curiously enough, however, the trial court concluded that there was nothing in the lease which required the landlord to keep the building as it was originally constructed.

and air from an open space owned by the lessor which is necessary to the beneficial enjoyment of the premises demised, even though there be no express agreement to that effect between lessor and lessee.

Some of the cases, even at an early time, have said that a lease, expressing nothing as to the way in which premises are to be used, clothes the lessee with full power and right to use the land in the same manner that the owner might have used it, subject to the usual qualification as to damage to the reversion. The cases are legion as to this point.<sup>85</sup> Courts have continually held that the lessee stands in the position of an owner in fee with regards to rights of use,<sup>86</sup> except that the lessee may not commit waste, and thus where the lessor draws the lease, ambiguities will be drawn against him most stringently.<sup>87</sup> The Draconian possibilities of such a doctrine are plain, yet the courts have not, as a statement of principle, seen fit to narrow it. Treating the lessee as the owner of a possessory estate, the courts have continually said that the lessor may be sued in trespass for unlawful entry,<sup>88</sup> or in ejectment where the tenant has been evicted, or possession has not been delivered to the lessee.<sup>89</sup>

In short, the holding of the courts has been that while the lease is in force, the tenant is the absolute owner of the premises and the landlord has only a reversionary interest. Textwriters have assented in this proposition, Taylor stating:

Upon taking possession the tenant is invested with all the rights incident to possession and to the use of all the privileges and easements appurtenant to the tenement. He may maintain an action against any person who disturbs his possession or trespasses upon the premises though it be the landlord himself. . . .<sup>90</sup>

Under the existing principles of landlord and tenant, it would be cautious in the extreme to declare that a tenant's rights do not extend beyond the exterior of the wall bounding the premises, where an extension would be necessary for the beneficial enjoyment of the premises. Of course, there are competing claims of right where there are several tenants, as in an office or apartment building, but this would seem to call for a balancing of the rights as between the tenants, instead of a restriction of the tenants rights *vis-à-vis* the landlord. In view of the fact that the language of the

<sup>85</sup> *U.S. v. Bostwick*, 94 U.S. 53 (1877); *Asling v. McAllister-Fitzgerald Lumber Co.*, 120 Kan. 455, 244 Pac. 16 (1926).

<sup>86</sup> *Columbia R. Gas & E. Co. v. Jones*, 119 S.C. 480, 112 S.E. 267 (1922); *Stern v. Sawyer*, 78 Vt. 5, 61 Atl. 36 (1905).

<sup>87</sup> *Grassham v. Robertson*, 277 Ky. 605, 126 S.W. 2d 1063 (1939); *Carbon Fuel Co. v. Gregory*, 131 W. Va. 494, 48 S.E. 2d 338 (1948).

<sup>88</sup> *Stanton v. Tapp.*, 113 Md. 324, 77 Atl. 672 (1910); *Winchester v. O'Brien*, 266 Mass. 33, 164 N.E. 807 (1929).

<sup>89</sup> *Walker v. Clifford*, 128 Ala. 67, 29 So. 588 (1900).

<sup>90</sup> *Taylor, Landlord and Tenant* (9th ed.), 228.

courts has been anything but restrictive of tenant's rights, it becomes difficult to reconcile the holdings in the New York television antenna cases with the principles enunciated in other decisions.

Because of the intangible nature of rights to airspace, the theorist treads on thin ground in attempting to define spatial limitations that may, in some instances, defy limitation, or be inherently incapable of precise delineation.<sup>91</sup> However, there is some degree of comfort in Whitehead's remark that success in practice depends on "theorists who, led by other motives of exploration, have been there before, and by some good chance have hit upon the relevant ideas."<sup>92</sup>

#### CONTIGUOUS LAND, CONTIGUOUS AIRSPACE

While an examination of so-called settled concepts provides an indication as to the path the courts may follow, there is one rule that, if applied by analogy, lends great weight to the tenant's right to reasonable use of the airspace outside the walls of the premises demised.

That rule is that a lease of an entire building, or the grant in fee of a building, carries with it "so much of the lot on which the building stands as is necessary to the complete enjoyment of the building for the purpose for which it was leased."<sup>93</sup> If this principle applies to the lease of an entire building, why not to the lease of an entire floor, and if to the lease of an entire floor, why not to a lease of an apartment or room? As the lot surrounding the building may be necessary to its complete enjoyment, similarly, the column of airspace surrounding it may be indispensable to reasonable and full use of the demised premises.

In *McDaniel v. Willer*, a recent case, there was a lease of a "General Merchandise store Building and Fixtures therein—The Store building is located in Village of Coffman, County of Ste. Genevieve, State of Mo. . . ."<sup>94</sup> The controversy was over admissibility of evidence tending to show that the parties by their actual agreement, had not intended to limit the property demised to the store building itself as appeared on the face of the lease, but on the contrary had intended and agreed that the leasehold

<sup>91</sup> Note, for instance, the difficulty courts have had in reconciling the maxim, *Cujus est solum ejus est usque ad coelum*, Shep. Touch. 90, with the right of free navigation of the skies. *U.S. v. Causby*, 328 U.S. 256 (1946), is a relatively recent and controversial decision in this regard.

<sup>92</sup> Whitehead, *The Aims of Education* (Mentor ed., 1952), 107.

<sup>93</sup> *Jackson v. Birgfeld*, 189 Md. 552, 56 A. 2d 793, 795 (1948). Whether land in the rear of a building is necessary to its complete enjoyment is a question for the jury depending upon the facts of the case, the court ruled. Note *Sheets v. Selden*, 2 Wall. 177, 17 L.ed. 822, 826 (1865), where it is said that a deed, in the absence of any language indicating a contrary intention of the grantor, passes to the grantee everything that is properly appurtenant to the land conveyed, i.e., everything essential or reasonably necessary to the full beneficial use and enjoyment of the property.

<sup>94</sup> 216 S.W. 2d 144 (Mo. App., 1948).

estate should embrace land immediately to the rear of the store upon which was situated an old barn, previously used for storage by the last proprietor of the store. Holding that the lease was ambiguous and that parol evidence was admissible to clear up the ambiguities, the court said:

The authorities are agreed that where, as in this instance, a lease purports on its face to be no more than the lease of an entire building, and contains no reference to the land, it will be none the less construed as carrying with it the lease, not only the land upon which the building actually stands, but also such adjacent land belonging to the lessor as may be used with the building or may be necessary to its proper occupation for the purpose for which it was intended.<sup>95</sup>

The court labeled as "arbitrary" an attempt by the landlord to restrict the leasehold estate to the lot on which the building was situated where the language of the lease "would comprehend whatever of his land might be shown to be incident to the complete enjoyment of the building."<sup>96</sup>

In view of the law's generosity with the landlord's land, why should it be less liberal with his airspace? An Illinois decision held that "[u]nder the recognized rules of construction, where property is leased by street number, the lease will include . . . the lot upon which the building itself is situated."<sup>97</sup> In the Massachusetts case of *Ansin v. Taylor*, it was held that ordinarily a grant of a house carries with it title to all the land under the house, including that under projecting eaves.<sup>98</sup> In *Patterson v. Graham*, it was held that where a lease does not in terms convey any right to a passageway to buildings in the rear of that leased, or any right to such buildings in the rear, the lease conveys so much of the lot on which the buildings stand as may be necessary to the complete enjoyment of the leased building for the purpose for which it is rented.<sup>99</sup>

The Illinois Supreme court has said in an early case that the grant of a steam elevator carries with it, as part of the grant, land upon which the elevator is located and all that is necessarily used in connection therewith.<sup>100</sup> The court cited *Tinker v. City of Rockford*<sup>101</sup> as authority for the proposition that when property is granted, whatever is necessary to the enjoyment of the grant is impliedly conveyed as an incident thereto. Thus, even though the mortgage conveying the elevator was upon a chattel mortgage form, it was held that the land on which the elevator was sit-

<sup>95</sup> *Ibid.*, at 144.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Killian v. Welfare Engineering Co.*, 328 Ill. App. 375, 387, 66 N.E. 2d 305, 311 (1946). Even where the deed conveyed the "building situated on lot number \_\_\_\_," it was held that the deed passed ten adjoining feet of another lot also occupied by the building. *Wilson v. Hunter*, 14 Wisc. 744, 80 Am. Dec. 795 (1861). Cf. *Gibson v. Brockway*, 8 N.H. 465, 31 Am. Dec. 200 (1837); *Dikeman v. Taylor*, 24 Conn. 219 (1855).

<sup>98</sup> 262 Mass. 159, 159 N.E. 513 (1928).

<sup>99</sup> 140 Ill. 531, 30 N.E. 460 (1892).

<sup>100</sup> *Cross v. Weare Commission Co.*, 153 Ill. 499, 38 N.E. 1038 (1894).

<sup>101</sup> 137 Ill. 123, 28 N.E. 573 (1894).

uated passed with the grant of the elevator. Likewise, the Alabama court of last resort has held that a mortgage on a grist and saw mill and gin, "together with all the privileges and appurtenances belonging thereto," included two acres of land upon which the mill and gin were located, and which had always been used in connection therewith and were thus "necessary to the enjoyment thereof."<sup>102</sup>

Finally, to adduce one extreme example, perhaps looking the other way as far as tenant's rights are concerned, there is the *Leiferman v. Ostein* case.<sup>103</sup> There, the landlord actually moved the building in which the tenant had rented a floor, to an adjoining lot. The court ruled that the tenant could have treated the removal as an eviction only by leaving, but that since he remained, there was no eviction. The court said that by renting part of a building, the tenant acquired only support rights and enjoyment of easements, but no estate in the land itself. Therefore, the tenant was only disturbed in the enjoyment of an easement, the court reasoned. This could constitute eviction only if treated as such by going out. Judgment for the landlord in the action of forcible entry and detainer was sustained. It is enough to say that the case is restrictive of the tenant's rights and is productive of a result more in keeping with the refinements of eviction law than with the underlying principles of landlord and tenant.

Nevertheless, it is settled that a lease of a building passes the land upon which the building stands for the duration of the lease, and in some cases may pass land contiguous or incident thereto necessary to the ordinary use and enjoyment of such building. It would, then, be obviously inconsistent to deny the lessee of an entire building necessary adjacent airspace, and yet grant him necessary adjacent land. And there are no cases so holding. Whether or not a lessee of a floor of a building, or of a room, has the right to make use of adjacent airspace necessary for the full enjoyment of the floor or room is not so obvious. However, consistency would require that such right be recognized.

#### CONCLUSION

Mr. Justice Holmes has pointed out that in law, only occasionally can an "absolutely final and quantitative determination" be reached, because as he says, "the worth of the competing social ends which respectively elicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed."<sup>104</sup>

There are few places in the law where his observation has greater validity than in assessing the rights of tenants in relation to other tenants and

<sup>102</sup> *Kimbrell v. Rogers*, 90 Ala. 339, 7 So. 241 (1890). Accord: *Rogers v. Snow*, 118 Mass. 118 (1875); *Trinity Church v. Boston*, 118 Mass. 164 (1875).

<sup>103</sup> 64 Ill. App. 578, 47 N.E. 203 (1896).

<sup>104</sup> *Law in Science and Science in Law*, Collected Legal Papers, 231 (1921).

in relation to the rights of the landlord. No doubt many of the decisions in the future in this regard will be "the unconscious result of instinctive preferences and inarticulate convictions . . . traceable to views of public policy in the last analysis."<sup>105</sup>

Yet is it possible to draw certain tentative conclusions. The courts have early and consistently held that the circle of the tenant's rights is great in circumference. They have not hesitated in giving him something like unbridled dominion over the exterior of the walls. Where an entire building has been leased, they have held that the lessee also takes by the lease necessary contiguous land. It is then but a short step to hold that the lessee of a floor, or of a room, has not only possession of the exterior of the walls, but also possession and the right to use adjacent airspace essential to the enjoyment of the lease.

But admittedly, the law here, as elsewhere, is unsettled, indeed undecided. Additional decisions will be needed to more fully clarify the rights of both landlords and tenants as technological advances continue to create new difficulties for lawyers and laymen alike. There is, then, reassurance in the words of Cardozo:

There are topics where the law is still uninformed and void. Some hint or premonition of coming shapes and moulds, it betrays amid the flux, yet it is so amorphous, so indeterminate, that formulation, if attempted would be the prophecy of what is to be rather than the statement of what is. . . . [W]ith all our centuries of common law development, with all our multitudinous decisions, there are so many questions, elementary in the sense of being primary and basic, that remain unsettled even now. . . . What is certain is that the gaps in the system will be filled, and filled with ever-growing consciousness of the process by a balancing of social interests, an estimate of social values, a reading of the social mind.<sup>106</sup>

<sup>105</sup> *Ibid.*

<sup>106</sup> *Paradoxes of Legal Science*, 76 (1928).

## COMMENTING UPON FAILURE OF ACCUSED TO TESTIFY

At common law, the defendant was incompetent to testify in a criminal proceeding.<sup>1</sup> As a result of such incompetency, comment by the prosecution concerning the failure of the accused to testify was of no importance. Historically, therefore, the problem of whether the prosecution can effectively comment upon the failure of the accused to take the witness stand was created by the enactment of the statutes which relieved the accused of his incapacity to testify.<sup>2</sup>

Some of these statutes contained express clauses that no presumption

<sup>1</sup> 2 Wigmore, *Evidence* § 579 (3d ed., 1940).

<sup>2</sup> *State v. Ferguson*, 222 Iowa 1148, 283 N.W. 917 (1939). For a list of the statutory enactments, see Reeder, *Comment Upon Failure of Accused to Testify*, 31 Mich. L. Rev. 40, 41, 42 (1932).