THE INDIGENT TENANT AND THE DOCTRINE OF CONSTRUCTIVE EVICTION

INTRODUCTION

In its report, President Johnson's National Advisory Commission on Civil Disorders, more popularly known as the "Riot Commission," stated:

> Today, after more than three decades of fragmented and grossly under-funded Federal housing programs, decent housing remains a chronic problem for the disadvantaged urban household. Fifty-six percent of the country's nonwhite families live in central cities today, and of these, nearly two-thirds live in neighborhoods marked by substandard housing and general urban blight. For these citizens, condemned by segregation and poverty to live in the decaying slums of our central cities, the goal of a decent home and suitable environment is as far distant as ever.[1]

The Commission also summarized some of the reasons for the snowballing phenomenon of the ghetto housing:

> The reasons many Negroes live in decaying slums are not difficult to discover. First and foremost is poverty. Most ghetto residents cannot pay the rent necessary to support decent housing.[2] This prevents private builders from constructing new units in the ghettos or from rehabilitating old ones, for either action involves an investment that would require substantially higher rents than most ghetto dwellers can pay. It also deters landlords from maintaining units that are presently structurally sound. Maintenance too requires additional investment, and at the minimal rents that inner-city Negroes can pay, landlords have little incentive to provide it.[3]

While the role of poverty in fostering slum conditions can scarcely be overestimated, its role has been exacerbated in certain major respects by outmoded principles of property law. The law of landlord and tenant has for many decades had to tolerate antiquated and rusty doctrines and must necessarily share some measure of the blame for the

1. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257 (1968).

2. However, in relation to their income, the Commission found that the slum tenant was paying *more* for his housing than was the case outside the ghetto; also it was found that less defective, more inexpensive lodging was often available for rent outside the ghetto but denied to the Negro because of his race. *Id.* at 258-259.

3. *Id.* at 259.

conditions described by the Riot Commission. It would, of course, be both unfair and inaccurate to deny that there have been important changes in this area of the law. Perhaps the most significant is the doctrine of constructive eviction by which a tenant can reject, like a defective chattel, the property he has leased. But new and far-reaching changes are desperately needed to solve the problems of the slums. One of the most pressing of these problems is the ineffectiveness of the doctrine of constructive eviction in the hands of the ghetto inhabitant. It is the purpose of this note to examine the doctrine of constructive eviction, its origin, its scope, and the conditions necessitating its modification.

I. The Landlord-Tenant Relationship at Common Law

A. *Historical Background*

1. *The Doctrine of Caveat Emptor*

It has been recently asserted that "to find a similarity between a feudal lord's fief and a cold water flat in a contemporary American city seems an anachronistic comparison."[4] Nevertheless, as new law students discover each year, often with astonishment, the heavy hand of the medieval past has a crushing grip on the "modern" law of real property in this country. In the words of one text writer, "landlord-tenant law suffers severely from senility."[5] Unfortunately, as will be shown below, it is the urban slum dwellers who suffers most from the persistence of this senile heritage.

The common law viewed the lease as a conveyance of reality for a term.[6] Along with the benefits of "ownership" of the property, the tenant also assumed its obligations and liabilities. As the tenant was legally in control of the premises, he, not the landlord, was responsible for its maintenance. Recognized as a conveyance of realty, with the rent regarded as the purchase price, the premises were leased subject to the same principle applied to the sale of a freehold interest in prop-

4. Note, *Rent Withholding—A Proposal for Change in Ohio*, 18 Wes. Res. L. Rev. 1705, 1707 (1967).

5. J. Cribbet, Principles Of The Law Of Property, 181 (1962).

6. *See, e.g.*, Fowler v. Bott, 6 Mass. 63 (1809); Warner v. Fry, 360 Mo. 496, 499, 228 S.W.2d 729, 730 (1950); Swingler v. Robinson, 321 S.W.2d 29 (Mo. Ct. App. 1959). *See also* W. Holdsworth, An Historical Introduction To The Landlaw, 230-355 (1927); H. Lesar, Landlord And Tenant, § 3.38 (1957) [hereinafter cited as Lesar]; C. Moynihan, Introduction To The Law Of Real Property, 69-73 (1962).

erty, i. e., the doctrine of *caveat emptor*. The doctrine is well stated by *Fowler v. Bott,* the leading early case:

> a lease for years is a sale of the demised premises for the term; and, unless in the case of an express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents or any other deterioration.[7]

In the absence of an express agreement to the contrary, therefore, landlords were not compelled to deliver possession of the premises in a safe and sanitary condition, the tenant taking the property "as is."[8]

Similarly, the lessor was under no duty to repair any defects which occurred while the tenant was in posession.[9] And if a demised building was destroyed by fire or other casualty, the tenant nevertheless remained liable for the payment of the rent reserved in the lease.[10] Even if the

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7. Fowler v. Bott, 6 Mass. 63, 67 (1809). *See also* authorities cited in note 6 *supra*. An exception is made in some jurisdictions for short term leases of furnished houses on the theory that no ample opportunity to inspect the premises was afforded the lessee prior to occupancy. And in at least one case, a court has held that when the premises are leased for short terms for immediate occupancy, there is an implied warranty of fitness regardless of whether the premises were furnished. Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931), noted in 16 MINN. L. REV. 445 (1932). In addition, in many jurisdictions, there is a duty on the lessor to inform the tenant of defects which are not discoverable by reasonable inspection of the premises. Failure of the landlord to apprise the tenant of such conditions, if known by the landlord, permits the tenant to rescind the lease and in some cases maintain an action for damages based on fraud. *See generally,* LESAR, § 3.45. In recent years, several courts have gone much further, and declared that in every lease there is an implied warranty of habitability, giving as reasons those stated by the Wisconsin court in Pines v. Perssion:

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*. Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.

14 Wis. 2d 590, 596, 111 N.W.2d 409, 412-13 (1961). *See also* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 523, 527 (1966).

8. See authorities cited note 7 *supra*.

9. *See* LESAR § 3.78 and cases cited therein; 2 R. POWELL, REAL PROPERTY ¶ 233 (P. Rohan ed. 1967). While the lessor was under no such duty, the tenant was under an obligation to the landlord to make such repairs as necessary to avoid liability for "permissive waste." 1 H. TIFFANY, REAL PROPERTY § 102 (3d ed. 1939).

10. *See, e.g.*, O'Neil v. Flanagan, 64 Mo. App. 87 (1895); Smith v. Kerr, 108 N.Y. 31, 15 N.E. 70 (1888). *Contra*, Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 69 N.W. 785 (1897). The theory behind this result was that the tenant is the "owner" of the premises and must bear the risks thereof. See notes 6, 7 and accompanying text *supra*. Similarly, the courts rationalized the rule on the presumption that the common law result reflected the intention of the parties since, if the tenant did not care to assume the risk of destruction, he might easily protect himself by an appropriate provision in the lease.

condition of the premises resulted in condemnation by municipal authorities,the tenant was not relieved of rent liability.[11]

The tenant was, of course, "free"[12] to secure a covenant from the landlord obligating the latter to assume the burden of repairing the premises. Therefore, the courts reasoned with thoughtless confidence, if the parties, being "free" men and standing on "equal terms"[13] did not expressly require such a covenant in the lease, it was surely not the function of the law to imply one. This deeply entrenched attitude of the courts played a significant role in shaping the present landlord law in this area. The invalidity of the "freedom of contract" presumption, on which the attitude is largely founded, will be dealt with below.

2. *Independent Covenants*

Despite his vastly superior bargaining position, it is possible that the landlord will covenant to make repairs independently of any coercion to do so imposed by law. Having secured such a covenant, however, the tenant has only slightly improved his position. At common law, covenants in a lease were recognized as being independent of each other, and a breach of covenant by one party did not relieve the other from his obligations under the lease.[14] Thus, nonperformance by the landlord of his covenant to repair or maintain the premises does not relieve the tenant of his duty to pay rent.[15] The reasons given to

Because of the belief that the lessor is in a far better position to insure the premises against such disasters, the common law has been modified and the risk of destruction placed upon the lessor by modern statutes. *See* LESAR § 3.103, at n.8 and accompanying text.

11. *See* Burnes v. Fuchs, 28 Mo. App. 279 (1887).

12. See notes 64-66 and accompanying text *infra*.

13. *See* Simmons, *Passion and Prudence: Rent Withholding under New York's Spiegel Law*, 15 BUFF. L. REV. 572, 575-576 (1966).

14. *See* RESTATEMENT OF CONTRACTS § 290 (1932); LESAR § 3.79; 3 H. TIFFANY, REAL PROPERTY § 909 (3d. ed. 1939). For an exhaustive annotation dealing with the rights of the tenant on breach of the landlord's covenant to repair, *see* Annot., 28 A.L.R.2d 446 (1953).

15. *See, e.g.*, Frazier v. Riley, 215 Ala. 517, 111 So. 10 (1926); Ng v. Warren, 79 Cal. App. 2d 54, 179 P.2d 41 (1947); Masser v. London Operating Co., 106 Fla. 474, 145 So. 79 (1932); Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938). However, an executory lease, wherein the lessor covenants to repair the premises prior to the tenant's possession, may be rescinded by the tenant if the landlord fails to repair; *see, e.g.*, Tuohy v. Novich, 230 S.W.2d 152 (Mo. Ct. App. 1950); Rein v. Robert Metrik Co., 200 Misc. 231, 105 N.Y.S.2d 160 (Sup. Ct. 1951); Minster v. Pennsylvania Co., 104 Pa. Super. 301, 159 A. 465 (1932). Acceptance of the premises prior to repair, however, renders the tenant liable for rent; *see, e.g.*, Richard Paul, Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945); Bankers Mtge. Co. v. Robson, 123 Kan. 746, 256 P. 997 (1927). The parties could, of course, expressly provide that the landlord's failure to repair relieved the tenant of

support the doctrine of independent covenants as it applies to the tenant's duty to pay rent are partly historical[16] and partly based on the presumption that covenants for services are subsidiary in the landlord-tenant relationship, and the breach of a promise to provide them can be readily compensated by an action at law.[17]

3. *Eviction and the Doctrine of Quiet Enjoyment*

A major exception to the doctrine of *caveat emptor* is the covenant of quiet enjoyment which is implied in all leases in the absence of express language to the contrary.[18] Basically, where the covenant is implied, the landlord warrants that he has an adequate title to the estate created by the lease, and that he will permit the tenant to enjoy the demised interest without disturbances or interruptions.[19] The basic purpose of the covenant for quiet enjoyment is to protect the tenant from the lawful claims of third parties having title paramount to the landlord as well as from any unlawful disturbances by the landlord or persons acting through him of the tenant's possession.[20]

This was indeed a significant exception to the doctrine of independent covenants and it was uniformly held that if the landlord or persons acting through him, actually evicted the tenant, that is, deprived him physically of the possession of a whole or substantial portion of the demised premises,[21] the tenant was thereby relieved of liability for rent.[22] To the early common law landlord, however, the problems presented by the implied covenant for quiet enjoyment were far from

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his liability for rent, but there is little doubt that few slum lords would enter into such a lease.

16. *See* RESTATEMENT OF CONTRACTS, comment to § 290 (1932); 6 WILLISTON, CONTRACTS § 890 at 587-589 (3d ed. 1962). It might also be noted that the property law of independent covenants became firmly established before the contract law of mutually dependent promises was developed.

17. *See, e.g.*, Goldberg v. Horan, 263 Mass. 302, 304, 160 N.E. 828, 829 (1928); Smithfield Improvement Co. v. Coley-Bardin, 156 N.C. 255, 72 S.E. 312 (1911). *See also* Bennett, *The Modern Lease*, 16 TEX. L. REV. 47 (1937).

18. The cases are collected in Annot., 62 A.L.R. 1257 (1929). For a discussion of the historical basis for the covenant of quiet enjoyment, see 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW, 253, 256-257 (2d ed. 1937); 3 G. THOMPSON, REAL PROPERTY, § 1129 (Replacement ed. 1959).

19. *See* cases cited in Annot., 62 A.L.R. 1257 (1929).

20. *Id.*

21. For a comprehensive collection of acts constituting actual eviction, see 1 J. RASCH, LANDLORD AND TENANT AND SUMMARY PROCEEDINGS, §§ 850-870 (1950).

22. *See* LESAR, § 3.52. In addition to the suspension of rent, the lessee may also sue for damages for breach of the covenant of quiet enjoyment, or even secure restoration of his possession; *id.* §§ 3.49, 3.52.

insurmountable. So long as the landlord did not physically oust the tenant, the latter remained liable for rent, and "no offensive or outrageous conduct on the part of the landlord, as by erecting a nuisance in the neighbourhood of the demised premises, will be sufficient" to release the tenant from his liability.[23]

This, of course, presented grave problems for the tenant. Conduct on the part of the landlord, such as failure to repair or provide heat, might render the premises utterly uninhabitable, yet so long as the lessor did not deny possession to the tenant, there was no eviction and no cessation of rent liability.

Such a state of affairs soon became unacceptable, even to the early common law judges. While it was apparently out of the question to suggest anything so radical as a modification of the view that possession of the property was the primary consideration of the landlord-tenant relationship, the courts were persuaded to liberalize the *actual* eviction requirement. Thus the link with the past was preserved, but the law was drastically changed by the emergence of a fiction, the doctrine of constructive eviction.

B. *The Doctrine of Constructive Eviction*

1. *Origin of the Doctrine*

The departure from the old law is perhaps best demonstrated by the leading case of *Dyett v. Pendleton.*[24] The tenant had leased a portion of a house into which the landlord introduced prostitutes. The tenant and his family abandoned the premises, testifying that the noises incidental to their new neighbors' trade kept them from sleeping and forced them to seek new lodging. In an action by the landlord for rent the trial court found no physical eviction, and thus, bound by long and deep-rooted precedent, held the tenant liable. On appeal, the case was reversed, the court holding that "other acts of the landlord going to diminish the enjoyment of the premises, besides an actual expulsion, will exonerate [the tenant] from the payment of rent."[25] The dissenting members of the court were not unaware of the significance of the majority opinion. One of the more farsighted faced the issue squarely, asking himself: might a tenant abandon the premises and be exonerated from the payment of rent because the misconduct of the lessor has disturbed

23. 3 J. KENT, COMMENTARIES ON AMERICAN LAW, 464 (2d ed. 1832).
24. 8 Cow. 727 (N.Y. 1826).
25. *Id.* at 732.

his enjoyment of the premises? Then he described the parade of horribles which would result from the majority's answer to this question:

> If this question were to be answered in the affirmative, it would . . . introduce a new and very extensive chapter in the law of landlord and tenant; for if the encouragement or practice of lewdness on premises under the same roof with the tenements leased, would warrant an abdication by the tenant, and release him from his covenant to pay rent, there is no reason why, if the landlord should by any other means render the occupation of the premises inconvenient or uncomfortable, the same consequences should not ensue. It would be so if the landlord were to maintain a house of ill fame adjoining or opposite to, or in the same street with the demised premises; if he were to set up a noisy or noxious manufactory near the tenements he had let; or if the landlord should happen to have the plague of a scolding wife under the same roof with his tenant, the tenant might feel himself authorized to leave the premises, and claim an exoneration from the payment of rent.[26]

2. *Trend Toward Liberalization of the Doctrine*

After the foundation of the doctrine of constructive eviction had been firmly established, the courts began gradually to extend its application. Thus, while in the early cases affirmative acts of the landlord were generally required to constitute a constructive eviction, more recent cases have held that mere nonfeasance will suffice.[27] Similarly, courts no longer adhere to the rigid requirement that the acts of the landlord be committed with the intent to compel the tenant to abandon the property or to deprive him of the beneficial enjoyment thereof. The usual approach of modern courts is that "the question of intention is coupled with the presumption that a landlord intends the natural and probable consequences of his acts."[28] And, in the words of Williston, "if the landlord's acts necessarily deprive the tenant permanently or for a substantial time of the enjoyment of the property, it can hardly be material with what intention the landlord acts."[29]

In the early cases, the application of the doctrine of constructive eviction was generally limited to those situations in which the conduct of the landlord had rendered the premises uninhabitable, and even

26. *Id.* at 739 (dissenting opinion).

27. *See, e.g.*, Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959 (1942), noted in 13 BAYLOR L. REV. 62, 64 (1961).

28. Pierce v. Nash, 126 Cal. App. 2d 606, 613, 272 P. 2d 938, 943 (1954).

29. 6 WILLISTON, CONTRACTS, § 891, 644-645 (3d ed. 1962).

today it is universally held that the tenant may not escape rent liability by abandoning the premises because of minor inconveniences or defects readily remedied by an action for damages.[30] Gradually, however, courts began to listen sympathetically to arguments that the tenant should be able to claim a constructive eviction when the premises are not necessarily uninhabitable, but are worthless, through the fault of the landlord, *for the particular purposes for which they were rented.* This change in the attitude of the courts is reflected by an early Michigan decision.[31] The lessors were the owners of a building in which they operated a furniture store. A portion of the salesroom of the store was leased by the tenant for use as a music store. The lease was to run for a term of ten years. After several years, the lessors closed their furniture store and leased the portion of the salesroom formerly occupied by them for use as a meat market. The tenant sought to enjoin the operation of the meat market on the ground that it detracted from his music business. The plight of the tenant apparently struck a most responsive chord, as the court stated:

> There goes with every rental of premises the right of beneficial enjoyment by the tenant for the purpose for which the premises are rented, at least to the extent disclosed to the lessor at the making of the lease. . . .
>
> Plaintiff deals in musical instruments, inclusive of Victrolas and records, and it is well known that purchasers desire a demonstration. A selection from Chopin, on a Victrola, played to the accompaniment of a cleaver cracking bones on a butcher's block, might not detract from the sale of meat, but would seriously interfere with the music business. No music dealer, with sense, would expect to be able to carry on his business in a butcher's shop. The carcass of a hog, hung by the heels, with opened body and bloody snout, may not look out of place in a butcher's shop, but wholly out of place and repulsive in the same room with a music store.[32]

The repudiation of uninhabitability as the only basis of constructive eviction was clearly reflected in the Missouri case of *O'Neill v. Manget.*[33] The landlord had torn down a sign which the tenant had placed over a window of the demised premises for advertising purposes. While this act appears inconsequential in terms of habitability, the court held

30. *See, e.g.*, Masser v. London Operating Co., 106 Fla. 474, 145 So. 79 (1932); Leo v. Santagada, 45 Misc. 2d 309, 256 N.Y.S.2d 511 (Newburgh City Ct. 1964).

31. Grinnell Bros. v. Asiuliewicz, 241 Mich. 186, 216 N.W. 383 (1927).

32. *Id.* at 188, 189, 216 N.W. at 388-389.

33. 44 Mo. App. 279 (1891).

it constituted a constructive eviction *since the tenant had leased the premises for business purposes known to the landlord.*

Today it appears that a majority of jurisdictions recognize that constructive eviction may occur when the conduct of the landlord causes the premises to become uninhabitable or unfit for the particular purpose for which they were leased.[34] However, a recent New York case,[35] involving quite unusual facts, appears to reach a different result. The tenant, a publisher of a magazine devoted to the presentation of women in "various forms of undress," was forced to abandon the leased building when the landlord refused to supply sufficient heat during hours when the tenant's employees were scantily attired. While there was no express covenant in the lease requiring the landlord to furnish more heat during these hours, these times were specified in the lease. The tenant argued that, because the landlord knew the purpose for which the tenant rented the building, failure to provide the needed warmth constituted a constructive eviction. The court was both sympathetic,

> Although sympathy may be in order for a model whose employment demands that she pose without the usual accouterments which help the body to retain heat, such hardship does not warrant the aid of the court to impose an obligation on the landlord which otherwise would not exist.

and poetic,

> Poor naked wretches, whereso'ever you are, That bide the pelting of this pitiless storm, How shall your chemiseless pelts and pink rumps by legal writ and judicial fiat be warmed? (King Lear, Act III, Scene 4)

but its passion lay with the landlord,

> At bar, the friction of heat is generated only by nonpayment of rent. Landlord did not undertake to supply or maintain a degree of heat sufficient to negative what is commonly referred to as "goose bumps" for nude professional models.[36]

The wit of the court is appreciated, but its decision cannot be ap-

34. *See, e.g.*, Berwick Corp. v. Kleinginna Invest. Corp., 143 So. 2d 684 (Fla. Dist. Ct. App. 1962); Overstreet v. Rhodes, 212 Ga. 521, 93 S.E.2d 715 (1956); Clark v. Sapp, 47 Ga. App. 91, 169 S.E. 692 (1933); Lynder v. S.S. Kresge Co., 329 Mich. 359, 45 N.W.2d 319 (1951); Banister Real Estate Co. v. Edwards, 282 S.W. 138 (Mo. Ct. App. 1926); Teeter v. Mid-West Enterprise Co., 174 Okla. 644, 52 P.2d 810 (1935).

35. Fusion Arts, Inc. v. Sampson Publishing & Dist. Co., 42 Misc. 2d 440, 248 N.Y.S.2d 383 (N.Y. City Civ. Ct. 1964).

36. *Id.* at 442, 248 N.Y.S.2d 385.

plauded. The landlord did not expressly covenant to provide more than a normal amount of heat during photographing hours, yet so long as he was aware of the purpose for which the premises were being leased, it would seem that the implied intention of the parties would not be that a cold-blooded landlord should be able to thwart the fulfillment of that purpose by stingily stoking a furnace solely within his control. Clearly the court does not rely on the landlord's lack of knowledge of the purpose of the tenant at the time when the lease terms, namely the rent, were agreed upon, since the court asserts that "even detailed knowledge of the specific activities to be conducted in the leased space, if it existed, would not justify such an extension of the duties and burdens assumed by the landlord."[37]

A further liberalizing tendency of the courts in their approach to the doctrine of constructive eviction is reflected by recent holdings that conditions allowed to exist in a portion of the building other than the demised premises may give rise to a constructive eviction.[38] The changing attitude of the courts is also reflected in the extent to which some judges have gone to bring a case within the doctrine by a liberal construction of the lease. One recent case, in which the landlord agreed to furnish certain services to the tenant, upheld the defense of constructive eviction, construing a clause in the lease which provided

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37. *Id.* Neither does the court base its decision on the possession by the tenant of an adequate remedy for damages, since in this action, the tenant counterclaimed for damages, the court finding for the landlord. The principal case should be compared with an earlier New York case in which the issue was whether in the absence of an express covenant the landlord was obligated to furnish heat at night to a restaurant. The court stated:

> It was evidently well known to the parties that the tenant to use the premises as a restaurant in a district where nightlife is predominant, and that it would be necessary for the landlord to heat such a restaurant. . . . A reasonable construction [of the lease] is that sufficient heat should be furnished to properly conduct the restaurant.
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> . . . It is reasonable to assume that under all the circumstances the landlord intended to heat these premises so that the tenant might successfully operate a restaurant, bearing in mind the location of the restaurant and the requirements of the neighborhood.

Columbus Spa, Inc. v. Star Co., 216 App. Div. 218, 222-223, 214 N.Y.S. 653, 658 (1926).

38. *See, e.g.*, Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967); Groh v. Kover's Bull Pen, Inc., 221 Cal. App. 2d 611, 34 Cal. Rptr. 637 (1963). It would not be practical in a paper of this length to review all of the many groups of cases where the tenant has been held to be constructively evicted. Extensive classification of the decisions may be found in the following authorities: LESAR, § 3.51; 1 J. RASCH, LANDLORD AND TENANT AND SUMMARY PROCEEDINGS, §§ 882-903 (1950); 3 G. THOMPSON ON REAL PROPERTY, § 1132 (1959 Replacement ed.).

that "no . . . interruption . . . of any such 'service' shall be deemed a constructive eviction, "[39] to apply only to "excusable" interruptions.[40]

3. *The Abandonment Requirement*

While the doctrine of constructive eviction has been stretched over the years, the courts have steadfastly refused to budge in their attitude towards abandonment. In an early New York case,[41] the court stated: "[W]e know of no case sustaining the doctrine that there can be a constructive eviction, without a surrender of possession."[42] With only few exceptions,[43] that statement might validly be made by a modern day court.[44] Most courts justify the requirement of abandonment by reasoning that if the premises were in fact uninhabitable or unfit for the purpose for which they were leased, the tenant would not have retained possession, but would have sought premises suitable to his needs.[45] Reliance on the doctrine of constructive eviction not only requires relinquishment of possession, but the tenant must do so within a reasonable time.[46]

4. *Partial Eviction*

In one situation at common law the courts have dispensed with the requirement of abandonment, permitting the tenant to remain in possession of the property without liability for rent. If the landlord *actually* evicts the tenant from a portion of the demised premises, the entire rent will be suspended until the entire leased premises are restored even though the tenant remains in possession of the remainder

39. Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, at 126 n.1, 163 N.E.2d 4, at 5 n.1 (1959).

40. *Id.* at 128, 163 N.E.2d at 6.

41. Boreel v. Lawton, 90 N.Y. 293 (1882).

42. *Id.* at 297.

43. See notes 88-96 and accompanying text, *infra.*

44. Authority for the abandonment requirement is endless. Recent cases discussing it include: Candell v. Western Fed. Sav. & Loan Ass'n, 156 Colo. 552, 400 P.2d 909 (1965); Richards v. Dodge, 150 So. 2d 477 (Fla. Dist. Ct. App. 1963); Venters v. Reynolds, 354 S.W.2d 521 (Ky. 1961); Strupp v. Canniff, 276 Minn. 558, 150 N.W.2d 574 (1967); Baker v. Simonds, 79 Nev. 434, 386 P.2d 86 (1963); Weiss v. I. Zapinsky, Inc., 65 N.J. Super. 351, 167 A.2d 802 (1961).

45. *See, e.g.,* Two Rector Street Corp. v. Bein, 226 App. Div. 73, 234 N.Y.S. 409 (1929); Chelten Ave. Bldg. Corp. v. Mayer, 316 Pa. 228, 172 A. 675 (1934).

46. The reasonableness requirement seems to be based on "waiver." *See* LESAR, § 3.51. The cases dealing with what constitutes a reasonable time are collected in Annot., 91 A.L.R.2d 638 (1963).

of the property.[47] In the often-quoted words of Cordozo in the leading case of *Fifth Avenue Building Company v. Kernochan*,[48] the entire rent is suspended "because the landlord is not permitted to apportion his own wrong."[49]

In explaining this decision, Cordozo is very careful to point out that in applying the partial eviction exception, and relieving the tenant of the duty to pay rent while he remains on the premises, "we are dealing . . . with an eviction which is actual and not constructive."[50] Recent attempts to extend the partial eviction exception to constructive eviction situations will be dealt with in a subsequent section of this note.

5. *Damages*

The lessor's breach of covenant, whether a breach of an express covenant, or merely the implied covenant for quiet enjoyment, entitles the tenant to recover damages.[51] If the lessor's breach constitutes a constructive eviction, the tenant abandoning possession on account thereof, the latter not only has a defense to an action for rent but may also recover damages.[52] If the tenant remains in possession, he may recover damages for any express covenants breached by the landlord.[53] With respect to the implied covenant of quiet enjoyment, the weight of authority holds that there can be no breach without an eviction, constructive or actual.[54] There are, however, a substantial number of well-reasoned cases holding to the contrary.[55]

II. Constructive Eviction and the Slum Tenant

The doctrine of constructive eviction provides little relief to the inhabitants of the ghetto. Both because the nature of the remedy requires those who seek to rely on it to act on the basis of *supposed*

47. *See, e.g.*, Joiner v. Brightwell, 252 Ala. 112, 39 So.2d 414 (1949); Fifth Ave. Estates, Inc. v. Scull, 42 Misc. 2d 1052, 249 N.Y.S.2d 774 (Sup. Ct. 1964); Nelson v. Lamb, 252 S.W.2d 713 (Tex. Civ. App. 1952).

48. 221 N.Y. 370, 117 N.E. 579 (1917).

49. *Id.* at 373, 117 N.E. 580.

50. *Id.*

51. *See* Lesar, §§ 3.50, 3.52 and cases cited therein.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See, e.g.*, Barry v. Holmesley, 24 Ariz. 375, 210 P. 318 (1922); Moe v. Sprankle, 32 Tenn. App. 33, 221 S.W.2d 712 (1948), noted in 3 Vand. L. Rev. 333 (1950).

rights, which may in fact not exist, and because having so acted, the tenant only rarely is able to improve his position, the doctrine for the most part has become a remedy of the rich.[56] Unfortunately, it is the poor who need it most.

A. *The Abandonment Problem*

1. *The Risk of Determining What Constitutes Constructive Eviction*

It will be remembered that, in order to rely on the defense of constructive eviction, the tenant must not only abandon the premises, but he must do so within a reasonable time after the occurrence of the acts which he alleges have forced him to leave.[57] To most courts—apparently blinded on this point by the glaring simplicity of their reasoning—the justification of such a requirement seems self-explanatory. However, an examination of the requirement in terms of its effect on the slum tenant reveals its deficiencies.

One of the greatest inadequacies of the doctrine of constructive eviction is its effect of placing on the tenant the burden of determining whether he may relinquish possession of the premises and successfully claim that he has been constructively evicted. What acts or omissions of the landlord will permit the tenant to abandon the premises without rent liability is necessarily a question of fact to be determined by the application of objective standards to the circumstances of each case. So long as the tenant remains in possession there is an absolute presumption that he has not been so deprived of the beneficial use and enjoyment of the property as to constitute an eviction. But the street does not run two ways; if the tenant gambles on his rights and abandons the premises, there is no presumption of uninhabitability or unfitness for use. The tenant must justify his action at the risk of being liable for both rent without possession and damages for breach of covenant. To the tenant who can barely afford slum housing, the thought of seeking new lodging, while at the same time paying for the old, must indeed be a frightful one.

2. *The Risk of Determining Reasonable Time*

In addition to the necessity of having to guess whether the premises have become sufficiently uninhabitable, the tenant must also gamble on the time factor. In determining what is a "reasonable" time, the

56. *See* DeKoven v. 780 West End Realty Co., 48 Misc. 2d 951, 266 N.Y.S.2d 463 N.Y. City Civ. Ct. 1965), holding that lack of a doorman constituted a constructive eviction.

57. See 41-46 *supra* and accompanying text.

tenant must not only decide that he has waited long enough to give the landlord a reasonable time to remedy the condition,[58] but also that he has not waited so long as to "waive" the defects.[59] With the help of an attorney, the tenant should be able to make a reasonably accurate guess; without one, most slum tenants are probably unaware even of their right to leave without paying rent no matter how uninhabitable the premises become.

It is probable that a significant number of indigent tenants have leased property on the basis of oral promises by their landlords to make certain repairs. Whether he seeks to use the landlord's failure to make these repairs as a basis for constructive eviction or as a ground for an action for damages, the tenant will almost invariably face difficult proof problems in court. For the indigent slum tenant, the common law provides a meager arsenal of effective remedies against a defaulting landlord.

3. *No Place to Go*

As discussed previously,[60] the abandonment requirement is for the most part based on the reasoning that, if the premises were in fact uninhabitable or unfit for purpose, the tenant would not have retained possession. Therefore, so long as he is content to retain the use of the property, he should not be able to claim it is not fit and habitable. In the thoughtless words of one court, "[a] tenant cannot claim uninhabitability, and at the same time continue to inhabit."[61] The absurdity of basing a finding of habitability on the fact of human occupancy is best demonstrated by the descriptive account by a New York court of the plight of a tenant and his family after partial destruction of their leased apartment by fire:

> In the halcyon days of an ample supply of housing accomodations the tenant might well have turned his back on the whole wretched ruin and, with his wife and small children, faced resolutely forward to the resumption of family life in fresher quarters, secure from further liability to his old landlord for rent. . . .
>
> But if the tenant . . . on surveying the wreckage of his quondam holding made any such right about, he came face to face with a

58. *See* Repacz, *Origin and Evolution of Constructive Eviction in The United States*, 1 DEPAULE L. REV. 69, 85 (1951).

59. According to many of the cases, the tenant has no more than a month to make up his mind. *See* Annot., 91 A.L.R.2d 638 (1963).

60. *See* note 45 *supra* and accompanying text.

61. Two Rector Street Corp. v. Bein, 226 App. Div. 73, 76, 234 N.Y.S. 409, 412 (1929).

housing shortage of such intensity and proportions as to constitute a grave public emergency. . . .

Thus under the duress of unalterable circumstances the tenant had no choice, after the fire, but to lead his brood back to his whilom apartment and, picking a path through mounds of fire-rubbish, seek the most nearly habitable corner of this dismal, reeking waste as at least some semblance of shelter from the less penetrating elements. . . . With a fortitude born of desperation the tenant and his wife made shift as best they could and as only the homeless can. Showing a genius for improvisation and a patient endurance rivalling that of their displaced brothers and sisters in the bombed-out cities of Europe, they adapted a onetime bedroom into a whimsical sort of refuge where the family could at least make common resort for the crudest of nightly lodging. Without toilet, cooking or heating facilities; without water supply, gas or electricity, the tenant and his family made camp in this corner of a cave.[62]

The abandonment requirement renders the doctrine of constructive eviction a hollow remedy for indigents and "offers little more than the alternative of quitting one substandard unit for another."[63]

4. *The Disparity of the Tenant's Bargaining Position*

One justification sometimes given by the courts for strict adherence to the abandonment requirement is that the parties were free to provide otherwise in the lease and that it is not the function of the courts to write the parties' agreement.[64] With respect to the slum tenant, continued adherence to this notion represents complete incognizance of the economic and educational status of the inhabitants of America's ghettos. It is indeed possible to provide expressly in the lease that the tenant may remain in possession of the property without rent liability until any defects are corrected.[65] But to suggest that the uneducated and economically impotent slum dweller caught up in the phenomenon

62. Johnson v. Pemberton, 197 Misc. 739, 740-41, 97 N.Y.S.2d 153, 155 N.Y. City Civ. Ct. 1950). In consequence of its findings, the court did not release the tenant from rent liability but held that the rent should be reduced under the New York rent control statute.

63. Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572, 577 (1966). *See also* 2 R. POWELL, REAL PROPERTY, ¶ 230[3] (P. Rohan ed. 1967) in which Powell comments:

> It has been recently suggested that the utility of the doctrine of constructive eviction as a weapon in the hands of lessees to compel lessors to do as they have agreed has been eliminated by the housing shortage, which practically prevents a tenant from removing when treated badly.

64. See notes 12, 13 *supra* and accompanying text.

65. *Cf.* Williams v. Bernath, 61 Ga. App. 350, 6 S.E.2d 184 (1939).

of supply and demand might be able to procure, independently of the help of the law, more than the adhesion contracts presently used by most slumlords is to reject reality. The estate of most slum tenants consists of no more than an oral periodic tenancy, the tenant receiving from the landlord possession and only those covenants which the law requires, and in this regard , the law is at best very stingy.[66]

B. *The Inadequacy of Damages*

Rigid adherence to the common law requirements of constructive eviction has frequently been justified by the courts on the basis that, even if the tenant is not able to bring his case within its terms, he can find protection by maintaining an action against the landlord for damages. Unfortunately here again we find that such an action is a hollow remedy in the hands of the indigent.

In the first place, the slum tenant is rarely in a financial position to prosecute a law suit, even assuming his awareness of his right to do so. In addition, if the tenant is relying on unwritten promises by the landlord he will undoubtedly encounter difficult proof problems. Even if the tenant should prevail in such an action, his recovery would be negligible,[67] and he still would not have secured adequate housing, his most pressing need. A further limitation on the damage remedy is that it subjects the tenant—in many cases owning no more than a fragile periodic tenancy—to the revenge of the landlord in the form of retaliatory eviction,[68] a most frightful thought indeed to a person who has known the horrors of a housing shortage.

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66. Note, *Rent Withholding—A Proposal for Legislation in Ohio,* 18 WES. RES. L. REV. 1705, 1707-1708 (1967).

67. While there is some conflict as to the proper measure of damages recoverable by the tenant for breach of an express repair covenant, the usual rule is the difference between the rental value of the premises as they actually are and their value if the repairs had been made. *See, e.g.,* Johns v. Hudson, 182 Ark. 1162, 34 S.W.2d 760 (1931); Noble v. Tweedy, 90 Cal. App. 2d 738, 203 P.2d 778 (1949); Daniels v. Cohen, 249 Mass. 362, 144 N.E. 237 (1924). *See also* Annot., 28 A.L.R.2d 446, 480-492 (1953). As has been pointed out previously the cost of slum housing is not significantly less than modern housing. See note 2 *supra.* And as was noted in a student work, "If the dwelling is run down and in a slum neighborhood, the difference in the value of the premises with and without hot water . . . may not be very great." Note, *Rent Withholding and the Improvement of Substandard Housing,* 53 CALIF. L. REV. 304, 313 n.41 (1965).

68. For a recent District of Columbia case holding that a landlord has no legal right to evict a tenant in retaliation for the tenant's report of housing code violations to the authorities, see Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968). *See generally* Note, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia,* 36 GEO. WASH. L. REV. 190 (1967); Comment, *Landlord and Tenant—Retaliatory Eviction,* 3 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 193 (1967); Note, *Retaliatory Eviction —Is California Lagging Behind?,* 18 HASTINGS L.J. 700 (1967).

III. Legislative Innovation

While several impatient and imaginative judges have launched sorties on some of the more antiquated features of the law of landlord and tenant, it is apparent that the modifications needed in this area of the law to help relieve the slum tenants of the burdens of their deplorable living conditions can only be accomplished by a full scale assault by our legislatures. To date, this assault has met with only mixed success.

A. *Housing Codes*

Basically, it is the purpose of housing codes to require property owners to comply with minimum housing standards covering such areas as lighting, ventilation, toilet facilities, plumbing, and fire escape facilities. In addition, many codes have provisions providing for the control of vermin, overcrowding, and other unsanitary conditions.[69] Housing codes are most commonly enforced by the use of criminal sanctions in the form of fines or prison sentences.[70] Some codes, however, provide for the vacation of non-conforming buildings.[71]

The codes have undoubtedly helped to improve the standard of American housing. Yet while they have, perhaps, slowed the spiralling forces of urban deterioration, they have not stopped their advance, and in the words of one observer, "the codes are not doing the job that was expected of them."[72] Perhaps the inadequacies of the codes were best summarized by President Johnson's Riot Commission:

> Thousands of landlords in disadvantaged neighborhoods openly violate building codes with impunity, thereby providing a constant demonstration of flagrant discrimination by legal authorities. A high proportion of residential and other structures contain numerous violations of building and housing codes. Refusal to remedy these violations is a criminal offense, one which can have serious effects upon the victims living in these structures. Yet in most cities, few building code violations in these areas are ever corrected, even when tenants complain directly to municipal building departments.

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69. *See* Note, 69 HARV. L. REV. 1115, 1116 (1956).

70. *See, e.g.*, N.Y. MULT. DWELL. LAW § 304 (McKinney Supp. 1968). *See generally* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

71. *See* Note, 69 HARV. L. REV. 1115 (1956).

72. Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 316 (1965).

> There are economic reasons why these codes are not rigorously enforced. Bringing many old structures up to code standards and maintaining them at that level often would require owners to raise rents far above the ability of local residents to pay. In New York City, rigorous code enforcement has already caused owners to board up and abandon over 2,500 buildings rather than incur the expense of repairing them. Nevertheless, open violation of codes is a constant source of distress to low-income tenants and creates serious hazards to health and safety in disadvantaged neighborhoods.[73]

Housing codes and the difficulties and consequences of their enforcement are complex phenomena and cannot be dealt with in depth in this note. It is clear that legislatures have not been satisfied with the results accomplished by the criminal sanction; several of the more imaginative states, consequently, have experimented with new methods of code enforcement.

B. *Repair and Deduct Laws*

In a substantial number of states, upon breach by the landlord of an express promise to repair, the tenant is permitted to make the necessary repairs and deduct the expense therefor from the rent.[74] Adopting and extending this approach, a few states have enacted "repair and deduct" laws, by which the tenant is authorized to make certain repairs refused to be made by the landlord and deduct the cost from the rent.[75] For the most part, these statutes have been unsuccessful. Their inadequacies are reflected by the Montana statute. In Montana, lessors are obligated, in the absence of an agreement to the contrary, to put demised premises into a condition fit for human occupation.[76] When the lessor neglects to perform this duty, Montana permits the tenant to make the repairs himself, provided that "the cost of such repairs do not require an expenditure greater than one month's rent. . . ."[77] The incongruity of the statute is, of course, that the condition of the premises which permit the tenant to make repairs could scarcely be remedied by the spending of one month's rent.[78] In

73. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 259 (1968).

74. *See, e.g.*, Childress v. Tyson, 200 Ark. 1129, 143 S.W.2d 45 (1940); Masser v. London Operating Co., 106 Fla. 474, 145 So. 79 (1932); Johns v. Gibson, 60 Ga. App. 585, 4 S.E.2d 480 (1939); Loy v. Sparks, 304 Ill. App. 35, 25 N.E.2d 893 (1940).

75. *See, e.g.*, CAL. CIV. CODE §§ 1941-42 (Deering 1960); MONT. REV. CODES ANN. §§ 42-201, -202 (1947); OKLA. STAT. tit. 41, §§ 31-32 (1961); S.D. CODE §§ 38.0409, .0410 (1939).

76. MONT. REV. CODES ANN. 42-201 (1947).

77. MONT. REV. CODES ANN. 42-202 (1947).

78. *See*, Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 312 (1965).

addition, the statute is only operative "in the absence of agreement to the contrary." Nothing, therefore, prevents the landlord from avoiding the statute by shifting the burden to repair to the tenant by a standard adhesion contract.

C. *Receivership*

The most significant receivership law is the New York statute,[79] which permits the City of New York to repair conditions that constitute a serious menace to the health and safety of tenants which the landlord, after notice, has refused to make. The City recovers its expenses directly from the tenant's rents, the receiver having a prior lien thereon.[80] The problem with the receivership laws is not hard to find—MONEY. It is obvious that municipalities cannot afford to repair and rehabilitate all of the dilapidated buildings they might find, and while theoretically the cities are to be reimbursed for any repairs made, the reimbursement would be a slow process and the initial outlay of capital which would be needed for extensive repairs has not been made available. Another obstacle to the effectiveness of these statutes is time; proceedings under the New York statute take up to a year.[81]

D. *Rent Withholding*

One of the most controversial responses to the inadequacies of housing codes—and to the ineffectiveness of the doctrine of constructive eviction—has been the enactment of rent withholding statutes. These statutes have taken various forms. New York, once again, has taken the lead as evidenced by the following legislation:[82] section 302-a of the Multiple Dwelling Law provides for the withholding of rent by the tenant when the landlord, after notice, refuses to correct defects which constitute "a serious threat to the life, health or safety" of the tenants;[83] section 755 of the Real Property Actions and Proceedings Law provides that when the condition of the premises is such as to constitute a constructive eviction, the tenant, until repairs are made, may pay his

79. N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1967).

80. *Id.* at § 309(5)(d)(1). The constitutionality of this part of the statute has been upheld by the New York Court of Appeals in In re Department of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 342, 14 N.Y.S.2d 441 (1964).

81. *See* Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

82. *See generally* Note, *Rent Strike Legislation—New York's Solution to Landlord-Tenant Conflicts*, 40 ST. JOHN'S L. REV. 253 (1966).

83. N.Y. MULT. DWELL. LAW § 302-a(2)(a) (McKinney Supp. 1967).

rent into the court, the court staying any proceeding against the tenant for nonpaymen of rent;[84] sections 769-82 of the Real Property Actions Law provides that one-third or more of the tenants of a multiple dwelling in New York City may petition to have their rent payments deposited into court to remedy conditions "dangerous to life, health, or safety."[85] In addition, section 143-b of the Social Welfare Law permits rent withholding by the Department of Welfare and will be discussed below.[86]

Section 755 of the Real Property Actions and Proceedings Law,[87] first enacted in 1939 has been the most extensively litigated of the New York statutes. Basically, it provides that if leased premises are in violation of housing code requirements so as to constructively evict the tenant from a portion of the premises occupied by him, the tenant may deposit his rent with the court and be protected from any action by the landlord based on nonpayment of rent. The rent is to be released to the landlord only after he has removed the code violations. It should be noted that this statute does not modify the common law doctrine of constructive eviction in that while the tenant remains in possession of the premises he must pay rent. The purpose of the statute is to induce the landlord to make repairs by keeping the rents from him so long as he fails to do so. Perhaps the most vehement objection to section 755 is the continued liability of the tenant for rent. Critics argue that once the premises are found to be defective or in a dangerous or unhealthy condition this liability should cease until the landlord makes the required repairs. In the recent case of *Gombo v. Martise,*[88] an unsuccessful attempt was made to remedy this situation. The tenants, while remaining in possession of the property, paid their rents into the court after city officials had discovered twenty-nine code violations on the premises. The landlord brought an action against the tenants seeking to recover the rents. Not content with merely withholding the rent from the landlord under section 755, Judge Moritt upon finding that the condition of the premises was "a menace to life, limb and health," and constituted a partial eviction, held that the rent should be returned *in toto* to the tenants and that they should not have to pay rent to the

84. N.Y. REAL PROP. ACTIONS § 755 (McKinney 1963).

85. N.Y. REAL PROP. ACTIONS § 769-82 (McKinney Supp. 1968).

86. N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966).

87. N.Y. REAL PROP. ACTIONS § 755 (McKinney 1963).

88. 41 Misc. 2d 475, 246 N.Y.S.2d 750 (N.Y. City Civ. Ct. 1964), *rev'd per curiam,* 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. Div. 1964).

court or the landlord until the repairs were made.[89] On appeal, the *Gombo* case was reversed *per curiam,* the appellate court holding that the facts did not warrant the finding of an actual eviction and that no constructive eviction can occur while the tenants remain in possession of the premises.[90] Despite its reversal, the significance of Judge Moritt's decision should not be overlooked.

In reaching his decision, Moritt relied exclusively, with respect to case law, on the opinion by Cordozo in *Fifth Avenue Building Company v. Kernochan*[91] and especially on the statement therein that "if such an eviction, though partial only, is the act of the landlord, it suspends the entire rent because the landlord is not permitted to apportion his own wrong."[92] To rely exclusively on *Fifth Avenue* was, perhaps, a fatal mistake. On its facts, that case was readily distinguishable from *Gombo* since as previously mentioned,[93] Cordozo had expressly confined his holding to cases of *actual* and not constructive eviction.[94]

Since the *Fifth Avenue* decision, there have been two New York cases, *Johnson v. Pemberton*[95] and *Majen Realty Corporation v. Glotzen*[96] which have extended the partial eviction exception to include partial constructive eviction, but only so far as abating the rent in proportion to the degree of diminished use and enjoyment by the tenant. Thus, while in these cases the tenant was not relieved of his duty to pay rent, he was permitted to pay less rent. Both of these cases represent a significant step from *Fifth Avenue.* While the next logical step would appear to be the one taken by Judge Moritt in *Gombo,* it was, perhaps, unwise to try to take it by stepping over *Johnson* and *Majen.*

Following New York's lead, in 1966 Massachusetts enacted a rent withholding statute which though similar to section 755, replaces the constructive eviction test of that statute with the provision that the violation must "endanger or materially impair the health or safety of persons occupying the premises."[97]

89. Gombo v. Martise, 41 Misc. 2d 475, 246 N.Y.S.2d 750 (N.Y. City Civ. Ct. 1964).
90. Gombo v. Martise, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. Div. 1964).
91. 221 N.Y. 370, 117 N.E. 579 (1917). See notes 48-50 *supra* and accompanying text.
92. *Id.* at 373, 117 N.E. at 580.
93. See notes 48-50 *supra* and accompanying text.
94. Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917).
95. 97 N.Y.S.2d 153 (N.Y. City Civ. Ct. 1950). See note 62 *supra* and accompanying text.
96. 61 N.Y.S.2d 195 (N.Y. City Civ. Ct. 1946).
97. MASS. ANN. LAWS ch. 239, § 8A (Supp. 1967) (emphasis added).

A recently enacted Pennsylvania statute provides that when an official agency "certifies a dwelling as unfit for human habitation, the duty of any tenant of such dwelling to pay, and the right of the landlord to collect rent shall be suspended *without affecting any other terms or conditions of the landlord-tenant relationship. . . .*"[98] The statute further provides that during the period of suspension the rent is paid into an escrow account to be paid to the landlord when the dwelling is rendered fit for habitation. If the repairs are not made within six months, the tenant may withdraw the rent and remain in possession free from the threat of eviction or, in the alternative, the rent paid into escrow may be used to make the needed repairs.[99]

The District of Columbia has adopted a significantly different approach to the problem of housing code violations and leased property. Under the District of Columbia Housing Regulations,[100] the landlord is prohibited from renting property which is not in a clean, safe, sanitary and repaired condition. Similarly, tenants are prohibited from occupying premises which are not in such condition. This statute was applied in the recent case of *Brown v. Southall Realty Company.*[101] Property was leased to the tenant in an unsafe and unsanitary condition. Upon the tenant's failure to pay rent the landlord sued for recovery thereof. The tenant, having since abandoned the property, defended on the basis of the statute, claiming that the lease agreement was void and that the landlord had no rights thereunder. The court sustained the defense.

Despite the importance which has been ascribed to the *Brown* case,[102] it would appear that the decision has only slightly improved the position of the slum tenant in the District of Columbia. By its decision, the court prevented the landlord from obtaining rent from the letting of uninhabitable dwellings. Yet, by declaring the lease illegal and void, it follows that there is no longer a landlord-tenant relationship, and the landlord would be able to evict the tenant from his property, the tenant having no more than an estate at sufferance. The effect of this statute would undoubtedly cause most slum tenants to think twice before reporting code violations to municipal authorities if they could be evicted for doing so. Recognizing this problem the Court of Appeals

98. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1967).
99. *Id.*
100. HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA §§ 2304, 2501 (1956).
101. 237 A.2d 834 (D.C. Cir. 1968).
102. *See* LAW IN ACTION, Feb., 1968, at 1.

for the District of Columbia Circuit has recently held retaliatory eviction illegal within the District.[103]

E. *The Spiegel Law*

Perhaps the most controversial of the new rent withholding laws is New York's section 143-b of the Social Welfare Law, popularly known as the Spiegel Law.[104] This legislation provides that the Department of Welfare may make direct payments of rent to the landlords of welfare recipients and that such payments be withheld from the landlord when violations of housing standards "dangerous, hazardous or detrimental to life or health" exist on the premises. The statute further provides for the stay of any action brought by the landlord against the tenant for nonpayment of rent during the time when the rent is being withheld.

Underlying the Spiegel Law is the simple logic that slumlords who maintain their property in violation of state law should not be supported by state funds. While the application of the statute is limited to dwellings in which welfare recipients reside, the number of people receiving welfare in our major cities is substantial, and it is the buildings in which they live that most desperately are in need of repair.

The constitutionality of the Spiegel Law has been attacked on both due process and equal protection grounds. While the validity of the statute has been upheld in lower New York decisions,[105] it was only recently tested by the New York Court of Appeals in *Farrell v. Drew*.[106] In that case, a New York building inspector discovered that a door in the landlord's building which led to the apartment of a tenant not on welfare did not close properly and thus was in violation of the building code. The Department of Welfare abated all rent payments to the landlord since there were three welfare recipients living in the building. In an action brought by the landlord to evict the three tenants for nonpayment of rent, the lower court held for the tenants, finding that the defective door was within the terms of the Spiegel Law in that it was

103. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

104. N.Y. Soc. WELFARE LAW § 143-b (McKinney 1966).

105. *See* Milchman v. Rivera, 39 Misc. 2d 347, 240 N.Y.S.2d 859 (N.Y. City Civ. Ct. 1963), *appeal dismissed*, 13 N.Y.2d 1123, 196 N.E.2d 555, 247 N.Y.S.2d 122 (1964); Schaeffer v. Montes, 37 Misc. 2d 722, 233 N.Y.S.2d 444 (N.Y. City Civ. Ct. 1962). *But see* Trozze v. Drooney, 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (Binghampton City Ct. 1962).

106. 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967), noted in 13 VILL. L. REV. 205. *See also* Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572 (1966).

hazardous to life and health. The Court of Appeals affirmed, holding that the statute was neither violative of equal protection nor due process of the law.[107]

In 1965, the Illinois legislature enacted a statute patterned after the Spiegel Law.[108] While the Illinois law has several variations in its terms, the principle on which the statute is based is the same as that underlying the Spiegel Law. One significant difference between the two statutes is that the Illinois law provides for intervention by the Department of Buildings in any action by the landlord against the welfare tenants for nonpayment of rent. In New York, the Department could only appear by petitioning the court as *amicus curiae*.[109]

CONCLUSION

Recent legislation represents an important awareness of the ineffectiveness of common law remedies afforded the slum tenant. Such laws are also a legislative acknowledgement of the failure of criminal sanctions to induce compliance with housing codes. Satisfactory renovation of our big city slums will require huge amounts of capital, and modification of the landlord-tenant law in this country cannot by itself provide the impetus needed. A large step will have been taken, however, when the law provides indigent tenants with the means to force slumlords to comply with at least the health and safety provisions of modern housing codes.

It is submitted that the doctrine of constructive eviction, so long as the increasing pressures of our population explosion render adequate housing a comparative scarcity, offers little to the slum tenant and is insufficient to coerce the landlord to make needed repairs. It is further submitted that rent withholding statutes, such as those discussed above, represent a step in the right direction. As courts and legislatures iron out the deficiencies of these initial statutes, it is hoped that more states will confront the need to modernize the law of landlord and tenant and especially that area of the law which has for years contributed to the hardships of the indigent tenant.

107. Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967).

108. ILL. REV. STAT. ch. 23, § 11-23 (1968).

109. *See* Note, *Rent Withholding—Public and Private*, 48 CHI. BAR REC. 14, 15-18 (1967).