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## RENT ABATEMENT LEGISLATION: AN ANSWER TO LANDLORDS

### I. INTRODUCTION

The modern body of law which governs the respective rights and duties of landlord and tenant traces its development to a period when the subject matter of most leases was the large tract of land and the tenant's primary purpose in entering the lease agreement was to obtain the profits that the use of the land would bring.<sup>1</sup> Although many tenants continue to lease large tracts in order to obtain economic profits,<sup>2</sup> today the object of the majority of leases is simply to provide living quarters for the tenant. The tenant's main area of concern under such a residential lease is not that his possession will be subject to interference by the landlord, but rather that the demised premises will be habitable. His inquiry then is what remedies are available to him if his rented premises should cease to be habitable through no fault of his own. Adequate means of recourse are provided for those tenants who can choose where they wish to live, and the competition between lessors of the newer and higher-priced rental units guarantees such tenants at least "habitable" housing. However, for the tenant who cannot afford these more expensive units, the present law of landlord and tenant falls far short of offering any guarantee of habitability and, in fact, serves only to lessen the tenant's bargaining power in negotiating with the landlord for housing that will meet even the minimal standards of the health and safety codes.

This comment will attempt to establish a basis for granting to the low income or indigent tenant, either through the courts or, preferably, through legislative action, the right to a dwelling fit for human habitation.

### II. PRESENT RIGHTS AND DUTIES OF THE TENANT

#### A. *Duty to Pay Rent*

Because the relationship of landlord and tenant is essentially contractual in nature, the obligation of the tenant to pay rent arises from the agreement of the parties.<sup>3</sup> Historically, this obligation was absolute in the absence of an expulsion of the lessee from the premises.<sup>4</sup> However, most courts now recognize the doctrine of constructive eviction and hold

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1. See 2 POLLOCK & MATTLAND, HISTORY OF ENGLISH LAW 106-30 (2d ed. 1923); Bennett, *The Modern Lease*, 16 TEXAS L. REV. 47 (1937).

2. See Clark, *Farm Leases*, 10 KAN. L. REV. 355, 356 (1962), which notes that approximately 50% of Kansas farm land or about 25 million acres are managed by farm tenants and that 28% of the Kansas farm operators are tenants.

3. *E.g.*, Progressive Friendship Sav. & Loan Ass'n v. Rose, 235 Md. 169, 201 A.2d 8 (1964); Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964); Emerman v. Baldwin, 186 Pa. Super. 561, 142 A.2d 440 (1958).

4. Lord Mansfield stated, "The rule of law is clear, namely, that to occasion a suspension of the rent, there must be an eviction or expulsion of the lessee." Hunt v. Cope, 1 Cowp. 242, 243, 98 Eng. Rep. 1065, 1066 (K.B. 1775).

such an occurrence sufficient to suspend the tenant's duty to pay rent.<sup>5</sup> By definition, a constructive eviction results when an act of the landlord, or his agent,<sup>6</sup> so seriously interferes with the tenant's enjoyment and use of the premises as to render them uninhabitable.<sup>7</sup> It is also required that the tenant abandon the premises within a reasonable time or else the duty to pay rent will continue.<sup>8</sup> However, the requirement of abandonment has been waived in at least one case where it would have constituted a useless act.<sup>9</sup>

As a means of combating a landlord's disregard of the substandard conditions of a dwelling, a mass demonstration technique, called the "rent strike," has appeared. This is a method whereby the tenants refuse to pay rent while continuing to occupy the demised premises. The rent is either deposited in an escrow account to be paid to the landlord once he makes the necessary repairs, or used by the tenants themselves to make the repairs and consider the cost as a set-off. Although "the rent strike is simple, direct, and appealing in theory,"<sup>10</sup> the legality of such action is in serious doubt.<sup>11</sup>

### B. *The Right to Occupy and Use the Leased Premises*

Like the tenant's obligation to pay rent, his right to the enjoyment and use of the demised premises has not appreciably changed within the last 200 years. Although a covenant of quiet enjoyment of the demised premises usually is contained in the lease agreement, any activity that

5. The existence of a constructive eviction is a factual determination; however, the following is illustrative of the kinds of interference required: *Hayden Co. v. Kehoe*, 177 App. Div. 734, 164 N.Y. Supp. 686 (1917) (failure to maintain elevator service provided for in lease and which was essential to the lessee's business); *Jackson v. Paterno*, 128 App. Div. 474, 112 N.Y. Supp. 924 (1908) (lack of heat); *Heissenbittel v. Comnas*, 14 Misc. 2d 509, 177 N.Y.S.2d 850 (Sup. Ct. 1958) (intensely disagreeable and obnoxious odor); *Mutual Life Ins. Co. of N.Y. v. Winslow*, 183 Misc. 754, 52 N.Y.S.2d 255 (Sup. Ct. 1944) (presence of mice); *Flechner v. Douglass*, 136 Misc. 57, 239 N.Y. Supp. 121 (Sup. Ct. 1929) (failure to supply hot water).

6. The act causing the substantial interference cannot be that of a third party. *Lott v. Guiden*, 113 P.L.J. 175, 180, *aff'd*, 205 Pa. Super. 519, 211 A.2d 72 (1965). *Cf. Dolman v. United States Trust Co.*, 2 N.Y.2d 110, 138 N.E.2d 784, 157 N.Y.S.2d 537 (1956), 2 VILL. L. REV. 564 (1957), where it was held that an agreement between the landlord and the public authority to condemn the property which was the subject matter of the leasehold did not amount to a constructive eviction by the landlord as the act was that of the sovereign and not the lessor. *But cf. Bruckner v. Heffaer*, 197 Wis. 582, 222 N.W. 790 (1929), where the failure of the landlord to quiet noisy tenants in the apartment adjacent to defendants' was considered sufficient to allow the tenant the defense of constructive eviction in an action for rent.

7. *Oakford v. Nixon*, 177 Pa. 76, 35 Atl. 588 (1896); *Weighley v. Muller*, 51 Pa. Super. 125 (1912); 2 POWELL, REAL PROPERTY § 225(3) (1965).

8. *Welk v. Bidwell*, 136 Conn. 603, 73 A.2d 295 (1950); *Loining v. Kilgore*, 232 Minn. 347, 45 N.W.2d 554 (1951).

9. *Majen Realty Corp. v. Glotzer*, 61 N.Y.S.2d 195 (Munic. Ct. N.Y.C. 1946) (based on judicial notice of post-WW-II housing shortage in New York City).

10. *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 844 (1965).

11. No cases could be found that would support the proposition that a tenant has a right to withhold rent until the leased premises are rendered habitable by the landlord. Other researchers apparently have come to a similar conclusion. See 17 SYRACUSE L. REV. 490, 493 (1966); *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 844-46 (1965).

falls short of constructive eviction gives rise only to an action in damages.<sup>12</sup> In addition, a covenant that the premises are fit for a particular purpose,<sup>13</sup> or that the premises are habitable,<sup>14</sup> will not be implied. Nor does a lease containing restrictions as to the use of the leased premises imply that the premises are suitable for such restricted use.<sup>15</sup> However, even assuming that such implied covenants did exist, their breach would normally not excuse the payment of rent since, unless the lease specifically provides otherwise, covenants are mutually independent and thus the breach of one does not excuse the performance of another.<sup>16</sup>

The landlord is also under no duty to make repairs, absent an express covenant creating such duty.<sup>17</sup> Rather, it is the tenant who, under an implied covenant, is liable for ordinary repairs to the demised premises.<sup>18</sup> But this obligation is no longer as strictly imposed as it once was.<sup>19</sup> It is thus clear that under the established case law, a tenant cannot in most cases remain in occupancy and refuse to pay rent.

### III. CAN THE TENANT OBTAIN A HABITABLE DWELLING?

#### A. *Implied Warranty of Habitability*

The principle of *caveat emptor* as applied to transfers of personal property has undergone a radical change within the last six years. Following *Henningsen v. Bloomfield Motors, Inc.*,<sup>20</sup> the courts have had little difficulty in imposing an implied warranty of merchantability upon the manufacturer of a defective product where the defect caused physical injury to someone who could reasonably be termed a consumer or user.<sup>21</sup> Although this implied warranty has not generally been extended to apply

12. *Raker v. G. C. Murphy Co.*, 358 Pa. 339, 58 A.2d 18 (1948); 2 POWELL, REAL PROPERTY § 225(3) (1965).

13. *Graham v. Hay*, 81 Pa. Super. 594 (1923); *Stein v. Bell Tel. Co.*, 301 Pa. 107, 151 Atl. 690 (1930).

14. *Davis v. Pierce*, 52 Pa. Super. 615 (1913).

15. *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 140 Atl. 506 (1928).

16. *Roth v. Golden Slipper Restaurant & Catering, Inc.*, 167 Pa. Super. 558, 76 A.2d 475 (1950).

17. *Lopez v. Gukenback*, 391 Pa. 359, 137 A.2d 771 (1958); *National Biscuit Co. v. Baer Bros.*, 203 Pa. Super. 133, 199 A.2d 494 (1964) (lessor held to have duty to repair only because of express covenant contained in lease); *Keiper v. Marquart*, 192 Pa. Super. 88, 159 A.2d 33 (1960).

18. *Leming v. Carlisle Motor Sales, Inc.*, 200 Pa. Super. 282, 189 A.2d 307 (1963); *Platt v. City of Philadelphia*, 183 Pa. Super. 486, 133 A.2d 860 (1957).

19. *Compare* *Suydam v. Jackson*, 54 N.Y. 450 (1873) (held duty of tenant to repair leaky roof), *with* *Platt v. City of Philadelphia*, *supra* note 18, where it was said that, "Even though a lease does not contain an express covenant to repair, the law will imply one on the part of the tenant but it is a defense to an action on the implied covenant for failure to repair where the damage occurred without fault on the lessee's part." 183 Pa. Super. at 492, 133 A.2d at 862-63. See Comment, 41 MARQ. L. REV. 58 (1957).

20. 32 N.J. 358, 161 A.2d 69 (1960).

21. *E.g.*, *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1962) (automobile); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (power tool); *Jakubowski v. Minnesota Mining & Mfg. Co.*, 80 N.J. Super. 184, 193 A.2d 275 (1963) (grinding wheel); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane instruments); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (Mun. App. D.C. 1962) (automobile).

to transfers other than the sale of personal property,<sup>22</sup> the New Jersey Supreme Court has recently held that a truck leasing agreement gives rise to an implied warranty of fitness for use which extends over the duration of the lease.<sup>23</sup> In New Jersey the lessee as well as the purchaser of any personalty can now be reasonably assured that if such property is not fit for the purpose it was intended to serve, he can recover from someone in the distributive chain for any defects which cause him bodily harm.<sup>24</sup>

The application of the implied warranties of merchantability and of fitness for use that are now generally applied to the sale (and in New Jersey to the lease) of chattels, to the lease of the substandard dwelling would certainly benefit the tenant, if only to compensate him for physical injuries suffered as a result of the defective condition of the leased premises.<sup>25</sup> However, it is submitted that such a warranty of habitability not only should cover the condition of the premises at the beginning of the lease but also should be extended to include those defects arising during the term, the cause of which can be shown to have been a condition that existed at the beginning of the lease. Thus, normal wear and tear excepted, and excluding defects caused by an act of the tenant, the landlord should at least be held responsible for maintaining his rental units at a level conforming to the relevant health, safety or building codes for the entire time that such units are occupied.<sup>26</sup>

Furthermore, the coverage of such a warranty should include liability for not only physical injury, but also for economic loss due to any condition that renders a dwelling uninhabitable. The measure of these damages

22. See PROSSER, TORTS § 98 (3d ed. 1964); but see note 23 *infra*; *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964).

23. *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965), 11 VILL. L. REV. 404 (1966).

24. For detailed and thorough discussions of the implied warranty of merchantability and the implied warranty of fitness for use, see Jaeger, *Privty of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1 (1963); Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAW. 501 (1964).

25. For the application of the above to a sale of real property, see *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

Instances of the lessor being held liable to the lessee for damages sustained due to the condition of the leased premises include:

- (a) negligence of the landlord as to that part of the premises remaining under his control, *Lemmon v. Bufalino*, 204 Pa. Super. 481, 205 A.2d 680 (1964) (tenant injured in fall due to icy steps);
- (b) negligence of the landlord in making repairs to the leased premises, *Vollum v. School Lane Apartments, Inc.*, 380 Pa. 252, 110 A.2d 251 (1955) (tenant injured by falling vestibule door);
- (c) fraudulent concealment by landlord of a dangerous condition existing on the leased premises at the time of the signing of the lease, *Harris v. Lewistown Trust Co.*, 326 Pa. 145, 191 Atl. 34 (1937) (tenant's wife injured due to collapse of defective stairway);
- (d) failure of the lessor to repair after agreeing to do so, *Leon Gabai, Inc. v. Krakovitz*, 98 Pa. Super. 150 (1929) (tenant granted recovery for damage to merchandise due to leaky roof); and
- (e) failure of lessor to repair when such duty is imposed by statute, *Altz v. Lieberson*, 233 N.Y. 16, 134 N.E. 703 (1922) (tenant injured by falling ceiling in tenement house).

26. Suggesting the same result but using the theory of constructive eviction without the requirement of abandonment is Schoshinski, *Remedies of the Indigent Tenant: Proposal For Change*, 54 GEO. LAW J. 519, 528-32 (1966).

would be the difference between the actual rent paid and the rental value of the premises during the time the premises were rendered uninhabitable. In this connection it is pointed out that recovery for mere economic loss has been granted in cases concerning the sale of chattels.<sup>27</sup> And in the personal injury cases where liability was predicated on breach of an implied warranty of merchantability, economic loss is properly part of the damage award.<sup>28</sup>

### B. *Warranty of Habitability and Real Property Law*

The law governing the transfer of real property does not offer to the lessee the degree of protection afforded to the purchaser in the sale of a chattel.<sup>29</sup> As a general rule, such protection is non-existent. Professor Haskell has observed that, "As far as assurances of quality are concerned, our law offers greater protection to the purchaser of a seventy-nine cent dog leash than it does to the purchaser of a 40,000 dollar house."<sup>30</sup> An authoritative treatise on the law of real property has summarized to the same effect the present law of landlord-tenant, noting that:

The norms applied today . . . bear marked resemblance to those in force two and three centuries ago and must be taken as an indication that these rules are deemed satisfactory, or that the necessary pressure in the direction of improvement has been lacking, or perhaps that the judiciary has felt itself bound by these principles solely because of their longevity and the assumption that change must await legislative action.<sup>31</sup>

However, there are several exceptions to the rule of *caveat emptor* as regards both the sale and lease of real property.

The failure to disclose a material defect known to the seller in the sale of new or used housing has, in recent years, been held a sufficient basis upon which the purchaser could recover for a loss due to a material defect.<sup>32</sup> This, of course, does not constitute the protection of a warranty since the buyer must prove that the vendor had knowledge of the defect and that the purchaser could not have discovered the same defect upon a reasonable inspection.<sup>33</sup> However, several states have held that an implied warranty of habitability exists in the sale of new housing where the construction of the dwelling was not started or completed at the time of

27. *Santor v. A&M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (carpeting that developed a noticeable line after purchase from retailer held to constitute breach of manufacturer's implied warranty of fitness). Cf. *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

28. 2 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 16.01(2) n.6 (1966).

29. See 7 WILLISTON, *CONTRACTS* § 926A (3d ed. 1966) (sales); 2 POWELL, *REAL PROPERTY* § 225(2) (1966) (lease agreements).

30. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965).

31. 2 POWELL, *REAL PROPERTY* § 220, p. 174 (1966).

32. *Cohen v. Vivian*, 141 Colo. 443, 349 P.2d 366 (1960); *Brooks v. Ervin Constr. Co.*, 253 N.C. 214, 116 S.E.2d 454 (1960).

33. See *Cohen v. Vivian*, *supra* note 32, at 449, 349 P.2d at 367.

the contract of sale.<sup>34</sup> When this "unfinished house" exception was considered by the Supreme Court of Colorado in the case of *Carpenter v. Donohue*<sup>35</sup> it was held "that the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of the contracting."<sup>36</sup> The court further held that there is an implied warranty that the builder-vendor has complied with the local building codes and then concluded that: "Where, as here, a home is the subject of sale, there are implied warranties that the home was built in [*sic*] workmanlike manner and is suitable for habitation."<sup>37</sup>

Recently the New Jersey Supreme Court also recognized the existence of an implied warranty of habitability when it permitted recovery by a home owner (although the plaintiff was not the original purchaser from the developer) against the builder-developer of the house when a defective hot water heating system installed by the builder allowed hot water to pass directly into the water taps resulting in severe injuries to the owner's infant son.<sup>38</sup> Holding that both of the plaintiff's theories — negligence and breach of implied warranty — were applicable, the court stated:

The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times.

. . . .

If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss. . . .<sup>39</sup>

In a lease of real property the landlord is generally held responsible for that part of the premises that remain under his control such as hallways,<sup>40</sup> stairways,<sup>41</sup> the systems providing utilities to the lessee in common with other tenants<sup>42</sup> and elevator service in multi-story apartment buildings.<sup>43</sup> However, the degree of maintenance required is only that necessary to keep these services and areas in as good condition as existed

34. *Weck v. A&M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958); *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957). *Contra* *Narup v. Higgins*, 51 Ill. App. 2d 102, 200 N.E.2d 922 (1964); *Druid Homes, Inc. v. Cooper*, 272 Ala. 415, 131 So. 2d 884 (1961); *Voight v. Ott*, 86 Ariz. 128, 341 P.2d 923 (1959).

35. 388 P.2d 399 (Colo. 1964).

36. *Id.* at 402.

37. *Ibid.*

38. *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

39. *Id.* at 90-91, 207 A.2d at 325-26.

40. *Jones v. Perlstein*, 138 Conn. 381, 85 A.2d 254 (1951).

41. *Staples v. Baty*, 206 Okla. 288, 242 P.2d 705 (1952).

42. *Ewing v. Balan*, 168 Cal. App. 2d 619, 336 P.2d 561 (1959) (exploding heater).

43. *Meltzer v. Temple Estates*, 116 N.Y.S.2d 546 (1952).

at the beginning of the lease.<sup>44</sup> Also, fraudulent concealment of a dangerous condition on the leased premises renders the lessor liable to the lessee and others for injuries sustained due to the concealed defect.<sup>45</sup> Another exception to the rule of *caveat emptor* in the lease of real property is the implied warranty of habitability or fitness for use in the short term lease of furnished housing.<sup>46</sup> Recently, the Supreme Court of Wisconsin in *Pines v. Perssion*<sup>47</sup> held that such warranties apply to the lease of a furnished house for the term of one year. On the basis of the above cases it appears that in some instances there exists a legal obligation to insure the habitability of real property on its transfer and change of possession. The underlying policy arguments that support these exceptions should certainly be applied to the case of the indigent tenant and substandard housing.

### C. *The Extent of the Cause of Action in Warranty*

While it is submitted that the protection of an implied warranty of habitability should be afforded the low income or indigent tenant, it is not urged that the term "habitability" be extended to include those items commonly classed as luxuries and generally associated with more expensive rental housing. It is clear that the lessor should not be deprived of his rent simply because an electric garbage disposal unit in the kitchen of a modern apartment does not function properly. What is suggested is a guarantee to the tenant of a minimum standard of habitability as determined by the relevant state or municipal housing codes and health and safety statutes. Breach of this implied warranty would constitute a violation of such laws only where it presents a condition dangerous to the life, health, or safety of the occupants of the leased premises.<sup>48</sup> This is basically the standard adopted by New York in its new rent abatement legislation, although it does not require that the dangerous condition actually be a violation of any existing law.<sup>49</sup> It is also submitted that the relief granted to the tenant, the recovery of the difference of the rent paid less the actual rental value of the premises, should only be used to repair the leased premises.<sup>50</sup>

44. *Fernandes v. Medeiros*, 325 Mass. 293, 90 N.E.2d 9 (1950).

45. *Kaylor v. Magill*, 181 F.2d 179 (6th Cir. 1950) (employee of lessee); *Wilensky v. Perell*, 72 So. 2d 278 (Fla. 1954) (business invitee); *Harris v. Lewis-town Trust Co.*, 326 Pa. 145, 191 Atl. 34 (1937) (tenant's wife).

46. *Pines v. Perssion*, 14 Wis. 2d 509, 111 N.W.2d 409 (1961), 45 MARQ. L. REV. 630 (1962); *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892). Cf. *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931), where this implied warranty was extended to include an unfurnished apartment in a multiple dwelling. However, the decision seems to rest on alleviating the harshness of the doctrine of *caveat emptor* where the lessee has little opportunity to inspect.

47. 14 Wis. 2d 509, 111 N.W.2d 409 (1961).

48. In *Carpenter v. Donohoe*, note 35 *supra*, it was held that there is an implied warranty in the sale of new housing that the construction complies to the local building code. If a purchaser has a right to expect compliance with such regulations, there appears to be no reason why the lessee cannot expect that the leased premises will comply with whatever local regulations govern the condition of rental property. Cf. note 37 *supra* and accompanying text.

49. Cf. note 51 *infra* and accompanying text. *But cf.* *Kearse v. Spaulding*, 406 Pa. 140, 141, 176 A.2d 450, 451 (1962), where it was held that "While municipal ordinances imposing duties and standards of care are often properly admitted in



The implementation of the warranty of habitability suggested above could improve the general housing conditions of the economically deprived tenant. It is admitted, however, that application would be difficult, especially in light of the limited availability of free legal counsel.

#### IV. RENT ABATEMENT LEGISLATION

The most promising remedy that could be afforded the tenant of substandard housing is the statutory right to withhold rent. Rent withholding can be sanctioned because the use of rent payments to repair the premises is in the public interest and does not actually deprive the lessor of anything that is rightfully his. The tenant, therefore, should only be allowed to withhold rent while the dangerous or unsanitary condition exists on the premises and only if the rent monies withheld are to be used to repair the premises. The successful use of this remedy to achieve better housing depends heavily upon effective rent abatement legislation.

##### A. *The New York Legislation*

In New York the problems facing the indigent or low income tenant who must live in a substandard dwelling have been recognized, and significant legislation has been enacted for his benefit. Most recently enacted and most significant is article 7-A of the Real Property Actions and Proceedings Law.<sup>51</sup> The act provides that one-third or more of the tenants<sup>52</sup> of a multiple dwelling<sup>53</sup> located within the City of New York may petition for a judgment directing the deposit of their rent payments into court and that such fund be used to remedy existing conditions of their dwelling that are dangerous to life, health or safety.<sup>54</sup> The conditions complained of need only exist for five days prior to the filing of the petition,<sup>55</sup> notice must be given to all interested parties<sup>56</sup> and the lessor is provided with defenses.<sup>57</sup> This proceeding does not allow the tenants to make the

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evidence in a trespass action, there is no Pennsylvania authority holding that the failure to comply with a housing code imposing statutory duties upon the landlord constitutes a breach of the terms and conditions of the lease."

50. If it could be considered that a warranty of habitability is an implied covenant of every lease then it appears that Pennsylvania law would not prohibit these alternative remedies. See *McDanel v. Mack Realty Co.*, 315 Pa. 174, 172 Atl. 97 (1934), where the court stated: "Three remedies are available to a tenant where a landlord fails to perform a lease covenant: (1) Upon the landlord's failure of performance, the tenant can perform it at his own expense and deduct the cost of such performance from the amount of rent due and payable; or (2) the tenant can surrender the possession of the premises . . . ; or (3) he can retain possession of the premises and deduct from the rent the difference between the rental value of the premises as it would have been if the lease had been fully complied with by the landlord and its rental value in the condition it actually was." *Id.* at 177-78, 172 Atl. at 98. See also Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 *Geo. L.J.* 519, 523-28 (1966).

51. Hereinafter cited as N.Y. RPAPL as authorized by § 101 of the act, as amended L.1965, c. 910, § 1. For considerations of the legislation and its probable effects see 40 *St. JOHN'S L. REV.* 253 (1966); 17 *SYRACUSE L. REV.* 490 (1966).

52. N.Y. RPAPL § 770.

53. N.Y. RPAPL § 782. "Multiple dwelling" is any dwelling containing six or more units or apartments.

54. N.Y. RPAPL § 769.

55. N.Y. RPAPL § 770.

56. N.Y. RPAPL § 771.

57. N.Y. RPAPL § 775.

repairs themselves, but if the lessor refuses to repair, the court can order the repairs to be made.<sup>58</sup> Once the repairs are completed, the balance of the rent withheld is then turned over to the lessor.<sup>59</sup>

Perhaps the most significant feature of this article is the independent cause of action granted to the tenant to remedy any condition dangerous to life, health or safety that exists in his dwelling. Thus the tenant does not have to wait for the arrival of a building inspector to certify that a code violation exists, as he is required to do under the other existing legislation in New York.<sup>60</sup> Although the law requires that one-third of the tenants of the multiple-dwelling join in the petition, this provision appears to be designed to limit the number of suits without substance and those brought for the sole purpose of harassing the landlord. Two other features of this article are worthy of particular attention. First, that there is no suspension of the duty to pay rent but only a suspension of the right of the landlord to receive it and the rent due must still be paid into court.<sup>61</sup> Second, the rent so deposited can be paid out for the necessary repairs by a court appointed administrator, thereby eliminating the problem that exists under the Multiple Dwelling Law where the landlord is deprived of the money necessary to make the repairs.<sup>62</sup> It appears, therefore, that article 7-A is a basically sound approach to the problem of substandard housing.

Other New York legislation that deals with rent withholding by tenants of substandard dwellings is section 755 of the N.Y.RPAPL. Essentially this section grants a stay of proceedings for rent when the tenant's defense is that a violation of the health or safety code exists on the demised premises.<sup>63</sup> A 1965 amendment to this section allows the court to release rent paid into court during the period of the stay to a contractor who will then remedy the violation.<sup>64</sup> This section only provides the tenant with a defense to an eviction proceeding and thus its value to the tenant is considerably less than the more comprehensive article 7-A, especially since the violation must amount to a constructive eviction before section 755 can be of assistance.<sup>65</sup>

Rent withholding is also authorized in New York by "The Rent Impairing Violations Law"<sup>66</sup> and the "Speigel Law."<sup>67</sup> However, neither of

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58. N.Y. RPAPL § 776(b) (3).

59. N.Y. RPAPL § 776(b) (4).

60. Compare N.Y. RPAPL § 770, with N.Y. RPAPL § 755(3).

61. N.Y. RPAPL § 776.

62. Compare N.Y. RPAPL § 778, with N.Y. MULT. DWELL. LAW § 302-(a).

63. N.Y. RPAPL § 755.

64. N.Y. Sess. Laws, 1965, ch. 881.

65. N.Y. RPAPL § 755(1).

66. N.Y. MULT. DWELL. LAW § 302-(a). This provides a defense to a tenant in an action for rent if there existed on the premises a rent impairing violation for six months after notice of such violation was issued to the landlord by the proper New York City authority. Before this act can benefit the tenant however, the proper authority must prepare a list of "rent impairing violations" and such list must be finally approved. Any interested person can challenge this classification of any condition and public hearings are required before such classification may become final.

67. N.Y. SOCIAL WELFARE LAW § 143-(b). This act provides that in those situations where the tenant is entitled to receive welfare payments for housing, the public

these statutes seems to be as helpful to the tenant as article 7-A, and the "Speigel Law" provides for rent withholding by only a public welfare agency.<sup>68</sup>

### B. *The Pennsylvania Statute*

The problems posed by substandard housing in Pennsylvania are quite different from those which confront New York City. However, a careful consideration of the "rent abatement" legislation enacted in Pennsylvania indicates that it has not yet faced up to the problem. The recent one-section act, which is similar in effect to the New York Multiple Dwelling Laws, provides basically that once authorized municipal officials certify a dwelling as unfit for human habitation, the duty of the tenant to pay rent ceases and remains in abeyance until the dwelling is re-certified as fit for occupancy.<sup>69</sup> The tenant, however, must pay the withheld rent into an escrow account and if, at the end of one year from the date of certification as unfit, the dwelling is not re-certified as fit, the deposits in escrow shall be repaid to the depositor.<sup>70</sup> The effectiveness of the act depends upon the degree of diligence exercised by the proper municipal authorities in investigating tenants' complaints concerning the condition of the dwelling, and more importantly, on the frequency and thoroughness of the housing inspections that are conducted.<sup>71</sup> If the complaints go unanswered and the inspections become no more than cursory examinations made once a year, the purpose of the act will be completely frustrated and its effect negligible.<sup>72</sup> It should be kept in mind that the duty to pay rent abates only after the dwelling is certified "as unfit for human habitation." Even after the conditions are met that allow the rent due to be withheld, there is no provision for court supervision of the withheld funds. The act only provides that the tenant deposit such rent in an escrow

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welfare department may make such payments to the landlord directly, and that if the condition of the housing is such that it is dangerous or hazardous to life and health the department may withhold such payments until the dangerous or hazardous conditions are corrected. The determination to withhold rent rests in the discretion of the welfare officials, but absent a clear abuse of this discretion, the tenant may invoke § 143-(b) as a defense in summary eviction proceedings.

68. See 17 SYRACUSE L. REV. 490, 502-05 (1966), where the cases are presented and the conclusion reached that the law is a valid exercise of police power since a legitimate public purpose is served.

69. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1966).

70. *Ibid.*

71. For detailed discussions of the effect of housing codes in making rented premises tenable, see *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); 106 U. PA. L. REV. 437 (1958); 53 CALIF. L. REV. 304, 314-23 (1965).

72. That such certification may take place long after the dwelling has in actuality become "unfit for human habitation" is almost a certainty. See 78 HARV. L. REV. 801, 806-09 (1965). It is pointed out that inspection on the basis of complaints is not effective as many tenants are unaware of the right to complain or to whom to complain. Area inspections are extremely effective but this is a task of great magnitude and it appears that this will be done only where it is required by law. *Id.* at 807 n.30.

account to be paid to the landlord at such time as the premises are once again certified as fit for human habitation.<sup>73</sup> This raises the question of how the landlord can make the necessary repairs when the rent money required to pay for the improvements is withheld from him — a problem that New York has successfully eliminated.

However it should be noted that in contradistinction to article 7-A of the N.Y.RPAPL, the individual tenant in Pennsylvania may initiate the rent withholding.<sup>74</sup> Thus the requirement of municipal determination of unfitness before any action may be taken by the tenant can be viewed as a necessary safeguard to avoid rent withholdings based on false and spurious allegations. But, the fact that under the Pennsylvania statute the rent withheld cannot be used for repairs is almost self-defeating. The purpose of rent withholding is not to deprive the landlord of his property and thus to allow the tenant to live rent free, but rather, as stated earlier, to improve substandard rental housing.<sup>75</sup> If the tenant were allowed to use the withheld rent for repairs once the dwelling was rendered "unfit for human habitation" the repairs would, no doubt, be less drastic and less costly than if, as now, the dwelling remains unfit until the repairs are made and paid for with money other than the withheld rent. Finally, the provision that the rent deposited by the lessee be returned after one year if the dwelling has not been re-certified as fit for human habitation not only deprives the landlord of his property, but also creates a strong possibility that the necessary repairs will never be made.<sup>76</sup>

#### V. CONCLUSION

Future legislation designed to assist the low income tenant to secure habitable housing should involve consideration of the actual availability to the tenant of any benefits that future enactments may provide.<sup>77</sup> The tenant should be granted his own cause of action but at the same time its use should be subject to some type of control. This is advisable because, as stated above, rent withholding cannot be sanctioned if the basis

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73. *Supra* note 69.

74. Compare N.Y. RPAPL § 772, with the Pennsylvania act, *supra* note 69.

75. Chief Justice Martin of the Supreme Court of Wisconsin, in holding that there is an implied warranty of habitability in a lease of furnished premises, stated: "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 cliché *caveat emptor*." *Pines v. Persson*, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961). See 53 CALIF. L. REV. 304, 305-10 (1965), which makes a detailed point of the fact that there is a definite lack of adequate low rent housing available in urban areas.

76. N.Y. MULT. DWELL. LAW § 302-(a) is quite similar in effect to the Pennsylvania statute. Popularly known as the "rent impairing violations law," it bars the landlord's recovery of rent from the tenant for the six month period during which the rent impairing violation exists on the demised premises. See N.Y. MULT. DWELL. LAW § 302-(a) at (3a) for what constitutes a rent impairing violation and how it is established. For comment on § 302-(a) see 40 ST. JOHN'S L. REV. 253, 264-65 (1966); 17 SYRACUSE L. REV. 490, 499-502 (1966).

77. One of the main purposes in enacting the various housing codes was to provide for a method of enforcement of certain minimum standards deemed essential for human occupancy. For a report on the difficulties of the enforcement of same see, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). Hopefully, future legislation will be of more real benefit to the tenant than the existing laws.

of the withholding is a false claim or the motivation is harassment of the lessor. The New York requirement that one-third of the tenants join in a petition to repair is only feasible when dealing with multiple dwellings. In Pennsylvania, however, where there are more substandard two family and single family rental units, one possible safeguard may be the practice of awarding court costs and reasonable attorney fees to the successful party — a proceeding similar to that authorized in New York under article 7-A of the RPAPL.

The detailed housing codes that exist in Philadelphia and Pittsburgh could also be utilized to set a standard of habitability. Any failure to meet these standards after a certain period of time<sup>78</sup> would allow the tenant to file a complaint with the proper municipal authorities. Once notice is given to the landlord of the existence of the violation and a reasonable time has elapsed in which to repair,<sup>79</sup> the tenant could then be allowed to withhold rent from that time on. However the withholding of rent should be under court supervision and the withheld rent deposited with the court. A court appointed administrator could then order the necessary repairs and make payment for same from the withheld rent fund. Any surplus would then be returned to the landlord. In addition, any statutory scheme granting the tenant the right to withhold rent should also provide for defenses available to the landlord. Among these should be the lack of notice of the violation when the condition arises during the term of tenancy, no actual violation of the relevant codes, and proof of an affidavit signed by the landlord stating that he will repair and indicating the starting date and his estimate of the costs involved.<sup>80</sup> Lastly, there should be recognition of the fact that slums and substandard housing are not solely a problem of the larger cities. This is particularly true in the suburban areas immediately adjacent to larger cities but politically outside the cities' boundaries and therefore not subject to the municipal codes and the laws applicable to the cities themselves.<sup>81</sup> The comprehensive statute enacted in New York should serve as an example and stimulate Pennsylvania and other states to provide a method for insuring low income housing that is consistent with decent standards.

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78. N.Y. RPAPL § 770 allows the violation to exist for five days before the tenant may act.

79. N.Y. MULT. DWELL. LAW § 302-(a) allows the "rent impairing violation" to exist for six months before the tenant's duty to pay rent abates. However, as the tenant's action should resemble more closely that allowed under article 7A, "reasonable" time after notice should be substantially less than six months.

80. See Schoshinski, *supra* note 50, at 541-52, for a discussion of the means available now and suggested means to combat possible retaliation by the landlord against the tenant.

81. The Pennsylvania act is now applicable only to cities of the first class, second class and second class A. *Supra* note 69. Only three cities, Philadelphia, Pittsburgh and Scranton are within the above classifications. PA. STAT. ANN. tit. 53, §§ 101-03.1. Article 7A of the N.Y. RPAPL and the N.Y. MULT. DWELL. LAW are likewise limited, being applicable to only multiple dwellings in New York City.